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Organised hypocrisy? African union and the international criminal court

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CHAPTER 1
INTRODUCTION

1.1 INTRODUCTION

The *Rome Statute* (henceforth the *Statute*) establishing the International Criminal Court (hereafter ICC or the Court) is explicit on its role in bridging the 'impunity gap' wherewith top-level authorities responsible for grave human rights violations slip through legal cracks of domestic systems and escape prosecution (MacNamee, 2014, p. 5). The Court operates on a principle of complementarity; it only acts where states are incapable or reluctant to prosecute (Fehl, 2014). Africa was very instrumental in the founding of the international criminal system. This was largely motivated by the human rights violations and atrocities that prevailed on the continent during the colonial era and beyond; the apartheid system in South Africa, the Rwandan genocide of 1994 among others.

The relationship between the African Union (*from now on the AU or the Union*) and the ICC has been degenerating. The watershed moment came when the prosecutor of the Court applied for a warrant of arrest against a sitting Head of State (HoS), Omar Hassan Ahmad al-Bashir (henceforward al-Bashir) in 2009 (Mamdani, 2009, p. 85). The AU became resolute not to collaborate with the ICC in facilitating the arrest of President al-Bashir, culminating in a tense relationship (Murithi, 2013, p. 3). The AU accused the ICC of handpicking African states for prosecution (Tladi, 2009, p. 61). Further, the AU underlined that international criminal law does not apply to the powerful, only the weak, hence the focus on Africa was a modern form of 'imperialism'. The AU contested that three of the Permanent five (P5) of the Security Council (SC) had either not signed up to or not ratified the *Rome Statute* (BBC News Africa, 2013). Furthermore, the AU contended that the prosecution of protagonist's destabilises ongoing peace processes.

The prosecution of Kenya's President Uhuru Kenyatta and his deputy William Ruto considerably augmented the contestation. It has stirred a newly assertive African conversation on issues of justice and peace (MacNamee, 2014, p. 5). Interestingly, the AU is not a state party to the ICC; it is the member states of the Union that form part of the Court's ASP. Yet the continental body swayed its member not to cooperate with the ICC in the arrest of al-Bashir and Kenyatta. The Union has produced contradictory statements on their stance with the issuing

of warrants of arrests of both presidents. In late 2016, three African countries signalled their intentions to withdraw from the ICC. Currently, the continental body is pushing for a mass withdrawal of ASP to the ICC (Keppler, 2017). However, within the organisation there are camps that support the ICC jurisdiction on the continent and another camp that contest its jurisdiction. The AU as an organisation must uphold these continuums.

The aim of the study is to evaluate the inconsistencies and contradictions of the AU towards the ICC in order to determine whether the AU is trying to bridge the impunity gap on the continent by drawing analysis from the case studies of President al-Bashir and President Kenyatta. It further interests this study to demonstrate how the Union is ensuring that mass atrocities do not occur on the continent. On the one hand, the AU member states have ratified the *Rome Statute*; on the other hand, they are contesting its jurisdiction. A remarkable feature of all of the cases before the Court is they are mostly self-referrals. How can this ambiguity of AU members towards the ICC be interpreted? The paper suggests that these inconsistencies and contradictions can be framed within the 'Organised Hypocrisy' (OH) approach.

The approach postulates that organisations react to conflicting pressures in external environments through contradictory actions and statements. These inconsistent rhetoric's and actions referred here as 'hypocrisy' results from conflicting material and normative pressures (Lipson, 2007, pp. 5-7). Article 4(h) of the AU's Constitutive Act states 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity' (African Union, 2000, p. 7) should be the moral background against which the AU holds its leaders accountable. However, the actions of the Union do not tally with the principles they espouses. Suffice to say that little is known about these incongruities and how they arise.

In spite of its moral defamation, OH can be essential for survival of the organisations. According to Egnell (2010, p. 467) hypocrisy can be understood as a safety valve that helps maintain the integrity of states and organisations, while simultaneously safeguarding order within the international system. It does not connote a normative accusation against organisations, rather it is an analytical tool used to explain the conflicting environments that organisations face. Additionally, organisations have to uphold certain values for legitimacy purposes; on the contrary, they are faced with material resource constraints. The conditions that give rise to OH

are an inescapable feature of the international system, indicating that OH should be common among international organisations such as the UN (Lipson (2007, p. 6).

In recent years, the AU has been criticised for falling short of its mark on taking a lead in brokering peace on the continent. Moreover, the Union is highly criticized for not affording victims of war crimes, genocide, and crimes against humanity justice. Frequently, the AU seems to be privileging peace over justice. In other occasions, it seems to favour state security (security of a state against armed attack and insurgency) over human security (the security of the individual in his or her personal surroundings and within the community) (Cilliers, 2004, p. 11). Their most cited reason for contending with the ICC is that the international Court interferes with fragile peace processes. Yet, the AU has been dependent largely on the United Nations (UN) and other international institutions such as the European Union (EU) to fund exorbitant peacekeeping missions on the continent and operational capacity of the Union.

Even in instances where the AU seems to be resolute to act, it is constrained by lack of resources. The Hissène Habré case demonstrates the constraints facing the AU for universal human rights and the protection of African citizens from crimes against humanity. More than two decades ago after committing war crimes, crimes against humanity and torture, the Chadian ex-dictator, only received a life sentence in prison in May 2016 in Dakar, Senegal (Keppler, 2016) under universal jurisdiction (Human Rights Watch, 2016). Universal jurisdiction refers to the indication that the national court may prosecute an individual for crimes against international law (International Justice Resource centre, 2017). It was the first time in which an African court prosecuted a perpetrator under universal jurisdiction. This tends to discredit the organisation. Parallel to this, there is a substantial amount of research produced on the limitations of the institution in tackling the so called ‘African solutions to African problems’. The extent to which it deals with the recalcitrant states has future implications on issues of accountability, responsibility, and efficient bureaucracies on the continent.

Dictators and authoritarian leaders found in Africa should not be left unchecked whilst committing mass atrocities. Nouwen and Werner (2011, p. 946) write that the ICC has become implicated in the distinction, and thus construction, of friends (allies) and enemies. The President of Zimbabwe, Robert Mugabe, as a chairman to the AU in 2015 unsurprisingly condemned the ICC and called for it to ‘stay out of the continent’ (Aljazeera America, 2015). Of course, he is a well-known leader of an oppressive regime who has been in power for almost

30 years. Owing to this recent advent there is little coherent literature exploring this new trend of inconsistencies and contradictions in organisations such as the UN and its peacekeeping missions.

Often the AU-ICC relations have been considerably politicised and sometimes polemic. At other times, aspersions of gloom are cast on institutions in Africa. My study provides a theory guided approach applying OH. As Lipson (2007, p. 6) so rightfully points out that 'identifying organised hypocrisy as a source of failure…permits a better diagnosis of the causes of dysfunction in…other international organisations'. Little is known about why this contradictory behaviour emanates from the African Union. On the one hand, applying OH to the AU gives us a better understanding of the operation of the Union as an international political organisation, while having to produce coordinated action simultaneously.

According to Krasner (1999, p. 173), 'every international system or society has a set of rules or norms that define actors and appropriate behaviour'. The anarchic nature of the international system requires states and international institutions to reflect these norms in their operations. March and Olsen (1998, p. 948) define institutions as a relatively stable collection of practices and rules defining appropriate behaviour for specific groups of actors in specific situations. The menu of international norms includes the Responsibility to Protect (R2P), democratic governance, non-intervention, sovereignty, universal human rights and many more that should ideally govern both states and international organisations. As Egnell (2010, p. 468) points out, such norms have created a number of irreconcilable tensions and inconsistencies for many actors within the system. Dissimilar interests are not always accommodated and in some cases they lead to competition, even conflict, within governing arrangements (Avant, et al., 2010, p. 8).

The central question for this study is: How is the AU responding to these contradictions and inconsistencies towards the ICC? The preliminary hypothesis is that the ambiguity of the AU towards the ICC is reflective of the dominant camp within the AU that is against the ICC's jurisdiction on the continent. The objective of this research is to understand the inconsistencies and contradictions of the AU towards the ICC. Moreover, it is to comprehend if the AU openly opposes the ICC or if it aims at playing by the rules and furthermore, to analyse how contradictions arise from the AU. It is to shed light on the fragmented nature of the AU. Lastly, it is to evaluate the progress of the AU with regards to impunity.

1.2 METHODS

The AU-ICC relations have been politicised and are sometimes controversial. My study provides a theory guided approach applying OH. The purpose hereafter is not to test OH as a theory, but to seek to explain an empirical phenomenon- the ambiguous AU reaction to the ICC prosecutions. This study is rooted in a case study method as it unpacks the hypocrisies of the AU. Two cases have been selected for the purpose of this research to allow investigating issues and drawing analysis in great depth (Leuffen, 2007, p. 149): The case study of al-Bashir that began in 2009 and the case of Kenya with Uhuru Kenyatta and his deputy Ruto in 2010.

I will use the within-method of causal interpretation that includes both congruence and process tracing to unearth contradictory behaviour of the AU. As such the Dependent Variable (DV) is the AU's relationship to the ICC which I assume is following the logic of OH which will be assessed by using the method of congruence. Congruence method commences with a theory and then attempts to assess its ability to explain or predict the outcome in a particular case. The theory postulates a relationship between variance in the independent variable and variance in the dependent variable. It can be deductive or take the form of an empirical generalization. The analyst first ascertains the value of the independent variable in the case at hand and then asks what prediction or expectation should follow from the theory. If the outcome of the case is consistent with the theory's prediction, there is a possibility that a causal relationship exist (George & Bennett, 2005, p. 181).

I will combine congruence with process tracing to assess whether the congruence between independent and dependent variables is causal or spurious. The aim here is to trace the influence of these two camps and show how the AU becomes a hypocrite which helps the organization to survive. Van Evera (1997, p. 64) states that 'in process tracing the investigator explores the chain of events or the decision-making process by which initial case conditions are translated into case outcomes'.

Pivotal to the sour relations of the AU towards the ICC is the al-Bashir case. The UNSC, acting under Chapter VII of the UN Charter, referred the situation in the Darfur region to the ICC in 2005. Two features make the Sudanese case special. Firstly, Sudan is not a party to the Rome Statute, though a member of the AU. Secondly, and what vexed the AU mostly about the al-Bashir indictment, is that he is a sitting HoS. This directly challenged the customary

international law of immunity as a HoS. The prosecutor of the ICC, Luis Moreno-Ocampo, began the investigation in 2009. Notable is that citizens of non-state parties to the *Rome Statute* can still be indicted by the ICC if referred by the UNSC and if they allow its jurisdiction (MacNamee, 2014, p. 6). I will use process tracing to track all the decisions, declarations and resolutions of the AU regarding the President of Sudan (Omar al-Bashir) who was charged with genocide, crimes against humanity and war crimes in the Darfur region.

In 2010, when the ICC began investigations against Uhuru Kenyatta, he was not a president but became a president in 2013 whilst still under investigation by the ICC, in which case his indictment was contested by the AU because he was then the HoS. I will trace the process of these decisions and their given outcomes. Through process tracing, I will be able to assess indicators for the observed outcome. I will probe into the AU official documents to find inconsistencies and contradictions suggested above. Therefore, AU Peace and Security Council (AU PSC) Press statements and communiqués; Assembly Decisions and many more will be searched. The ICC documents such as press releases and website will also be surveyed, for instance, the Prosecutor v. Uhuru Muigai Kenyatta and the Prosecutor v. Omar Hassan Ahmad Al Bashir found on the ICC webpages.

<u>Operationalisation of the variables will be as follows:</u>

Dependent Variable (DV): Reactions and actions taken by the AU towards the ICC

Independent Variable (IV): Conflicting loyalties of AU member states which is causing hypocritical behaviour as a form of institutional survival

<u>Indicators for the outcome OH</u>

a) Logics of consequence (competition for power under anarchy)
b) Logics of appropriateness
   - ✓ Justice
   - ✓ Peace
   - ✓ Sovereignty
   - ✓ Human security
c) Cultural and normative dimension of organisation

d) Material resource constraints of the institution

The logics of appropriateness (such as justice or peace) are ambiguous and therefore subordinate to logics of consequences (competition for power under anarchy). The international system is inadequately institutionalised, and lacks legitimate authority. Due to the anarchical nature of the international system, the logics of consequences are more prevalent than the logic of appropriateness. Domestic and international norms are erratic, while material pressures, competition for power under anarchy, are strong. Again, the cultural and normative dimension of organisations' environments increasingly outweighs technical (or material-resource) environments as determinants of formal structure.

In order to show the outcome OH, I will trace all the talks, statements, communiqués, decisions, declarations and reports of the AU towards the ICC and assess if those were met by a particular action. Often the rhetoric of the AU is that the ICC search for justice should be pursued in a way that does not endanger the promotion of peace. This is an appropriate response - seemingly the AU must act to endorse the principles it upholds. Equally, the ICC must respect the AU's position to negotiation peace talks among conflicting parties (usually rebels and governments).

Hitherto, there are countless victims of grave human violations who have not seen the perpetrators face the ends of justice. Currently, the AU, beyond organisational talks and decisions does not seem resolute to prosecute these perpetrators. I would expect the ICC prosecution of protagonists to have a negative impact on peace processes if the action translates into immediate collapse of negotiations between governments in the country under observation and rebels. If the Court's process does not have a negative impact on the peace processes in Sudan and Kenya at that point the reasons for lack of cooperation on the AU would have to be sought elsewhere. The indicators used would be the ones listed above through the al-Bashir and Uhuru case studies.

The AU must uphold conflicting member states preferences on how the Court must operate for its own survival. Undoubtedly, Africa does not speak with one voice. Botswana has publicly renounced the decision by the AU not to cooperate with the ICC. Malawi and South Africa to a larger degree have been empathetic towards the ICC though at varying degrees (Osei-Hwedie & Mokhawa, 2014, p. 17). On the contrary, Museveni of Uganda referred the case linked to the Lord's Resistance Army (LRA) to the Court, but presently takes a leading role in the

crusade against the ICC (Du Plessis, et al., 2013, p. 3). Rwanda's Paul Kagame, an authoritarian leader, accused the ICC of 'selective justice' (New Vision, 2013). As the AU's chairman in 2015, Robert Mugabe was very hostile towards the ICC.

Leaders such as these want to remain in power and promote the interests of constituencies that maintain their position. Although there is general consensus that Mugabe's Zimbabwe African National Union-Patriotic Front (ZANU-PF) is oppressive, the AU has taken a very passive role in dealing with this crisis. This can explain the hostility of Zimbabwe towards the ICC as an institution that requires accountability for mass atrocities. The ICC found evidence that al-Bashir used the entire state apparatus to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity (International Criminal Court, 2008). The contractual obligations of the *Statute* are sacrificed for norm violating leaders trying to escape international prosecution. The ICC is concerned with bringing to justice protagonists of mass atrocities and meeting this goal with actions. Hence the arrest warrant against al-Bashir and Uhuru. But the AU is claiming the same commitment, but with no actions beyond forms of organisational talks and decisions.

1.3 EMPIRICS

In consideration of the broader theoretical context of OH, this analysis draws from standard works such as *Sovereignty: Organised hypocrisy (2007)* by S.D. Krasner who extensively describe what constitutes OH and also situates the ruler as a unit of analysis within rational choice theory; *The organisation of hypocrisy: Talks, decisions and action in organisations* (1989) by Brunsson, N; *Peacekeeping: Organised hypocrisy?* (2007) by Michael, L who frames the UN within the theory of organised hypocrisy; *Who governs the globe? (2010)* by Avant D.D., Finnemore, M., & Sell, S.K; *The new institutionalism in organisational analysis* (1991) edited by Powell W.W and DiMaggio, P.J.

There is communication on the AU website on decisions of the PSC and the Assembly through press statements, communiqués, resolutions, and declarations to draw analysis from on the case study of President al-Bashir (Sudan). It is these kinds of contradictions that I will trace throughout this paper to shed light on the AU's contention with the ICC. Cole (2013, p. 672) cites that while the AU argues that the ICC's prosecutorial decisions are politically driven, their anxiety with the Court is itself politically motivated. Again, there is existing communication

on the part of the AU on the case of Kenya's Uhuru Kenyatta and his Deputy William Ruto involvement in the 2007 elections.

Research information will be drawn from primary resources as well as secondary sources. The primary sources as used above include the Decision on the progress report of the commission on the implementation of the Assembly Decisions on the ICC Doc. EX.CL/710(XX); Decision on international jurisdiction, justice and the international criminal court (ICC) Doc. Assembly/AU/13(XXI); PSC Press statement (PSC/PR/BR(CXLI); AU PSC Communiqués such as (PSC/PR/COMM.(CLXXV), PSC/MIN/Comm (CXLII); Progress report of the Commission on the implementation of Assembly decisions on the International Criminal Court (ICC) EX.CL/710(XX); Constitutive Act of the AU (2000) and other related AU reports and documents. The paper will also examine the ICC cases such as The Prosecutor v. Uhuru Muigai Kenyatta and The Prosecutor v. Omar Hassan Ahmad Al Bashir. These will be supplemented by the newspaper articles published in Addis Ababa where the AU headquarters is situated to elucidate what feeds into the decisions of the AU and general rhetoric's around the time of decision making processes of the AU, particularly the PSC.

Secondary sources include books, journal and newspaper articles, media reports and various online resources. It should be stated that this is not an empirical research but the information used in this research is fundamentally based on a literature study. Mouton (2001, p. 87) states that the purpose of the literature review is to find the latest, credible and relevant scholarship in the area of interest. The study is limited by lack of knowledge of what feeds into the decision making processes of the AU. Besides the communication published on the AU website, I will rely on journalists working in the region to shed light on some of these issues. Therefore, language might be an added barrier as this communication might be written in *Amharic* (predominant language) in Addis Ababa, Ethiopia.

1.4 CHAPTER OUTLINE

The first chapter is a general orientation of the study that gives context of it. It comprises of the introduction, research methods, empirics and a chapter outline. The second chapter presents a theoretical context of the study which is based on the 'Organised Hypocrisy' approach. The third chapter will be examining the organisations that the study investigates: The African Union and the International Criminal Court. Moreover, the relationship between

these two organisations will be discussed. The fourth chapter will be a case study of Sudan (al-Bashir) in order to understand the ambiguous relationship of the AU towards the ICC by tracing inconsistencies and contradictions. It will also give a background to the Darfur conflict, how the AU has dealt with the issue and how it responds to the ICC. The fifth chapter will be the case study of Kenya. It will also give a background to the 2007/8 conflict during the elections of which Uhuru Kenyatta was implicated in committing mass atrocities. Moreover, it will deliberate on how the AU has dealt with the issue and how it reacts to the ICC. The sixth and last chapter is an analysis in the decisions of the African Union and how organised hypocrisy arises.

CHAPTER 2
ORGANISED HYPOCRISY

2.1 ORGANISED HYPOCRISY (OH)

According to Lipson (2007, pp. 5-7), hypocrisy means organisations fail to act incongruence with the principles they promote. Consequently, OH refers to organisational response to conflicting pressures in the external environment through contradictory actions and statements. It is a response to conflicting material and ideational pressures. Actors retort to norms with symbolic action and yet altogether contravene norms through instrumental behaviour (ibid, p. 6). Lipson developed this theory on both Stephen Krasner and Nils Brunsson's concepts of 'decoupling' by applying it to the UN's peacekeeping missions. Lipson contends that OH has both negative and positive ramifications on peacekeeping. It is likely to intensify gaps between commitments and resources, weaken reforms if they are decoupled from practice, and encumber efforts to mitigate harmful peacekeeping externalities (Lipson, 2007, p. 5). Material pressure exists because organisations have in most cases limited budgets but bigger mandates.

For instance, in the case of the Rwandan genocide, the UNSC passed Resolutions to approve peacekeepers to afford security for endangered civilians (ibid, p. 5). Beyond speech-crafting, this resolution was not followed by coordinated action. The UNSC's reaction was not to attempt to avert the massacres but instead withdrew the peacekeepers (Barnett & Finnemore, 2004). In the interim, close to a million people were massacred by the Hutu extremists - a rate of killing four times greater than at the height of the Nazi Holocaust (United Nations Mechanisms for International Tribunals, n.d). A belated response, instead, in the form of an International Criminal Tribunal for Rwanda (ICTR) to indict persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighbouring states was instituted by the UNSC between January and December 1994 (UNMICT, n.d). Subsequently, the UN was accused of hypocrisy- failing to act in accordance with its ideals, but seemingly resolute to chase international criminals.

Lipson (2007, p. 7) observes that organisational environments inflict upon organisations both material and resource constrictions linked to competitive efficacy and societal beliefs of conformity with external normative cultural standards. Sociological institutionalists maintain

that in the contemporary era, the cultural and normative facets of an organisation's environment progressively overshadows the material environments as determinants of formal structure. Accordingly, organisations put in place formal structures and some other forms of arrangements as a smokescreen to imply conformity with endorsed principles in their particular organisational arenas. Meyer and Rowan (1991, p. 41) note that formal structures of many organisations reflect the myths of their institutional environments instead of the demands of their work activities. Integrating externally legitimised formal structures raises the commitment of internal members and external constituents. Lipson (2007, p. 7) assumes that organisational structures mirror institutional more than the technical pressures. Thus, formal structures are a symbolic smokescreen produced to conform to cultural expectations, but are decoupled - causally disconnected- from irreconcilable internal organisational activities (ibid, p. 8). When this happens, it takes the form of inconsistent rhetoric and behaviour, which amounts to OH.

I turn first to the contribution made by Stephen Krasner in the field of IR. He applies the concept of OH to the principle of sovereignty. Krasner's concept of OH is more drastic. Firstly, he relocated the concept of OH from its Sociological origins into rationalist, 'actor-oriented' model rooted within realist international theory. Realism perceives the world through the concept of 'interest understood in terms of power' (Lebow, 2013, p. 63) while rationalism is based on rational choice theory which posits that individual behaviour is motivated by self-interest, utility maximization or, more simply put, goal fulfilment (Petracca, 1991, p. 289). A rational actor calculates the costs and benefits of different courses of action and chooses the course of action that provides the highest net pay-off (Dunne, 2011, p. 357).

The ontological given, according to Krasner (1999, p. 7), are rulers or specific policy makers. It is these rulers and not the anarchical international system that decide on policies and the rules within the system. An assumption Krasner makes is that rulers want to stay and retain their power. Therefore, they are committed to promote security, prosperity and values of their constituents. It is the decision of these rulers that determines whether to honour the international legal sovereignty and Westphalian sovereignty. Various forces in the international arena on rulers have led to a decoupling between the norm of autonomy and actual practice- their actions and talks do not tally (ibid, p. 8). These rulers usually say one thing and act in another way. For example, the commitment to non-intervention is usually trumped by a contradictory international norm of universal human rights or the Responsibility to Protect

(R2P) which alters the domestic institutional structures of other states. Krasner (ibid, p. 8-9) finds that rulers must speak to and secure the support of diverse communities eliciting varying demands.

Secondly, Krasner repositioned the concept of OH from its domestic organisational setting advanced by organisational theorist such as Nils Brunsson and applied it to international organisations. He writes that organisational theorists, who proposed that hypocrisy might be a normal state of affairs, have focused their attention on domestic political settings (ibid, p. 66). Following their logic, their analyses suggest that OH will prevail more in the international environment – solely because there are more constituencies to manage. Often than not, domestic actors are joined by international ones. Norms of appropriateness emanating from the international environment could be in line with those originating from domestic sources.

Krasner views all political and social environments of being made up of two logics of actions advanced by James March and John Olsen: logics of expected consequences and logics of appropriateness. Logics of consequences perceive political action and outcomes, including institutions, as the product of rational calculating action intended to maximise a given set of inexplicable preferences while logics of appropriateness comprehend political action as a product of rules, roles, and identities that specify proper behaviour in given circumstances (March & Olsen, 1998, p. 949). Accordingly, more often than not actors find themselves in circumstances where they have various incongruous roles and rules, or in a jungle with no rules at all, nonetheless when the results of different courses of actions are apparent then the logic of consequences will be triumphant. On the contrary, within a strong autonomous domestic polity, logics of appropriateness will overcome, though within the limits imposed by specific roles (such as a prime minister, general, senator) where actors will still calculate the course of action that will maximise their interests. The basic argument of Krasner is that the international system is a setting in which the logics of consequences subjugate the logic of appropriateness (Krasner, 2001, pp. 175-6).

There are a number of reasons why this is so according to Krasner. He puts forth the following reasons which are the gravamen of his arguments. Firstly, international norms are intermittently mutually inconsistent and there is no legal authority to arbitrate over them (international agreements are usually based on consent). Of all the social environments within which human beings function, the international system is mostly intricate and inadequately institutionalised

(Krasner, 1999, p. 42). Secondly, the international system is dominated by power asymmetries. There is no hierarchical authority. The discrepancy in resources available to rulers in different states can be massive. Henceforth, the strong tend to dominate the weak. Stronger states sign and ratify the rules they perceive as instrumental to their conduct (ibid, p. 6). Again, the strong can also use force to bend their opponents to their will.

Thirdly, the domestic context of rulers is more predominant than international roles. Domestic rather than international logics of appropriateness are most likely to dominate the self-conceptualisation of any political leader (Krasner, 2001, pp. 173-4). This is not to say that rules are irrelevant in the international system, because actors still have to justify their behaviour. Unfortunately, rulers would rather violate Westphalian sovereignty because the logic of consequences can be so convincing in the international environment (ibid, 1999, p. 7). Rulers have divergent constituencies. They react largely to domestic electorates who hold different values in different states. The material interest of states frequently collides and the logic of consequences can be compelling. Hence OH is the normal state of affairs (ibid, 1999, p. 41).

Consistent with Krasner's arguments is that hypocrisy is an inherent challenge for political organisations. These organisations earn support not with consistency but with satisfying the demands of different interests. Talks, decisions, and actions are formally addressed to different citizenries. The political organisations win legitimacy and support through logic of justification as well as through the provision of resources. OH occurs when the logics of consequences and the logics of appropriateness are in conflict. In order to safeguard resources from the environment, rulers must honour, even if it has to be only in talk, certain norms, yet at the same time act in ways that violate these norms if they anticipate preserving power and gratifying their constituents (ibid, p. 66). The Westphalian model is a case of OH. It is a well-known principle, one that is occasionally honoured and at times not. Rulers are concerned with governing and to do that they can verbally invoke Westphalian principles even when they are at the same time endorsing contradictory norms or making instrumental decisions that undercut the autonomy of their own or other polities (ibid, p. 69). International norms, including those associated with Westphalian sovereignty and international legal sovereignty, have constantly been categorised by OH.

Successive paragraphs present the contribution of Nils Brunsson on what he terms the 'Organisation of Hypocrisy' (OOH) to signify the difference between words and deeds so

common to organisations. Brunsson's preserves the original sociological grounds, but expands different forms of OH, widening the concept of 'decoupling'. Firstly, his concept of OH is based on organisations, not rulers as argued by Stephen Krasner. It is organisations that produce coordinated action. Hypocrisy makes it possible to preserve the legitimacy of organisations, even when they are faced with conflicting demands in their environment. He proposes that the purpose is not to influence the environment, but to accept responsibility from it (Brunsson, 2002, p. 195). Goals within the organisations are vital and valuable in themselves, irrespective of where they lead. It is the good intention of the organisation that is important, not necessarily meeting targets.

Secondly, Brunsson breaks away from traditional decision-making theorists and administrative insights who assumed that talks and decisions facing in one direction increase the prospect that corresponding action will follow. In organisational hypocrisy there is a causal relation between talk, decision and action, but causality is reverse. Talk or decision indicating in one direction reduces the likelihood of the corresponding action really happening while action in particular direction reduces the likelihood of any corresponding talk or decisions taking place. Rather, to use the concept of 'coupling', when hypocrisy takes place, the talk and decisions and actions are not de-coupled or loosely coupled. Rather, they are coupled, albeit in another way than is seldom anticipated (Brunsson, 1989, p. 490). When institutional norms fail to agree with the requirements for action, organisations will often try to create two sets of structures and processes, one for each type of norm. These sets should not interfere with one another, but should be separated or 'decoupled' (ibid, 2002, p. 7).

Brunsson (1989, p. 501) discusses a relationship between ideas (talk) and action. He contends that ideas and action compensate for one another, in other words, they thoroughly contradict one another. Organisational talk is adapted to some norms, and action to others. He labels this hypocrisy. It might be beneficial if the organisational output comprises not only products but also talk. Hypocrisy may be the solution to the problem of the inconsistent norms which face the organisation. Hypocrisy denotes that ideas and actions do not directly back one another. It might be said that the action is being protected, in that management fulfils by talk the demands which the action cannot meet. It then becomes easier to act since the action does not have to satisfy inconsistent norms. Brunsson (2002, p. 173) further argues that a decision is a coupling mechanism between ideas and action; they occur between ideas and action. He treats decisions as an independent activity, separate from action. He suggests that decisions may or may not

influence action and actions or may not be produced by decision. Decision can assign responsibility and can legitimate decision-makers and organisations (Brunsson, 1986, p. 177). However, decoupling of decision and action does not have to be regarded as a problem; in fact, it can also be interpreted as a solution. This occurs when decisions are counted as organisational outputs (ibid, 2002, p. 188).

Moreover, Brunsson coins the term 'political organisations' described above. The political organisation aims all its structures and processes directly to the environment they exist in. The intention is to show them to the outside world; to prove that the organisation is dealing with the inconsistent demands which are being forced upon it. Political organisations are not compelled to yield coordinated action. Their own form of legitimation is to reflect contradictory norms and satisfy the expectations of dissimilar groups in its environment. Brunson (2002, p. 26) indicates that political organisations have a tendency to give a good deal of consideration in producing and promoting ideologies. One of the ideological outputs of organisations is talk. The political organisation sets its bar by what it says, verbally or in writing directed at the external environment. Again, its output is to produce decisions. These are a form of talks adequately imperative to parade as a separate category. The political organisation makes decisions which it is then anxious to demonstrate clearly to the outside world. As a result, talks, decisions and physical products are utilised to reflect shifting norms in the environment.

Brunsson (2002, pp. 212-3) contends that highly political organisations are by description more open than acting organisations. They must exhibit their own surroundings internally. In part because the member of these organisations comprise of agents of various interests in the environment, the organisation truly constitutes part of this environment and cannot be ignored. The organisation manifests norms supported by external groups, so these contingencies are prone to work hard for the survival of the organisation. Open organisations are also more flexible. Organisations that focus on action need to escape extreme external pressure in order to enable internal mobilisation directed towards specific action. For an action organisation, certain level of autonomy is a necessary quality of action. However, extremely political organisations may provide a grim setting for their members and are apt to be blamed for inefficiency, yet due to their good chances at survival they can also afford great security.

Brunsson (1986, p. 171) argues that talks, decisions and products are mutually autonomous instruments employed by the political organisation in gaining legitimacy and support from its milieu. Within the action organisation paradigm, talk and decisions are devices for coordinating action which produces products. Hence talk, decisions and products tend to be consistent. On the one hand, in the political organisation the talk, decision and actions do not have to be interrelated in this way. It is normal to find inconsistencies between them. In order for political organisations to mirror inconsistencies in their environment, they employ these contradictions, not only within the separate areas of talk or decision or products but also between them. Put differently, hypocrisy is a vital type of conduct in the political organisation: to talk in a way that gratifies one demand, to decide in a way that pleases another, and to supply products in a way that satisfies a third (ibid, 2002, p. 27).

Nonetheless, political organisations and action organisations never exist independently in the real world. Most organisations must exude both features of the action organisation and political organisation. These organisations are subject to evaluation according to technical criteria of operational effectiveness as well as institutional criteria of legitimacy. This is what Brunsson terms 'real organisation'. He argues that the complexity of these organisations commence here- having to reflect inconsistent norms as well as producing action (ibid, 1986, p. 182). He maintains that the demand for action necessitates an integrative structure, the demand for politics requires dissolution (ibid, 2002, p. 33). Normally, to succeed at both, organisations must separate and isolate politics and action, to 'decouple' them. Accordingly, there are four ways in which organisations can separate action from politics: chronologically - respond to the demand for politics at certain periods and the demand for action at others, by subject matter - respond to different topics or issues, in different environments - choose the response according to the environment with which it is interacting with, and in different organisational units - both action and politics are treated separately in order to resemble their ideal type (ibid, p. 33).

Nonetheless, hypocrisy does not connote a normative accusation against organisations, rather it is an analytical tool used to explain the conflicting environments that organisations face. Lipson consents that aside from the moral defamation it denotes, OH can be essential for survival of the organisations. Additionally, organisations have to uphold certain values for legitimacy purposes. On the contrary, they are faced with material resource constraints. The conditions that give rise to OH are an inescapable feature of the international system, indicating that OH should be common among international organisations such as the AU. On the other

hand, Lipson (2007, pp. 13-4) argues that OH contributes to the dysfunction in peacekeeping in at least three ways. Firstly, because of the normative pressure to act it often drives members to become tangled in problems they are not willing to fund. Secondly, structural reforms will not achieve their set goals if they are decoupled or loosely coupled to the behaviour of member states and UN bodies. Lastly, decoupling or counter-coupling of talk and action may weaken efforts to deal with complications that UN peacekeeping can exacerbate such as HIV/AIDS.

Brunsson (2002, p. xi) accepts that the overall view of hypocrisy cast aspersions on it and should be evaded altogether. However, he maintains that hypocrisy should be seen as a solution rather than a problem. It retains some moral advantage, and it is often difficult to avoid it. Hypocrisy is a response to the world in which values, ideas or people are in conflict with another (ibid, p. xiii). Moreover, Brunsson (ibid, p. 233) states, 'if we are to preserve high and inconsistent values we must be prepared to handle them on more procedural lines, rather than linking them to achievement of action and results; values are better suited to handling in talk than in action, and by reference to the future rather than the present'. Organisations handle conflicts by reflecting them, by integrating within themselves elements conforming to the conflicts. The institutional features and the international environment render international organizations, such as the UN, particularly prone to, and even vitally dependent on, OH (Hirschmann, 2012, p. 171).

The AU fits into this approach as it has been conveying contradictory signals in dealing with grave crimes (genocide, crimes against humanity and war crimes) and impunity on the continent. According to MacNamee (2014, p. 8) the past two decades have witnessed a clear trend towards a rejection of impunity within the international system. Yet the AU seems to be behaving differently when it comes to international criminal justice. In fact, the continental body is regressing on the matter as exemplified by the Malabo protocol (discussed below). Some of the founding documents of the Union deal directly with this issue, denunciation and rejection of impunity. These are moral standards that the AU should uphold and growing norms within the international system. The following section looks at the founding documents of the AU that cover genocide, crimes against humanity and war crimes. Moreover, it discusses the work of the International Criminal Court. Lastly, it examines the relationship between the two organisations.

CHAPTER 3
AFRICAN UNION AND THE INTERNATIONAL CRIMINAL COURT

3.1 INTRODUCTION

More than two-thirds of the members of the AU are parties to the treaty establishing the ICC (Batohi, 2015, p. 49). Africa was very pivotal in the establishment of the ICC. This relationship has taken a different turn. The arrest warrant against president al-Bashir exasperated the AU. The AU claimed that the ICC's indictment of an African leader reflects and reproduces forms of neo-colonial rule under the guise of 'international justice'. This relationship was further put at odds when the ICC issued a warrant of arrest against President Uhuru Kenyatta. According to the AU the ICC has become the greatest threat to Africa's sovereignty, peace and stability (MacNamee, 2014, p. 6). In 2016, three African governments signalled their intentions to leave the ICC.

This section is a discussion on the two organisations being investigated: the African Union and the International Criminal Court. The aim is to look at some of the founding documents on the African Union that cover precisely international crimes of genocide, crimes against humanity and war crimes pivotal to this study. It also aims to comprehend how the International Criminal Court functions and subsequently, to comprehend what has strained the relationship between the African Union and the International Criminal Court.

3.2 THE AFRICAN UNION (AU)

The Organisation of the African Unity (OAU) was transformed into the African Union (AU) in July 2002. The OAU was unsuccessful in a number of ways. It could not avert civil wars, genocides, authoritarianism and dictatorships on the continent. This was an outcome of its principles of non-interference and respect for sovereignty of member states. It was often hailed a 'toothless dog' self-serving interests of its leaders (Carbone, 2002, p. 30). The Union coincided with the African Renaissance; essentially a common vision for all those who belong to the continent (Vale & Barrett, 2009, p. 455). It resonates with a vision of a more unified and integrated Africa. All these efforts channelled towards Africa's development, peace and security, democratic governance and economic growth.

The birth of the AU similarly overlapped with a growing international norm dynamic of the Responsibility to Protect (R2P). The ICRtoP (2014) states that the R2P is a contemporary international security and human rights norm to tackle the international community's failure to prevent and stop war crimes, genocides, ethnic cleansing and crimes against humanity. The growing focus here is a distinct shift from territorial security to human security. As Neethling (2012, p. 28) points out, there is also no desertion of the norm of non-intervention and transfer of state sovereign rights, but being redefined within international norm dynamics. The AU subscribe to these international agreed norms. The Union has founding documents that deal with the central issues of this research: atrocious crimes (genocide, war crimes and crimes against humanity) and consequently, impunity. This is the primary aim of this section.

3.2.1 Principles of non-indifference

The transition from the OAU to the AU in 2002 was a turning point were member states agreed to a common position of non-indifference to the plight of Africans. This was a striking shift from the norm of non-interference (William, 2007, p. 256). Africans took a common position not to remain unresponsive to the maladies that prevailed on the continent like malaria, TB, HIV and AIDS, poverty, dictatorships, hunger, droughts, famine, and unconstitutional change of governments, social exclusion, and authoritarianism among its member states. Consequently it integrated international norms such as condemnation of unconstitutional change of governments and intervention in member states in grave circumstances in their operation (Hengari & Turianskyi, 2015, p. 45).

The OAU was highly criticised for being 'toothless' amidst growing authoritarianism and dictatorships on the continent. It was also infamous for disregarding oppressions and suffering of its member states (Murithi, 2009, p. 94), along with humanitarian crises that plagued the continent and the ensuing challenges to human security. The AU had to be active on the continent to ensure a common future for African people. Above all, it had to reflect international norms and principles for universal human rights in their operation - the birth of localising a human security culture. The principle of non-indifference in cases of genocide, crimes against humanity and war crimes made it feasible for the AU to intervene with all necessary means, including force (Gottschalk & Schmidt, 2004, p. 141).

3.2.2 Constitutive Act of the African Union

The Constitutive Act of the AU was adopted on 11 July 2000 at Lomé, Togo. One of the founding principles on which the AU, through this Act, is apparently based on 'condemnation and rejection of impunity' and is guarded against atrocious crimes (Abraham, 2015: 13). Article 4(h) of the AU Constitutive Act (African Union, 2000, p. 7) which covers the issue at hand states, 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity' while Article 4 (o) states, 'respect for the sanctity of human life, condemnation and rejection of impunity…'

The Constitutive Act tabulates the norms without information on what constitutes these crimes. This is in direct contrast to the *Rome Statute* which gives elaborate details on what constitutes each international offense. The ambiguous nature of these crimes gives the Union's member states much room to manoeuvre on their interpretation (Securelli, 2016). This is in light of the fact that accession to AU membership is not based on human rights records, and so is the chairing of different seats within the Union such as Chairperson of the Assembly. In 2015, Robert Mugabe was a chairman of the Assembly of the African Union, a well-known authoritarian leader.

3.2.3 Peace and Security Council (PSC) Protocol

The Protocol relating to the establishment of the Peace and Security Council (PSC) of the AU was adopted at the 1st Ordinary Session of the AU in Durban, South Africa on 9 July 2002. Its main focus is in prevention, management and conflict resolution (African Union, n.d.). Article 2 of the Protocol states, the PSC will be '…a standing decision-making organ for the prevention, management and resolution of conflicts and shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa' (African Union, 2002, p. 4). Article 4(j) of the Protocol states that the PSC will be guided by principles enshrined in the Constitutive Act of the AU. Moreover, Article 7(a) deals with the issue on genocide. It is the duty of the PSC to 'anticipate and prevent disputes and conflicts, as well as policies that may lead to genocide and crimes against humanity'. Article 7(e), the PSC will 'recommend to the Assembly pursuant of Article 4(h) of the Constitutive Act…' (African Union, 2002, pp. 6-9).

3.2.4 The Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights (commonly known as the 'Malabo Protocol')

The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the 'Malabo Protocol') was adopted on 27 June 2014 by Heads of States (HoS) at an AU summit in Malabo, Equatorial Guinea (African Union, 2014). The proposed court amalgamates the existing African Court on Human and People's Rights (ACHPR) with the African Court of Justice (ACJ) (MacNamee, 2014, p. 12). The ACJ's jurisdiction is yet to be activated while the ACHPR came into force in 2004 (African Court on Human and People's Rights, n.d.). The original plan for the African Court of Justice and Human Rights (ACHPR to change to ACJHR) was a court with two divisions - a general affairs division and a human rights section. The Malabo Protocol introduces a third section: the international criminal law section.

Article 28(1) of the Malabo Protocol list the following fourteen crimes that if the Malabo Protocol comes into force, the ACJHR will have jurisdiction on: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression (African Union, 2014, p. 18). This Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) member states, so far it has 9 signatories and none ratifications (African Union, 2016).

Article 46(a) *bis* of the Malabo Protocol sets an interesting tone for the AU, it states, 'No charges shall be commenced or continued before the Court against any serving AU Head of State or Government (HoSG), or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office' (African Union, 2014, pp. 38-9). An interesting development is that the earlier drafts of the protocol did not make provision for immunity. This was incorporated after the AU resolutions taken in May and October 2013 demanding that the ICC allow for national mechanisms in Kenya (Du Plessis, 2014, p. 9) based on the principle of complementarity on the part of the ICC.

Abraham (2015, p. 14) remarks that advances in international human rights law and international criminal law have barred a plea of personal immunity before international tribunals

including the Statutes of the Yugoslav and Rwanda International Criminal Tribunals 1993 and 1994 respectively. Abraham (2015, p. 14) notes that 'article 46 A... of the Malabo Protocol represents a major setback in the advance of international criminal justice; in fact, it can only be construed as in the interests of those African leaders fearful of an end to a culture of impunity'. Du Plessis (2014, p. 3) puts forth that the Union has sought to afford itself regional exceptionalism of the most nefarious kind: immunity for African HoSG who have committed international crimes. Not to mention that it is in direct contrast with its own Constitutive Act, as abstract as it is. This should be a moral obligation of the AU towards the many victims on the continent of atrocious crimes.

3.2.5 Decisions of the African Union

The Assembly issued a decision, Assembly/AU/Dec.590(XXVI), in January 2016 which, 'reiterates the commitment of the African Union and its Member States to the fight against impunity in accordance with the Constitutive Act of the African Union' and 'expressed its deep grievance at the failure of the UNSC to respond to the requests of the AU for deferral of the Sudan and Kenyan cases for the past five (5) years' (Assembly of the African Union, 2016). Again, the Assembly took a decision in January 2014, Assembly/AU/Dec.493(XXII), which 'reiterates the unflinching commitment of the African Union and its Member States to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with the Constitutive Act of the African Union' (Assembly of the African Union, 2014). What is apparent is the constant inconsistency of the AU which is unacceptable in the face of many victims of atrocious crimes in Africa. The uncertainty with regards to its own legal commitments is appalling.

Further, in July 2010, the AU HoSG issued a decision, Assembly/AU/Dec.296(XV), which 'decides to reject for now, the request by ICC to open a Liaison Officer to the AU in Addis Ababa, Ethiopia and requests the Commission to inform the ICC accordingly' (Assembly of the African Union, 2010). The Executive Council per EX.CL/Dec.868(XXVI) in January 2015, 'decide in accordance with its decisions particularly the African States Parties to the Rome Statute reserves the right to take any measures in order to preserve and safeguard peace, security and stability, as well as the dignity, sovereignty and integrity of the continent' (Executive Council, 2015). The list is not exhaustive but gives an idea of the founding documents and some of the decisions issued by the Assembly, Executive Council and the Peace

and Security Council of the AU that will be discussed in the case studies, many of which represents these contradictory statements and ambiguity on the stance of the AU on these matters.

3.3 THE INTERNATIONAL CRIMINAL COURT (ICC)

The Nuremberg and Tokyo trials left the international community with a bitter taste and an undeniable requisite for a permanent court to act against those responsible for mass atrocities as witnessed in the holocaust and other horrendous cases during the Cold War (Murithi, 2013, p. 2). This was only realised in the 1990s and 2000s when further atrocities on a massive scale ensued. The conflict in the former Yugoslavia, the Rwandan genocide and the conflict in Sierra Leone led to the creation of ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and Sierra Leone Special Court (SCSL) respectively (Cole, 2013, p. 671). Although these tribunals were ad hoc in nature, they ushered in an establishment of a permanent international criminal court to prosecute those perpetrators of serious human rights violations.

In July 1998 at the Rome conference, the *Statute* was signed establishing the Court after a long and strenuous affair of international negotiation and politicking. The *Rome Statute* of the ICC entered into force on 1 July 2002 after being ratified by 122 states; only 60 ratifications were needed (Vernet & Pichon, 2016). Luis Moreno Ocampo was the first prosecutor of the ICC serving from 2003-2012. The current prosecutor Fatou Bensouda, was appointed in December 2011 by the Assembly of State Parties. She was a former Attorney General and Minister of Justice of Gambia. Bensouda worked as key member of the Ocampo team as the Deputy Prosecutor in charge of the ICC Prosecution's Division (Murithi, 2013, p. 5).

The Court's mandate is to indict those responsible for war crimes, genocide, crimes against humanity and crimes of aggression (only adopted in 2010) (International Criminal Court, 2002). Article 5(2) of the *Rome Statute* states, 'the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations' (ibid, p. 2). It has taken longer for the crime aggression to be defined solely because major powers have objected to it. It would put

limitations on the use of armed force and thus restrain western powers from mounting operations such as those in Libya in 2011 and the Iraq invasion of 2003. Those who oppose the ICC, particularly in Africa, argue that western powers have safeguarded immunity for themselves in ways that their African counterparts could not (MacNamee, 2014, p. 8). The USA under the George W. Bush administration withdrew its signature establishing the ICC *Statute* and embarked on an active campaign against the Court (Fehl, 2014, p. 5). Powerful countries such as Russia and China have not supported the Court and have not subjected themselves to its criminal jurisdiction; these are the P5 countries that make up the UNSC. The fundamental principle behind the Court is to address the issue of impunity where HoSG escape prosecution for mass atrocities.

The *Rome Statute* of the ICC (2002, p. 12) operates on a principle of complementarity or as 'Court of last resort': the ICC only has jurisdiction over those cases that domestic courts are unable or unwilling genuinely to investigate or prosecute (Art. 17). The European Parliament (ibid, p. 67) found out that when nations fulfil their mandate to investigate and prosecute international crimes domestically, this decreases the burden on the ICC, as a complementary Court. Article 13 of the *Rome Statute* (ibid, p. 11) sets out instances for the exercise of jurisdiction by the Court: through the referral of a 'situation' by a State Party; the ICC Prosecutor can refer a situation at his/her own initiative *(proprio motu);* and lastly through a UNSC referral or resolution acting under Chapter VII of the Charter of the UN. Cole (2013, p. 677) clarifies that what generally is referred are not individual criminal cases but, rather, 'situations'.

Fehl (2014, p. 1) clarifies this point by stating that in the first two instances, the Court can only investigate crimes committed on the territory of or by the nationals of member states (Art. 12). This prerequisite is not applicable to referrals made by the UNSC which also has the power to defer ICC investigations for a year's period (which it can renew) as stated in Art. 16. In all three instances that can warrant an investigation, the decision to open an official investigation is preceded by a 'preliminary examination' of the case's admissibility, and is subject to the approval of the ICC Pre-Trial Chamber (ibid, p. 1).

International law distinguishes between *ratione personae* (personal immunity) and *ratione materiae* (functional immunity). What is commonly known as personal immunity is accorded to HoSG or a senior state official when occupying a specific office (Abraham, 2015, p. 13).

People who occupy these offices cannot be tried for any reason, particularly international crimes by the courts of another state. Abraham (ibid, p 14) maintains that functional immunity may be invoked by a sitting or former HoS, or senior state official, in respect of official acts of which an international crime is not an official act. Du Plessis (2014, p. 6) indicates, when it comes to international criminal law there is near universal acceptance of the principle that international crimes cannot be covered by immunity *ratione materiae* before international or domestic tribunals. Article 16 on deferral of investigation or prosecution reads, 'No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the UN, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'.

Article 27(1) of the *Rome Statute* (2002, p. 18) states, 'This Statute shall apply equally to all persons without any distinction based on official capacity…' and Article 27(2) state, 'Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person'. According to Du Plessis (Du Plessis, 2014, p. 7) state practice has established that tribunals may indict and charge the most senior officials of a state, including HoS, suspected of crimes under their jurisdiction, even when they are still in power as illustrated by the Nuremberg trials. Du Plessis, Maluwa & O'Reilley (2013, p. 5) contends that Article 27 of the *Rome Statute* creates an exception to customary international law and allows HoS and other senior state officials to be tried in this particular jurisdiction.

What happens in those instances when crimes are committed by states that are not party to the *Statute*? Article 98 of *the Rome Statute* (ICC, p. 63) on: Cooperation with respect to waiver of immunity and consent to surrender para. (1) states, 'The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity' and para.(2) 'The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender'. The UNSC Resolution 1593

(United Nations Security Council, 2005, p. 1) 'Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court....' while Kenya case was initiated by the prosecutor, Luis Moreno-Ocampo.

3.4 THE RELATIONSHIP BETWEEN THE AFRICAN UNION AND THE INTERNATIONAL CRIMINAL COURT

The AU was undoubtedly active in the negotiation of the *Rome Statute* to establish the ICC in the late 1990s. Africa had the highest regional representation; 34 African states (substantially sub-Saharan) were party to the *Statute* (Monageng, 2014, p. 13). The continental bloc is not party to the treaty, its affiliation is with regards to its member states. In September 1997, the Southern African Development Community (SADC) adopted 10 principles that were to form the basis for the ICC and the *Dakar Declaration* which encapsulated support for a fair and effective ICC, aided to shape the *Statute* and the international criminal justice system (European Parliament, 2014, p. 79). Moreover, in the wake of the Rwandan genocide, Africans needed to contribute to strengthening the rule of law and the emerging global governance norms (MacNamee, 2014, p. 5). African states through regional organisations such as SADC mobilised support for the creation of an autonomous, *apolitical* international court free to select cases and investigate international crimes (ibid, p. 5).

The 2000s ushered in an era of scepticism and distrust between the AU and the ICC. Presently when talking about the AU and the ICC there is an element of tension, hostility, denigration and controversy. This began with the former international tribunals that gave rise to the ICC. In 2000, Abdoulaye Yerodia Ndombasi, Minister of Foreign Affairs in the DRC was issued an arrest warrant by Belgium (Trial International, 2016). In addition, Rose Kabuye, Chief of Protocol to President Paul Kagame of Rwanda, was arrested in Frankfurt pursuant to a French arrest warrant in 2008. Kabuye was linked to the shooting down of the former Rwandan president's plane that triggered the 1994 Rwandan genocide (BBC News Africa, 2008).

In March 2005, Resolution 1593 was adopted by the UNSC acting under Chapter VI of the UN Charter to arrest al-Bashir regarding the situation in Darfur since July 2002 (United Nations Security Council, 2005). This brought about the seminal moment when in March 2009 the ICC dispensed an international arrest warrant for President al-Bashir for crimes committed in Darfur, Sudan (Magliveras & Naldi, 2013, p. 491). The laying of charges against and an

ensuing trial of the sitting President Uhuru Kenyatta, and his Deputy President, William Ruto in 2010 further added salt to injury. Uhuru was charged with the 2007-8 post-election violence in Kenya (Bowcott, 2014). The AU responded with a trail of decisions and declarations which will be discussed later in the case studies and the consequent dropping of charges in 2014. The UNSC ignored most of these grievances. The AU argument against prosecution of these presidents has been twofold. Firstly, prosecution of HoS disturbs the ongoing peace processes internally. Murithi (2013, p. 4) notes this is remarkably so because frequently, individuals who have been subject to the jurisdiction of the Court are also key negotiators in ongoing peace processes. Secondly, indictment of HoS is unacceptable under international law.

The biggest criticism spurted against the ICC from the AU is that of all the eight countries where the ICC was and is actively prosecuting suspects are all in Africa (with the current exception of Georgia). These are cases from Uganda, the DRC, Darfur (Sudan), Central African Republic (CAR), Kenya (charges against Uhuru dropped in 2014), Mali, Libya and Côté d'Ivoire. Of these entire eight situations that the ICC was investigating, four were self-referral by African states: Uganda, the DRC, CAR and Mali, with CAR referring situations twice in 2004 and 2014. Two situations – Libya and Darfur – were referred by the UNSC while Côté d'Ivoire and Kenya were *proprio motu*. The argument that the ICC is selective of African states is refuted by a lot of authors and will not be rehearsed here (*see* Fehl, 2014; Du Plessis, Maluwa & O'Reilley, 2013; McNamee, 2014) - solely on the basis that most cases were self-referrals. Another criticism levelled against the ICC is that of international jurisdiction that it is being manipulated by powerful nations (particularly EU countries that predominantly fund the ICC) of which the AU has released decisions and resolutions which will be discussed in the succeeding case studies.

Given such erroneous assumptions with regard to the ICC's partial way of dealing with African cases, there is need to further launch a probe in the manner in which the ICC executes its mandate. Du Plessis, Maluwa and O'Reilley (2013, p. 2) point to the large scale atrocities that happen on the continent as natural course for the ICC to investigate. McNamee (2014, p. 4) notes, 'The absence of ICC cases from elsewhere has reinforced the (flawed) impression that atrocities happen only in Africa'. This poses such calls for attention on the ostensible flaws of the ICC's mandate. To add credence on this notion, an escape clause would be referring to more cynical non-African cases such as the Syrian case, Afghanistan, Palestine or Iraq. One might ask if there is a convincing non-political argument why the Syrian situation has not been

referred to the ICC by the UNSC? The AU's antagonism towards the ICC generated a legal conflict for states that are member states to both institutions. Different governments have chosen to resolve it in different ways. Unfortunately, there are divisions within the AU on ways to handle conflict with the ICC. In 2016, the ICC was issued a letter to withdraw membership by three African states, that is, South Africa, Gambia and Burkina Faso. Botswana has remained undoubtedly supportive of the ICC's endeavours. This will be discussed in the case studies that follow.

Regrettably both the AU and the ICC share a convergence of mandates to address impunity and to ensure accountability for grave international offenses. A fundamental difference between the two organisations is that the AU is a political organisation and the ICC is an international judicial organisation (Murithi, 2013, p. 2). Fehl (2014, p. 2) concurs with this line of thought by mentioning, the ICC must be interpreted not only as a legal institution that is operating according to the logic and a procedure of international law but it is both subject and object of politics of international criminal justice.

3.5 CONCLUSION

Organised hypocrisy attempts to explain the discrepancies between organisation's talk, decisions, and actions, and how these discrepancies may allow organisations flexibility in their management of conflicting stakeholder demands (Cho, et al., 2015, p. 79). The founding documents of the AU must represent a legal and moral background against which the Union can hold its members accountable. Regrettably, the contradictory nature and ambiguity of these documents make it susceptible for African state parties to the ICC to avoid international prosecution in the guise of 'sovereignty'.

The problem of immunities that arise out of the *Malabo Protocol* is not sacrosanct to Africa. There are wider debates within the international law spheres on this issue. The *Arrest Warrant Case* did not help settle this matter where it found that Belgium violated customary international law by arresting the incumbent Minister for Foreign Affairs of the DRC consequently disrespecting the immunity of HoSG (International Court of Justice, 2002). Africa boasts one of the largest bloc to the Assembly of State Parties of the ICC. This is not something they have leveraged over the ICC to negotiate better their engagement with the Court. In all fairness, the blame should not only lie on the African side between the two

organisations. The ICC has its fair share of failures. The relationship of the ICC and the UNSC is problematic with regards to its referral system. The argument that the powerful seek to dominate the weak become apparent here. Three of the P5 of the UNSC are not signatories to the Rome Statute yet they can still refer cases and have veto power. The next section examines the cases in details.

CHAPTER 4:
THE PROSECUTOR *v.* OMAR HASSAN AHMAD AL BASHIR

4.1 INTRODUCTION

The UNSC referred the humanitarian situation in Darfur to the ICC in March 2005. A preliminary investigation was opened in June 2005. President of Sudan, Omar Hassan Ahmad al-Bashir (hereafter al-Bashir), was issued the first warrant of arrest by the ICC on 4 March 2009 (International Criminal Court, 2005) and was charged with crimes against humanity, war crimes and genocide committed since 1 July 2002 in Darfur. The Darfur region by mid-2004 had made international headlines with appalling cinematography, undoubtedly the worst humanitarian crises of the 21st century. The Report of the International Commission of Inquiry on Darfur to the Secretary-General (2005, p. 20) detailed that during the conflict more than 300 000 people had died with 2 million internally displaced persons (IDPs) since 2003. The long and disastrous war coupled with international pressure obligated the government and rebel groups to initiate peace talks in 2004 (Straus, 2005, p. 125).

The AU perpetually entreated the UNSC to defer the case for a year against al-Bashir. The UNSC disregarded this petition. On 3 July 2009, the AU took a Resolution appealing to its members to disregard the international warrant of arrest allotted to al-Bashir (Du Plessis, 2014, p. 9). This marked an epoch of open hostility between the AU and the ICC. The AU maintained indicting HoS interrupts the ongoing peace processes and that the contentious issue of immunity is unsettled in international law. The AU remains sceptical of the intentions of prevailing western powers which seemingly dominate weak African states (Du Plessis, et al., 2013, p. 4). Lastly, the trial of al-Bashir was irrefutably controversial as the ICC proceeded against a HoS that is not party to the *Rome Statute*.

Withstanding, the AU member states that are party to the *Statute* have willingly signed up to the ICC jurisdiction. These members are controverting their own ideals and principles, consequently weakening the AU and compromising ideals of the organisation which are embedded in its founding documents. Krasner (1999, p. 238) highlights that ‘norms can matter, but they can also be mutually contradictory’- organised hypocrisy (OH) is a normal state of affairs in the international system. When negotiations failed with the UN to defer the case for a year, the AU Assembly meeting in February 2009 adopted decision

Assembly/AU/Dec.213(XII), which proposed the creation of the 'Expanded Court' (Abraham, 2015, p. 8) and the inclusion of article 46(a) *bis* to shield African HoS from international prosecution. This placed AU member states in a predicament, having to choose between honouring their obligations as AU State Parties and signatories to the *Rome Statute* concomitantly. Different states within the AU have taken differing standpoints on this issue.

The aim of this chapter is to assess the relationship between the AU and the ICC by analysing how the AU responded to the ICC on the indictment of President Omar al-Bashir. The chapter will commence with a background to the conflict in the Darfur region since July 2003. Then will discuss briefly the humanitarian crises and the response to the crises in Darfur. Thereafter, an elaboration of the case before the ICC will follow. Subsequently, the Prosecutor v. Omar Hassan Ahmad al Bashir case will be discussed. Following this will be a chronological account on the African Union's reaction to the ICC which follows the logic of organised hypocrisy.

4.2 BACKGROUND: CONFLICT IN DARFUR (2003-)

The Republic of Sudan gained its independence from Great Britain and Egypt in 1956. President al-Bashir toppled the government of Sadiq Al-Mahdi in a coup d'état and became the president in 1993. During the colonial years, civilization and modernity advanced in the north while the south remained primordial, constructing visible parallel entities which discounted the diversity and historical linkages between the regions (Peace Direct, 2009). When al-Bashir took office, along with the rise of authoritarianism, the ongoing war with the south strengthened and has since caused 2 million deaths and the displacement of more than 4 million people (Bashir Watch, 2016). This led to civil wars and ultimate secession of the south on 9 July 2011 to form the newly independent state of South Sudan (BBC News Africa, 2016). Empirical evidence suggests that the conflict in Sudan is not restricted to the North and the South regions but the central government and the peripheries.

The Darfur region is Sudan's largest area found on its western border with Libya, Chad, and the CAR. It comprises of African farmers such as the *Fur, Masalit* and *Zaghawa*. The *Fur* and *Masalit* are the dominant ethnicities and the rest comprises of nomadic Arab tribes, *Zaghawa* other minor ethnicities (Udombana, 2005, p. 1152). Mamdani (2009, p. 86) highlights that the racialization of identities began when the British tried to systematise two confederations in Darfur: one 'Arab' the other 'Zurga' or black. Historically, intermarriages between the

dominant groups and Arabs and an interchange of religious believes is evident. Yet, Khartoum favoured the Arab groups in the region whilst neglecting the dominant '*Zurga*' tribes. De Kock (2011, p. 7) finds that the fundamental problem of Sudan's peripheries is the monopolisation of power and embezzling of resources by the central government. This has resulted in a history of internal armed and political struggles between the state and local forces, revolving around lack of resources or the state's inability to create an economic base for collective survival in a harsh climate and geography.

Two rebel groups rose up against the central government in February 2003. The Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM) were disgruntled about the continued ostracism of the South regions and non-Arabs in the region. The government responded with a counter-rebel group and armed it against the non-Arab *Fur* and *Zaghawa* populations of Darfur (Peace Direct, 2009). The central government in Khartoum was suspected of recruiting *Janjaweed*, Arab militias who are pillaging villages while committing mass atrocities (Thomson Reuters Foundation news, 2014). According to Grono (2006, p. 624), the government supported the resulting ethnic cleansing campaign with well-coordinated air strikes and joint ground forces. There was interplay between government security forces and private militias which opened a stage for genocide and grave crimes against humanity in the region. Regrettably during time of violent conflicts, there is a deliberate aggression against women and girls, including gang rapes, abductions, being confined to specific spaces and repeatedly raped (Udombana, 2005, p. 1154).

The International Refugees Rights Initiative (IRRI) Report (n.d., p. 8) relates that since the conflict began in 2003, more than 300 000 people are estimated to have been killed and around 3 million IDPs (approximately 2.6 million of whom are internally displaced within Sudan and approximately 350,000 of whom have fled to Chad). Al-Bashir has been accused of trying to wipe out three non-Arab ethnic groups in the region, the *Fur, Masalit and Zaghawa* (The Guardian, 2010). Besides grave massacres, malnutrition and preventable disease in IDPs camps killed more people, estimated at 108,588 in January 2005, with approximately 25,000 more having died in remote regions (Bellamy, 2005, p. 31). The Abuja Agreement (or the Darfur Peace Agreement) of 5 May 2005 was signed by the government and a faction of the SLM/A.

Sudan has signed a number of Peace Accords. The Comprehensive Peace Agreement (CPA) signed in 2005 ended the second civil war. The CPA was one of the three distinct peace

agreements that Sudan signed in the first decade of the 21st century, the other two were the Darfur Peace Agreement (DPA) (2006), also known as the Abuja Agreement signed by the Sudanese government and SLM/A. The agreement leaves out the JEM who ignored the deal and continued with the violence (Bashir Watch, 2016). Furthermore, the Eastern Sudan Peace Agreement (ESPA) was signed with the Eastern Front in October 2006 (De Kock, 2011, p. 11). The CPA not only brought the civil war to an end, but is also aimed at restructuring wealth accumulation and power distribution in the Sudanese system.

In 2013 alone, IDPs in Darfur were more than 30,000 refugees that fled to neighbouring Chad, and more than 250,000 people have fled the violence since February 2014 (Human Security Baseline Assessment for Sudan and South Sudan, 2014). The Darfur region continues to be plagued with violent attacks that displace thousands of civilians. Between January and March 2016, a major offensive was launched against rebels in Central Darfur's mountains, Jebel Marra region, and displaced more than 100 000 people despite of claims by Khartoum that peace has been achieved in the region (International Refugees Rights Initiative, 2016, p. 7). The conflict subtleties in Darfur continue to evolve, fluid between the battle for resources, land distribution and ownership, ethnic tensions and racial divide while actors are growing in numbers and motives.

4.3 RESPONSE TO THE HUMANITARIAN CRISES IN DARFUR: THE UNITED NATIONS AND THE AFRICAN UNION

The government of Sudan denied humanitarian agencies and organisations access to intervene which aggravated the humanitarian consequences of the conflict. In April 2004, President Idris Déby of Chad mediated a ceasefire agreement to allow humanitarian access in Darfur between the government and a joint SLM/A and JEM delegation. The government had denied the US, EU and UN delegation to participate in the crises and eventually compromised on the AU as mediators, with international observation only for talks on humanitarian issues (Hottinger, 2006, p. 46). At the 5th Session of the AU PSC, 13 April 2004, a Report of the Chairperson of the Commission on the Darfur situation in Sudan acknowledged the humanitarian crises in Darfur. By mid-2004, the scale of the crises had drawn global media attention. In June 2004, the AU established their first peacekeeping mission in Darfur– the AU Mission in Sudan (AMIS) consisting of 60 monitors and 300 troops (Grono, 2006, p. 625). AMIS augmented its operations by 2 200 personnel in October 2004 which included force

protectors and unarmed civilian police. On 20 October 2004 the AU PSC issued a communiqué, PSC/PR/Com.(XVII), deciding on the personnel required to manage the situation in Darfur as 3320 including 2341 military personnel, 450 observers, and up to 815 civilian police personnel (Peace and Security Council, 2004, p. 2). This number increased to 7 000 troops by mid-2005, placing it as the largest AU deployment on peacekeeping operations (Peace Direct, 2009). AMIS had contributed immensely to the protection of the civilian population and the improvement of the security and humanitarian situation in Darfur despite serious financial, logistical and other limitations facing the Mission (Peace and Security Council, 2006).

The UNSC delivered its first assertive response about the situation in Darfur in Resolution 1556 of 30 July 2004 demanding Sudan to disarm militias in the region (United Nations Security Council, 2004). The UN took over the peacekeeping mission in Darfur to relieve the AU which was wanting in resources. The UN was reluctant to take over the mantle without a peace agreement, hence the DPA was signed on 5 May 2006. The UN Mission resumed under the new appellation UN–AU Mission in Darfur (UNAMID) by UNSC Resolution 1706 in August 2006, mandating the deployment of UN peacekeepers to Darfur (United Nations Security Council, 2006). On 31 July 2007, the UNSC adopted Resolution 1769 authorizing UNAMID under Chapter VII of the UN Charter to implement the DPA and to protect both civilians and its own personnel (ibid, 2007). This hybrid mission began its operations on 31 December 2007. A UN International Commission of Inquiry on Darfur on 18 September 2004 was set up and was concluded on 25 January 2005 (Badescu & Bergholm, 2009, p. 295).

The Report to the UN Secretary-General (2005, p. 4) found that the government of Sudan had not pursued a policy of genocide. However, the report stated there were two elements of genocide which might be deduced from the gross violations of human rights perpetrated by government forces and the militias under their control. Firstly, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction. Secondly, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct was prevalent. In addition, ‘the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic

basis, and therefore may amount to crimes against humanity' (ibid, p. 4). These are the conditions that led the UNSC to refer the case to the ICC for investigation, of which the report stated, 'the Commission does recognise that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis' (ibid, p. 2). The UNSC acting under Chapter VII of the Charter of the UN adopted Resolution 1593, 'decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court' (ibid, p. 1).

4.4 THE PROSECUTOR *v.* OMAR HASSAN AHMAD AL BASHIR

The former prosecutor of the ICC, Luis Moreno-Ocampo, referred a situation *proprio motu* in March 2005 to launch an investigation in Darfur. The Pre-Trial Chamber was satisfied with the evidence provided by Ocampo that the case against al-Bashir falls within the jurisdiction of the Court and there will not be any further grounds under article 19 of the Statute to determine otherwise (International Criminal Court, 2009, p. 4). President al-Bashir had been issued two warrants of arrests. The first was issued on 4 March 2009 where the Pre-Trial Chamber 1 charged him with allegations of war crimes and crimes against humanity as individual criminal responsibility under article 25(3)(a) of the Rome Statute as an indirect (co) perpetrator including (ICC, 2015; 2009, p. 3 & 2009, p. 50):

- *Five counts of crimes against humanity: murder (article 7(1)(a)); extermination (article 7(1)(b)); forcible transfer (article 7(1)(d)); torture (article 7(1)(f)); and rape (article 7(1)(g));*
- *Two counts of war crimes: intentionally directing attacks against a civilian population as such or against individual civilians not taking part in hostilities (article 8(2)(e)(i)); and pillaging (article 8(2)(e)(v))*

The crime of genocide was only included on 12 July 2010 where the Pre-Trial Chamber I found that there were reasonable grounds to believe that al-Bashir acted with specific intent to destroy in part the *Fur, Masalit and Zaghawa* ethnic groups. As part of the ongoing investigation, the ICC Report (The Office of the Prosecutor, n.d., p. 3) stated that, '…over the years, AL BASHIR…promoted the idea of a polarization between tribes aligned with him, whom he labelled "Arabs" and the three ethnic groups he perceived as the main threats…who became derogatorily referred to as "Zurgas" or "Africans" ' (ICC, 2008, p. 7; 2010, p. 25). This led to the ICC issuing the HoS with a second arrest warrant (ibid, 2010, p.14) for:

- *Three counts of genocide: genocide by killing (article 6-a), genocide by causing serious bodily or mental harm (article 6-b) and genocide by deliberately inflicting on each target group conditions of life calculated to bring about the group's physical destruction (article 6-c).*

The Court's investigation in Darfur has generated a number of cases with accused from government officials, militia leaders such as the *Janjaweed*. For instance, the Sudanese Minister of State for the Interior of the government, Ahmad Muhammed Harun, was issued an arrest warrant in 2007 on 42 accounts of crimes including 20 crimes against humanity and 22 war crimes committed in the Darfur between 2002 and 2003 (ibid, 2007). Currently, the president remains at large with an extremely contentious case where his African counterparts openly repudiate collaboration with the ICC. This is the theme for the next section.

4.5 THE AFRICAN UNION'S RESPONSE AS ORGANISED HYPOCRISY

On 12 January 2006, the AU PSC delivered a Communiqué, PSC/PR/Comm.(XLV,), in which the Council implored African leaders and other stakeholders in the Sudanese conflict to exert pressure on them to respect their obligations and negotiate in good faith with a view to ending violence in Darfur and concluding the CPA. This is an appropriate response and sets a moral tone for the AU to end violent conflicts on the continent. In the same year on 19 June, the AU PSC received the Prosecutor of the ICC and affirmed its resolve to fight impunity on the continent (Peace and Security Council, 2006). The end of impunity in Africa will be a regular thread that runs throughout the communication of the Union.

As early as 2008, the AU was apprehensive that some non-African states (primarily EU) were manipulating the principle of universal jurisdiction which, according to the AU, is a direct violation of the international norm of sovereignty and territorial integrity of states. This would be a staunch position of the Union as narrated in Assembly/AU/Dec.270(XIV) of 2010 and many more. The challenge here is the contradictory dispatch that the AU relays. The international norm of sovereignty is directly opposed to the end of impunity. This is hypocrisy. It affirms the point that international norms are often contradictory and leaders choose the constituencies to gratify.

On 1 July 2008 the Assembly issued decision Assembly/AU/ Dec.199(XI) relaying that the abuse and misuse of indictments against African leaders have a destabilizing effect that will

negatively impact on the political, social and economic development of states and their ability to conduct international relations (Assembly of the African Union, 2008). It stated solidly that the arrest warrants will not be executed within AU member states. It also continually implore its members to balance their relationship between both organisations per Assembly/AU/Dec.296(XV) (Assembly of the African Union, 2010, pp. 1-2). This merely illustrates a façade that the AU is not resolute to fight impunity on the continent. It is engaging in hypocritical behaviour, shielding African leaders from prosecution for crimes committed abroad.

In the same month, on 11 July 2008, the AU PSC issued a Press Statement, PSC/PR/BR(CXLI), in which it maintained that the quest for justice should be attained in a way that does not obstruct or endanger efforts targeted at promoting long-lasting peace or on-going peace negotiations. This is the thread which runs through most communication of the AU to the ICC such as Assembly decisions Assembly/AU/Dec.221(XII) (2009) and Assembly/AU/Dec.397(XVIII) [2012]. The PSC further contended that in Resolution 1593(2005) dated 31 March 2005, the UNSC heightened the need to promote healing and reconciliation. Again, they noted the alarm of the Assembly on indictments against African leaders (Peace and Security Council, 2008, p. 1). Since it is shared understanding that signing the *Rome Statute* is directly linked to prosecution of HoSG, this violates international norms and is synonymous to organised hypocrisy.

On 3 February 2009, the Assembly of the AU (Assembly of the African Union, 2009, p. 1) issued decision Assembly/AU/Dec.221(XII), in which it articulated its concerns over the indictment of president al-Bashir. There is consistent communication in this regard, Assembly/AU/Dec.245(XIII) Rev.1 (2009), PSC/PR/COMM(CXCVIII) (2009). Again, the Assembly requests the Commission to examine the work of the ICC with regards to Africa, particularly its Afro-centric nature. On the same decision, the Assembly echoed their unflinching commitment to fighting impunity as indicated in the Constitutive Act. It also highlighted the need for perpetrators to be brought to justice. At this session, decision Assembly/AU/Dec.213(XII) was communicated that emphasised the need for the unity of the AU as the only suitable joint response to counter the exercise of power by strong western states over weak (African) states (Assembly of the African Union, 2009, p. 1). The question then is where is the moral commitment in this contradictory rhetoric? This is an epitome of hypocritical behaviour. The commitment seems to be the protection of Africa leaders rather

than affording justice to the victims of atrocious crimes. In one instance, the AU is avoiding prosecution for al-Bashir but claiming to end impunity while looking for ways to coordinate its operations in producing more hypocritical statements.

The AU PSC issued a communiqué, PSC/PR/COMM.(CLXXV), on 5 March 2009, claiming its commitment to fighting impunity, consistent with the relevant provisions of the Constitutive Act, and its renunciation of gross violations of human rights in Darfur. In the very same communiqué, the PSC urged the UNSC to defer the case under article 16 of the Rome statute. This has been a common thread and position of the AU as exemplified by Assembly/AU/Dec.270(XIV) (2010), Assembly/AU/Dec.296(XV) (2010]), Assembly/AU/Dec.366(XVII) (2011), Assembly/AU/Dec.482(XXI)(2013]) and many more. Again, the PSC urged all AU organs and the Sudan government to hasten steps towards bringing to justice all perpetrators of gross human rights abuses (Peace and Security Council, 2009, p. 2). OH should not only be seen as a source of dysfunction, it also allows the AU to manage irreconcilable pressures that might render the organisation incapable of effective action and threaten its survival. As long as these contradictory and inconsistent statements are given, the survival of the AU is assured.

From 2009, the Assembly of the AU adopted decision, Assembly/AU/Dec.245(XIII) Rev.1 (Assembly of the African Union, 2009, pp. 1-2), to determine the feasibility of the ACHPR to try international crimes (genocide, war crimes *etc.),* while it reaffirms its commitment to end impunity and promote the rule of law, good governance and promoting democracy. Furthermore, the Assembly communicated the urgency to understand immunities for states that are not signatories to the ICC. Further, the Assembly questioned the legitimacy of the prosecutor (Ocampo) in initiating a situation *prorio muto* (Assembly of the African Union, 2009, pp. 2-3). The AU does not clarify how the African Court will relate to the ICC; whether it will replace it completely or it will maintain complementary status.

In the same year, the AU PSC issued communiqué PSC/PR/COMM(CXCVIII), where the AU PSC maintained their position of non-cooperation of AU member states to arrest the Sudan president and appealed to all AU member States to respect decision Assembly/AU/Dec.245 (XIII) adopted by the Assembly of the Union at its 13th ordinary session held in Sirte, Libya, from 1-3 July 2009 (Peace and Security Council, 2009, p. 3). This has been an unwavering commitment of the Union ever since. In the same year, the Assembly issued a decision,

Assembly/AU/Dec.296(XV), to reject the proposal by the ICC to open a liaison office in Addis Ababa (Assembly of the African Union, 2010, pp. 1-2). The AU member states have ratified the *Rome Statute* but remain hostile towards the execution of its mandate- compromising the credibility of the AU.

Various decisions were issued by the AU, Assembly/AU/ Dec.334(XVI) and EX.CL/710(XX), to express regret that the ICC was issuing reports implicating various African states about the visit of President al-Bashir to different African countries: Chad, DRC, Kenya, Malawi, Djibouti and South Africa amongst others (Assembly of the African Union, 2011, p. 1; Executive Council, 2015, p. 3; Assembly of the African Union, 2016, pp. 1). The AU embraced these states, acknowledging that they were implementing several decisions of the Union not to arrest al-Bashir pursuant to article 23 (2) of the Constitutive Act (sanctions of members for non-compliance) and Article 98 of the *Rome Statute* of the ICC. Again, the Assembly beseeched the African State Parties to the Rome Statute of the ICC to harmonise their views during consultations with the ICC. This is an interesting phenomenon as the AU is promoting non-cooperation with the only international court. Needless to say the principles of non-indifference seem to be viable only on paper. The AU endorses all of these hypocritical stances, non-cooperation with the AU, but resolute to fight impunity.

In January 2012, the Assembly of the AU issued decision Assembly/AU/Dec.397(XVIII), in which it recalled article 98(1) of the *Rome Statute* establishing the ICC (Assembly of the African Union, 2012, p. 1). Again the Assembly expressed disappointment at some member states that are opposing the majority ruling pertaining to the selection of African Judges to the ICC which would decrease their chances of influencing the evolution of the Court's jurisprudence (Assembly of African Union, 2012, p. 1). Lastly, the Assembly requested the Commission to consider seeking an advisory opinion from the ICJ regarding the immunities of state officials under international law (Assembly of the African Union, 2012, p. 2). This is exemplary of the AU using existing leeway to get Sudan not to cooperate with the ICC. More so, it highlights these inconsistencies of the AU towards the ICC. On the one hand, the AU seeks to dominate the ICC; on the other hand, it is contesting to cooperate with it.

On a number of occasions, the AU has alluded to the significance of putting the welfare of victims at the heart of all actions in sustaining the fight against impunity, As exemplified by the Assembly decision Assembly/AU/Dec.419(XIX) (Assembly of African Union, 2012, p. 1).

Moreover, the Assembly has entreated African States to the Statute of the ICC and African non-states parties to complete bilateral agreements on the immunities of their state senior officials (Assembly of African Union, 2012, p. 1). Interestingly, the Assembly invited the African Commission on Human and Peoples' Rights and the ACHPR to publish their development towards the protection of non-combatants in circumstances where international crimes have been committed (Assembly of African Union, 2012, p. 1). If bilateral agreements are upheld by African states, how will these perpetrators be prosecuted under the auspices of the AU?

Tracing the AU's communication, it has consistently expressed concern over the deterioration of the security situation on the ground in Darfur and called on involved parties to exercise utmost restraint as epitomized by Assembly/AU/Dec.472(XX), Assembly/AU/Dec.493(XXII) and Assembly/AU/Dec.536(XXIII*)* of 2013, 2014 and 2015 respectively. What is not evident is enforcing accountability measures on all parties involved in the Darfur conflict. But the rhetoric seeks to appease some constituency not necessarily action oriented, amounting to organised hypocrisy. The mediation processes have been dragged on for too long without the purported 'lasting peace'. What the AU is mostly interested in is the 'African selection for prosecution' found in Assembly/AU/Dec.482(XXI) (Assembly of the African Union, 2013, p. 1). On this decision of the Assembly 'decision on international jurisdiction, justice and the International criminal Court' Document, Assembly/AU/13(XXI), a reservation was entered by Botswana on the entire decision (Assembly of the African Union, 2013, p. 1).

The AU finally requested the ICC to suspend proceedings against President al-Bashir and to urge the UNSC to withdraw the referral case of the Sudan in January 2015 illustrated by EX.CL/Dec.868(XXVI), Assembly/AU/Dec.547(XXIV) and Assembly/AU/Dec.586(XXV) (Executive Council, 2015, p. 3; Assembly of the African Union, 2015, pp. 1-3 and 2015, p. 1) consecutively. There is no mention what the intention of the AU is in order to bring perpetrators of extensively notorious atrocities in the Darfur region to account. Instead, the AU's ultimate aim seems to be the reproduction (output) of inconsistencies. This includes the AU's objection to inclusion of language of the UN peacekeeping mandates to assist in the enforcement of ICC arrest warrants (Peace and Security Council, 2016) as contained in PSC/PR/COMM.(DCVI) of June 2016. The continental body cites that this will impact negatively the neutral capacity of the UN. At the time of completing this research the official documentation of the 28th OS of the Assembly of the AU hosted 22-31 January 2017, had not been uploaded on the AU website.

However, the development with regards the topic at hand is that the Assembly of the AU has adopted a mass withdrawal strategy from the ICC. This point will be discussed in successive chapters.

4.6 CONCLUSION

Talks, decisions, and actions of the AU are ceremoniously contradictory and their aim is to produce more contradictions. At some point (predominantly in the western worlds) they reject impunity and are 'doing something' about it while defending HoSG that embrace impunity. At other times they are concerned about the victims in Darfur, in the same breath value peace over justice. The AU has endorsed the culture of norms such as R2P and the evolution of human security among a plethora of norms. It has pledges not to be indifferent to mass atrocities committed on their watch. Yet their statements fail to agree with the requirements for action. Hence these norms are structured not to interfere with one another. They are separated or 'decoupled', albeit in a reversed manner. Up to date, President al-Bashir has not accounted to any of the mass killing in Darfur and the millions of IDPs.

From the communication of the AU, it appeared conceivable that the Union employed existing leeway to get out of prosecution for al-Bashir such as article 98 of the Rome Statute. This is where the complexity of the matter launches. Du Plessis et. al (2013: 5) state that at this juncture it is not important that Sudan is not a state party since the case was referred by a UNSC resolution, which is binding on all UN member states. McNamee (2014: 6) shares the same views by stating that citizens of non-State parties to the *Statute* can still be prosecuted by the ICC if the UNSC decides to 'refer' them to the Court, as is the case with Libya and Sudan. Within the international system, there is no overarching authority to arbitrate over disputes, so the AU used this approach to avert prosecution of its member state. This means, the Union aims to play by the rules, but not necessarily to obey them. More so it highlights that the AU is willing to compromise its moral obligations for norm violating leaders.

CHAPTER 5
THE PROSECUTOR OPEN AN INVESTIGATION *PROPRIO MOTU* IN THE SITUATION IN KENYA

5.1 INTRODUCTION

The Republic of Kenya (hereafter Kenya) ratified the *Rome Statute* establishing the ICC on 15 March 2005. In 2007, Kenya held its general elections which spiralled into ethnic violence that started from December 2007 to February 2008 (International Coalition for the Reponsibility to Protect, n.a). The post-election violence led the ICC Prosecutor to open an investigation on the situation on 31 March 2010, pinning it on six leaders on both sides of the conflict, including then Deputy Prime Minister Uhuru Kenyatta (elected President in 2013) and his former opponent and current Deputy President, William Ruto (Fehl, 2014, p. 12). All of the accused appeared voluntarily when issued summons at The Hague. They were charged with crimes against humanity including murder, rape, persecution deportation or forcible transfer of population and other inhumane acts (International Criminal Court, 2009)

Arguments raised by the ICC focus on Africa have been considerably intensified by the prosecutions of Kenyatta and Ruto (MacNamee, 2014, p. 4). Needless to say, the indictment of Kenyatta as a HoS advanced scepticism within the AU camp as to the actual mandate of the Court and its failure to deliver justice impartially. Du Plessis (2014, p. 9) notes that the notion of opening an investigation against a HoS raised questions about immunity under customary international law- the question that the AU has retorted to with open hostility and draconian actions. The AU makes reference to the sovereignty of African states. When making a case for Organised Hypocrisy (OH), Krasner (1999, p. 51) contends that international norms are often contradictory. Brunsson (2002, p. 6) suggested that the international system is awash with norms that are proliferating and fashions that are growing increasingly changeable and influential.

The purpose of this chapter is to illustrate the response of the AU to the ICC on the indictment of Kenyatta (and his deputy Ruto). The chapter begins with a brief background into the elections and the post-elections violence that began in December 2007 in Kenya. Then it progresses to discuss how the AU responded to the violence. The next section will deliberate on the case against Kenyatta before the ICC. Subsequently, it will discuss how the AU responded to the ICC indictment of a sitting HoS and government officials.

5.2 BACKGROUND: 2007 ELECTIONS AND THE POST-ELECTION VIOLENCE IN KENYA

On 27 December 2007, the trigger for the violence was the rigging of elections that saw the re-election of President Mwai Kibaki (a *Kikuyu*) of the Party of National Unity (PNU). PNU was a political coalition founded shortly before the 2007 elections comprising of parties such as the Kenya African National Union (KANU) led by Uhuru Kenyatta in the contest for elections. Electoral fraud was persistent during the elections period starting from the polling stations to the actual 'stealing' of elections. Over a million votes were claimed to be rigged from Odinga's Orange Democratic Movement [ODM] (Human Rights Watch, 2008, p. 22) and within 35 minutes of the dubious win, the incumbent Kibaki was sworn in as president (Roberts, 2009, p. 12) despite the many irregularities within the electoral process, including the counting and tallying of election results (See Table 1 below) (Kriegler Commision, 2008, p. 139).

The credibility of the Electoral Commission of Kenya (ECK) had been compromised when Kibaki nominated 18 out of 21 Commissioners in the run up to the elections without prior consultation with opposition parties (Department for International Development, 2009, p. 1). Shortly before the elections, the incumbent appointed six judges to the Electoral Court suggesting that he was preparing to manage judicial resolution of any disputes that might arise (Ajulu, 2008, p. 42) while the citizens were unhappy with his administration marred in corruption. The failed constitutional referendum in 2005 did not improve Kibaki's political standing. The opposition capitalised on this weakness in their campaign (Khaliagala, 2008, p. 7). Thus, five ECK commissioners dissociated themselves from the proclaimed results (Klopp & Kamungi , 2008, p. 11). The Party of National Unity (PNU) had lost the majority of seats in parliament (had only 21 per cent) which signalled a win for the ODM, which had 48 per cent (Adar, 2008, p. 54). According to Ajulu (2008, p. 42) more than 30 political parties disputed the outcome of the elections. Odinga's ODM and its breakaway faction ODM-K led by Kalonzo Musyoka were the most active leaders of the opposition.

The violence that erupted gyrated along ethnic lines, although it is rather reductionist to attribute conflicts in Africa as purely 'tribal'. Thomson (2010, p. 61) maintains that ethnicity becomes an instrument for politicians to highlight cleavages in societies and that social

stratifications foster conflicting interests ubiquitously (ibid, p. 65). The opposition parties dissatisfied with the rigging of elections, attempted public protests but were raided by the police on Kibaki's order (Roberts, 2009, p. 12). The government took an unyielding position of deploying the state security apparatus to prevent opposition mass protests and mitigate the threat to institute parallel government (Khaliagala, 2008, p. 8), justifying the ban lawfully as 'maintenance of peace and security'. The police brutality could not be justified and mass killings of unarmed citizen prevailed, predominantly in the Rift Valley Province that is home to the *Kalenjin* (see table 2 below). The *Kalenjin* were killing their *Kikuyu* counterparts whom they referred to as 'foreigners' in their region. There are five dominant ethnicities in Kenya; *Kikuyu* (20 per cent of the population); *Luo; Luhya; Kamba; and Kalenjin* in total accounting for 70 per cent of the entire population (African Studies Centre, n.d.).

Table 1: Election results in the December 2007 Elections in Kenya

Candidate	Party	Votes	Percentage
Mwai Kibaki	Party of National Unity (PNU)	4,584,721	46.42
Raila Odinga	Orange Democratic Movement (ODM)	4,352,993	44.07
Kalonzo Musyoka	Orange Democratic Movement- Kenya (ODM-K)	879,903	8.91
Joeph Karani	Kenya Patriotic Trust Party (KPTP)	21,171	0.21
Pui Muiri	Kenya's People's Party (KPP)	9,667	0.1
Nazlin Omar	Workers Congress Party of Kenya	8 624	0.09
Kenneth Matiba	Saba Saba Asili (SSA)	8 046	0.08
David Waweru Ngethe	Chama Cha Uma (CCU)	5 976	0.06
Nixon Kukubo	Republican Party of Kenya (RPK)	5 927	0.06
Total		**9 877 028**	**100**

*****Adapted from Electoral Institute for Sustainable Democracy in Africa [EISA] (2010)

The 2007 election in Kenya was brutal and a blood battle which involved burning people alive, stoning, mob injustice, arrow shots, blunt object, hanging, gunshots and many more (Waki Commission, 2008, p. 311). Fourteen days after the elections over 1500 had been killed, 350 000 displaced, 100 000 refugees and 3 000 women raped (Adar, 2008, p. 53). Roberts (2009, p. 14) concludes that there were many levels intertwined in the conflict, a disgruntled youth with inefficient government to create job opportunities and the members of the *Kalenjin* attacking their *Kikuyu* neighbours over an age old land dispute. A point advanced by Yard (2014, p. 47) was that the causes for the violence can be old age disputes over land or weak government structures. The Rift Valley became home to militia activities launched by the *Kalenjin* ethnic group against the *Kikuyu*, took the form of killings, destruction of property,

and displacement of people. The predominantly *Kikuyu* militia, known as *Mungiki*, retaliated (Khaliagala, 2008, pp. 7-8).

The Commission of Inquiry on Post-Election Violence Report (Waki Commission, 2008, p. 76) summarises the occurrences in the Rift Valley as follows: '…general spontaneous anger by ODM's Kalenjin candidates and voters at the announcement of a Kibaki win amidst allegations of rigging; land hunger and a desire to evict so-called outsiders whatever the outcome of the elections; and a desire by Kalenjin ODM candidates to overturn the presidential election and assume power'. As it turned out, Odinga rejected the result, convinced that he had won (Kariuki, 2008, p. 136). Kenya, once a beacon of peace, fell prey to the violence quotidian to Zimbabwe, the DRC, and CAR. The AU initiated a Power Sharing Agreement (PSA) of 2008 where Kibaki became the President and Odinga a Prime Minister (a newly created position) to discontinue the civil unrest and violence. Uhuru Kenyatta became the Deputy Prime Minister and Minister of Finance elected by Kibaki's administration.

5.3 AFRICAN UNION'S REACTION TO THE CRISES IN KENYA

The occurrence of electoral violence is usually symptomatic of more widespread systematic grievances (Bekoe, 2010, p. 5). The violence that prevailed merited an international response, particularly when both parties had gotten to a stalemate in negotiations. The instability in Kenya had a greater impact in the region, surrounded by countries such as South Sudan and Somalia. South Africa' Archbishop Desmond Tutu by means of his moral standing, President Yoweri Museveni, as the Chairperson of the East African Community (EAC) and Ghana's President John Kufuor were active in the early phase of the conflict and paved a way for the AU Panel. On 10 January 2008, the AU mediated between the government and opposition parties by deploying a Panel of Eminent Personalities (PEP) led by former UN Secretary General Kofi Annan, Graça Machel of South Africa and former President of Tanzania Benjamin Mkapa (International Coalition for the Responsibility to Protect, n.a). Khadiagala (2008, p. 13) notes, 'The panel epitomised collective power – the coalescence of diverse diplomatic and moral skills'. The team was acknowledged by both the PNU and ODM. The negotiations ended up in a PSA ultimately signed on the 28 February 2008. At the Tenth OS of the Assembly on 2 February 2008, the Assembly of the AU issued decision *Assembly/AU/Dec.187 (X)* in which they were emphatic on the issue of accountability for gross

violations on human rights and perpetrators to be brought to justice (Assembly of the African Union, 2008).

The discoveries made by Kofi Annan would lay the foundation for the ICC prosecution into the architects behind the 2007 post-election violence that included high-ranking government officials. In 2009, the ICC prosecutor began an investigation that launched with the 'Ocampo six' as commonly known, including Uhuru Kenyatta and William Ruto. The Kenyan government was ineffective in setting up a domestic tribunal to convict the engineers behind the ethnic violence (Global Policy Forum, 2017).

5.4 THE PROSECUTOR *v.* PRESIDENT UHURU KENYATTA

An investigation into the allegations made about the 'Ocampo six' including the Kenyan elected president in 2013 Kenyatta and his deputy William Ruto's complicity into the ethno-violence in 2007 began in March 2010. Then, Kenyatta and Ruto were in opposition but subsequently had a common mandate to contest the 2013 general elections. An investigation was opened for all crimes committed from 1 June 2005 and 26 November 2009 (see table 2 below). Kenyatta was charged with criminality and responsibility as an indirect co-perpetrator pursuant to article 25(3)(a) of the *Rome Statute* for the crimes against humanity of: murder (article 7(l)(a)); deportation or forcible transfer of population (article 7(l)(d)); rape (article 7(l)(g)); persecution (article 7(l)(h)); and other inhumane acts (article 7(l)(k)) (International Criminal Court: The Prosecutor v. Uhuru Muigai Kenyatta, 2015). *Inter alia*, Mr Kenyatta and members of the *Mungiki* (criminal organisation), purportedly created a common plan to instigate assaults against non-Kikuyu ethnic populaces to retain the PNU in power, in exchange for an end to government tyranny and protection of the *Mungiki's* welfare.

Table 1

SUMMARY OF DEATHS PER PROVINCE	
Rift Valley	744
Nyanza	134
Central	5
Western	98
Coast	27
Nairobi	125
TOTAL	**1133**

*Adapted from the Waki Report (2008: 308)

All the while, Kenyatta worked tirelessly to lobby AU members to adopt a resolution that permits the cases to be referred to domestic courts in May 2013. The AU cited the argument of the Court compromising peace processes which were underway between the government and opposition parties. The resolution was embraced by all member states apart from Botswana (Du Plessis, et al., 2013, p. 5). At their Sixteenth OS, the Assembly of the AU (2011, p. 1) supported Kenya's request to allow for national prosecution and further requested the UNSC to concede to their requests to allow for peaceful conciliation processes to the end of the conflict and in accordance with the principle of complementarity. On 8 March 2011, the UNSC did not grant this request, Kenyatta and Ruto were prosecuted and summoned to appear before the ICC's Pre-Trial Chamber II. The hearing for the trial of Kenyatta, Joshua arap Sang and William Ruto commenced on 21 September 2011. In March 2013, the case was complicated when in presidential elections in Kenya resulted in victory for a Kenyatta - Ruto union, the two being confirmed president and deputy president respectively (Abraham, 2015, p. 9). The drastic turn of events did not deter the ICC from pursuing the case; the trial began on 10 September 2013. A momentous time in history occurred as Kenyatta became the first serving HoG to appear before the ICC at The Hague on 8 October 2014, when the case was suspended by its current prosecutor, Fatou Bensouda. The charges against Kenyatta were dropped on 5 December 2014 on the basis of not having sufficient evidence to prosecute. The ICC maintains that it will reopen the case when new evidence arises.

The case against Uhuru Kenyatta before the court was complex. Allegation of intimidation and bribery of suspects were made. In which case, the ICC claimed it jurisdiction under article 70 of the *Rome Statute*, dealing with witness bribery, intimidation and offenses against the administrations of justice (Maliti, 2015). Back at home, Uhuru and Ruto were able to use their indictment to draw mass support on rhetoric's of unfair 'international criminal justice'- leading up to his election as president in 2013. Moreover, Kenyatta was able to gunner continental support from fellow Africans based on a common fear of western domination within the international system. Further, the Kenyan government did not fully cooperate with the ICC, ultimately refusing to hand in required documents by the ICC (Allison, 2016) such as his bank and phone records (Lang'at, 2016). In due course, Bensouda had to terminate the case against the president, having not gathered enough evidence to continue the trial that pins the 2007 post-elections on Uhuru, of which the prosecutor was deeply regretful as evidenced by her statement

on the matter (International Criminal Court, 2014). The main arguments against William Ruto were rounded up in September 2015, awaiting new evidence (Aljazeera, 2016).

5.5 THE AFRICAN UNION'S RESPONSE AS ORGANISED HYPOCRISY

The AU issued various decisions on Kenya requesting the ICC to allow for national mechanisms to try Uhuru Kenyatta for crimes committed in the post-election violence of 2007/8 under article 16 of the Rome Statute in line with the principle of complementarity (Assembly of the African Union, 2011, p. 1; 2011, p. 1; and 2014, p. 1) as illustrated by Assembly/AU/Dec.366(XVII), Assembly/AU/ Dec.334(XVI) *and* Assembly/AU/Dec.493(XXII). This was an ultimate position of the AU throughout the life span of this case. Moreover, the Assembly petitioned the UNSC to consent to their appeal to allow for ongoing peace building and national reconciliation processes, in order to avoid the resumption of conflict and violence. The evoking of article 16 of the *Rome Statute* seems to be the first reaction of the AU. This underlines the hypocritical behaviour of the Union, to defer the case instead of action required for violating an international norm.

The Assembly of the AU issued decision, Assembly/AU/Dec.366(XVII), endorsing the Republic of Kenya's decision to receive President al-Bashir in Kenya. It argued that Kenya was discharging its obligations under Article 23 of the Constitutive Act of the AU and article 98 of the *Rome Statute* as well as acting in pursuit of peace and stability in their respective regions (Assembly of the African Union, 2011, p. 1). This is hypocrisy emanating from endorsing leaders who are being tried for violating international norms that the Union adhere to. Of interest, the Assembly requested the Commission in collaboration with the Permanent Representatives Committee to reflect on how best Africa's interests can be fully defended and protected in the international judicial system, and to actively pursue the implementation of the Assembly's Decisions on the ACJHPR being empowered to try serious international crimes committed on African soil (Assembly of the African Union, 2011, p. 2).

In 2012, the AU requested the UNSC to defer the case against President Uhuru Kenyatta and find alternative ways for the UNSC to heed to their appeal (Assembly of the African Union, 2012, p. 1) exemplified by decision Assembly/AU/Dec.397(XVIII) and Assembly/AU/Dec.482(XXI). Moreover, the AU continued to plea that the pursuit for justice should be executed in a manner that does not jeopardise efforts at promoting lasting peace and

reiterated AU's concern with the misuse of indictments against African leaders contained in Assembly/AU/Dec.482(XXI) (Assembly of the African Union, 2013, p. 1). Furthermore, the Assembly reiterated the need for engagement with the ICC and ways of strengthening African mechanisms to deal with African challenges and problems. On this decision of the Assembly 'decision on international jurisdiction, justice and the International Criminal Court' Doc. Assembly/AU/13(XXI) a reservation was entered by Botswana on the entire decision (Assembly of the African Union, 2013, p. 1). Botswana entered a reservation because it is a signatory to the ICC and has allowed for jurisdiction of the ICC. Yet the AU is influencing member states to remain sceptical of the ICC, standing in contrast with its own ideals of non-indifference.

The Assembly held an Extraordinary Session Ext/Assembly/AU/Dec.1(Oct.2013) on 12 October 2013. At this Summit, Kenya's indictment by the ICC was foremost on the itinerary. The Assembly was resolute that the charges against Uhuru Kenyatta and his deputy William Ruto should be suspended immediately. This would be the AU's staunch position onwards illustrated by decision EX.CL/Dec.868(XXVI) of the Executive Council (Executive Council, 2015, p. 3). The overarching theme at this summit was the concern by the AU that the ICC was politicizing indictment against African leaders. The Assembly took bold decisions at this Extraordinary Session (Assembly of the African Union, 2013, pp. 1-2). Firstly, there will be no charges that will commence or continue before any International Court or Tribunal against any serving AU HoSG or anybody acting or entitled to act in such capacity during their term in office ('regardless of what atrocious crimes they might commit'). The prototype of organised hypocrisy is claiming to fight impunity by entrenching decisions that protect African leaders from prosecution (while they are still in office). Moreover, the AU wished to quicken the operation of the ACHPR, to expand its mandate to include international crimes such as genocide and members to support this move. Further, that any AU member states seeking to refer situations to the ICC must seek council from the AU (Assembly of the African Union, 2013, pp. 2-3) 'to safeguard the interests of norm violating leaders'.

On 31 January 2015, the AU delivered decision Assembly/AU/Dec.547(XXIV) where it found disagreeable the subpoenaing of Kenyatta through a decision of the Trial Chamber V (b) of the ICC which did not respect the amendments of the Rules of Procedure and Evidence of the ICC adopted by the 12th Ordinary Session of the Assembly of States Parties to the *Rome Statute* held in the Hague, the Netherlands in November 2013 (Assembly of the African Union, 2015).

The Assembly applauded Kenyatta's leadership for appointing an acting president in order to be present at his trial in The Hague. On a lighter note, the Assembly welcomed the decision by Bensouda on 5 December 2014 to withdraw the charges against Kenyatta to 'the disappointment of victim in Africa'. The AU continued to express regret at the lengthy period it took the ICC to arrive at this decision. The Union recognised the need for the ICC to withdraw the charges against the deputy president of Kenya, William Ruto. Lastly, the Assembly emphasised the need to operationalise the African Court to cover international crimes (Assembly of the African Union, 2015). The question is, given the bilateral agreements for immunities that the AU advocate for and article 46(a) of the *Malabo Protocol*, what will be the function of this 'Expanded court'? The AU guarantees a lot of paper trail which is a smokescreen that it is acting against grave crime against humanity and impunity. Meanwhile, this is organised hypocrisy and its reproduction.

In June 2015, the AU took decision Assembly/AU/Dec.586(XXV) in which they recalled their previous decision Assembly/AU/Dec.547(XXIV), especially its reference to the ICC to suspend the actions against deputy president Ruto until the African views and proposals for amendments of the Rome Statute of the ICC are reflected (Assembly of the African Union, 2015, p. 1). A constant need to get out of indictments but not entrenching accountability measures and building strong institutions to counter genocide, crimes against humanity and war crimes.

In January 2016, the AU conveyed decision Assembly/AU/Dec.590(XXVI). In this communication, the Union took unwavering stances. More daunting, the AU decided to employ a Ministerial Committee develop of a comprehensive strategy for withdrawal from the ICC to inform the next action of AU member states that are also Parties to the Rome Statute (Assembly of the African Union, 2016, p. 3). Lastly, the Assembly pledged their commitment that the Commission will carry on to engage with relevant stakeholders within the ICC on matters that emanate in the many decisions of the AU Policy Organs on the ICC (Assembly of the African Union, 2016, p. 3). Influencing mass withdrawal is organised hypocrisy on the part of the AU, endorsing decisions that constantly contradicts its on ideals.

In 2016 alone, three African governments announced their withdrawal from the ICC, South Africa, Burkina Faso and Gambia (likely to return to the ICC under the new President Adama Barrow). At the 28th OS of the AU Summit held 22 - 31 January 2017, an 'exit plan from the

ICC' is made reference to (the guardian, 2016). This exit strategy is purported to be a draft but arguably the text reads like a final product (Keppler, 2017). The Assembly is claimed to have adopted a mass withdrawal strategy from the ICC. There are differing camps within the AU on this stance. With Lesotho, Senegal, Nigeria, Tanzania, Ivory Coast, Mali, Burkina Faso, Tunisia, Cape Verde, Botswana and Chad purported to be for the ICC and Kenya, Burundi and South Africa among others as antagonists (Mutambo, 2017). This is the theme for discussion in the analysis chapter.

5.6 CONCLUSION

It was previously argued in this paper that the extent to which the AU deals with the recalcitrant states has future implications on issues of accountability, responsibility, and efficient bureaucracies on the continent. The constant need for the AU to defer proceeding against Uhuru Kenyatta and his deputy William Ruto undermined the efforts of the AU to engrain accountability measures. As Krasner has argues, the logics of appropriateness (such as justice) are ambivalent and therefore subordinate to logics of consequences (competition for power under anarchy). Although the Union lacks the financial muscle to prosecute international crimes, it is resolute to play power politics within the international system, the very same accusation they make against the ICC.

Although the cases against President Uhuru Kenyatta and his deputy William Ruto have collapsed (Assembly of the African Union, 2016, p. 1), the AU has failed on its moral obligation to afford victims of horrendous crimes justice. Furthermost, the AU has failed its own moral commitments not to be indifferent about the atrocities of fellow Africans. Rather, it is shielding the very same leaders who are alleged to have perpetrated these crimes. This is organised hypocrisy. Talk or decision indicating in one direction of the Union reduced the likelihood of the corresponding action really occurring while action in particular direction reduces the likelihood of any corresponding talk or decisions taking place. The adoption of article 46(a) the *Malabo Protocol* epitomises organised hypocrisy.

CHAPTER 6
THE ENEMY WITHIN THE CAMP: A CASE FOR ORGANISED HYPOCRISY (OH)

6.1 INTRODUCTION

The rise of international non-governmental organisations (INGOs) with concentration on human rights augments pressure for states and international organisations (IOs) to manage their affairs. The AU is a classic political organisation that exists within the international system inundated with diverse constituencies to manage. Nonetheless, the Union must safeguard a certain degree of legitimacy in the eyes of its environments. It is this validity which ensures that the AU secures finances. The legitimacy for the AU can be obtained in two ways, the Unions' actions and the reflection of inconsistencies. The reflection of inconsistencies is what gives rise to OH. In the real world, the Union cannot entirely be a political organisation, it has to produce action therefore it is subject to evaluation according to technical criteria of operational effectiveness as well as institutional criteria of legitimacy.

There are divergent camps with the AU: those that support the work of the ICC and those that are against its jurisdiction. This section scrutinises what informs some of the AU's decision making processes towards the ICC. The AU as an organisation must uphold these continuums for its own survival. As previously argued, OH should not only be seen as source of dysfunction, it allows the Union to manage irreconcilable pressures that might render the organisation incapable of effective action and threaten its survival. What is the effect of these camps on the operation of the Union is what this section evaluates. The hypothesis is that the ambiguity of the AU towards the ICC is reflective of the dominant camp within the Union that is against the jurisdiction of the ICC on the continent. This is exemplified in that they have managed to push for mass withdrawal from the ICC thus far. It is this conflicting preference of member states that produces OH.

6.2 THE ENEMY WITHIN THE CAMP: A CASE FOR ORGANISED HYPOCRISY (OH)

A thread that runs throughout the communication of the AU since its inception as illustrated by Assembly decision Assembly/AU/Dec.617(XXVII) is the reformation of the UNSC to take into account the principles, objectives and ideals of the UN Charter for an impartial world based on universalism, equity and regional balance (Assembly of the African Union, 2016, p. 1). The structure of the ICC directly relates to this point. The UNSC comprises of 15 members, 5

permanent members and 10 members on a rotational basis. The system of UNSC referral to the ICC requests 9 acquiescent votes by members of which the P5 can still veto the decision and prevent a referral. According to MacNamee (2014, p. 6) the operation of the ICC can be influenced by powerful states in this way over and above opaque means and behaviour.

On several AU decisions illustrated in the cases, they have appealed to African states parties to the ICC to speak with one voice to ensure that the interests of the continent are protected. In the world of anarchy, the race seems to be for the acquisition and maintenance of power. In January 2015, the Assembly issued Assembly/AU/Dec.564(XXIV) in which it underlined, '…the overriding need to ensure that the interest of Africa continues to be maintained and safeguarded at all times in the on-going Intergovernmental Negotiation on Security Council reform'. In the same communication this text is written '…the need to redress the historical injustice the continent continues to suffer'. In June 2015, the Assembly issued decision Assembly/AU/Dec.574(XXV) where they reiterated 'the Common African Position, as contained in the Ezulwini Consensus and Sirte Declaration, shall continue to serve as the only viable option that reflects Africa's legitimate right and aspiration to rectify, inter alia, the historical injustice endured by the Continent' (Assembly of the African Union, 2015, p. 1).

In July 2016, the Assembly's issued a decision, Assembly/AU/Dec.616(XXVII), to implement decision Assembly/AU/Dec.590(XXVI) on the development of a comprehensive strategy including a collective withdrawal from the ICC to inform the next action of AU member states that are also parties to the *Rome Statute*. On this reservations were entered by Burkina Faso, Cabo Verde, the DRC and Senegal only. At the 28th Session at the beginning of 2017, the Assembly of the AU adopted a mass withdrawal strategy from the ICC and has appealed to all member states to consider implementing its recommendations (Assogbavi, 2017). This resolution is by no means binding on member states (ESAT, 2017). Countries that entered reservations on this text include Nigeria, Lesotho, Senegal, Tanzania, Ivory Coast, Chad, Cape Verde, Liberia, Zambia, Mali, Burkina Faso, Tunisia, Cape Verde, and Botswana among others (out of 55 states). OH arises inadvertently from uncoordinated responses to conflicting environmental pressures (Lipson, 2007, p. 9).

Botswana has been the most consistent AU member to publicly renounce the decision of non-cooperation with the ICC. Osei-Hwedie and Mokhawa (2014, p. 16) argue for the principles and moral standards of President Ian Khama. They conclude that the inclination to arrest any

African leader indicted by the ICC is based on devotion to international law as signatory to the *Rome Statute* of the ICC and Botswana's support for the ICC remains definite. Hence it was the only country to enter a reservation on the Assembly's decision to request the ICC to allow for national mechanisms in Kenya and to indicate their willingness to arrest al-Bashir if he sets foot in Botswana. Nigeria emphasized that the ICC is an imperative legal backstop for countries whose domestic justice systems have been destabilised by civil conflict (Vidija, 2017). Again, it declared that each country unilaterally signed up to the ICC jurisdiction, therefore sovereignty permits unilateral decision making (Momoh, 2017). Organised hypocrisy arise out of these kind of inconsistencies that need to be managed to produce coordinated action.

States that have opposed the ICC include South Africa, Kenya, Burundi, Uganda and Gambia and Zimbabwe among others. The newly elected President Adama Barrow of Gambia annulled the decision to withdraw from the ICC on 10 February 2017 (International Criminal Court, 2017) . Unfortunately, some of these rhetoric's are made outside formal meetings of the AU (Keppler, 2017). President Yoweri Museveni of Uganda referred the case linked to the LRA to the ICC, but currently is on the forefront in the campaign against the Court calling it 'a bunch of useless people' in his inaugural speech in May 2016 (The guardian, 2016) where foreign delegations led by the US walked out during his speech seemingly as a 'gesture to victims of genocide and other human atrocities'. President Robert Mugabe was the AU Chairman in 2015 and outright hostile towards the ICC. Mugabe commenting on the arrest warrant of al-Bashir while in SA at an AU Summit in 2015 said, 'this is not the headquarters of the ICC and we do not want it in this region at all' (Sky News Zimbabwe, 2016).

In October 2011, the President of Malawi, Bingu wa Mutharika, received al-Bashir attending a Summit on the Common Market for Eastern and Southern African states in the country, eventually falling out with the ICC by siding with the decisions of the AU not to cooperate with the Court on the arrest of al-Bashir (Du Plessis, et al., 2013) 4). The following year, Joyce Banda, then president of Malawi negated the AU decision to allow al-Bashir to attend an AU summit. Current President Peter Mutharika has opted to remain a state party to the Rome Statute of the ICC while watching where the collective AU tide is flowing (Chimulala, 2016). President Paul Kagame of Rwanda has accused the ICC of 'selective justice' and says the 'ICC is a political tool disguised in justice'. In September 2013, at a UNGA meeting, Kagame stated that the ICC does not seek to promote justice and peace, rather it continues to undercut progress

at reconciliation and humiliation of Africans and their leaders, as well to serve the political interests of prevailing first world nations (The Sun Daily, 2013).

President al-Bashir was received by many other states that are party to the *Rome Statute*, including Kenya. During the run-up to the election of the Chairperson of the AU Commission last year, President Kenyatta had been campaigning for Kenya's Foreign Affairs Cabinet Secretary Amina Mohamed by sending special envoys to about 53 African states (Mutambo, 2017) and has spent KES350 million (roughly $3.5 million) of taxpayer's money in a battle for recognition as a principal player at the AU (Khamisi, 2017). It is debated that Kenyatta preferred Amina for her strong Pan-African agenda and her role in arguing for the discharge of the case against him and his deputy William Ruto at The Hague (Ndung'u, 2017; Barasa, 2017). Ms Mohamed lost to the Chadian Foreign Minister Moussa Faki Mahamat as the newly elected chair of the AU Commission since 30 January 2017. Krasner (1999, p. 50) gives greater weight to the importance of power asymmetries. In the international environment rulers constantly scan for resources, material and ideological, that will enhance their ability to stay in power and promote the interest of their supporters.

President Kenyatta has not been the only one leveraging continental leadership. In January 2012, SA pursued the appointment of Nkosazana Dlamini-Zuma as the Chairperson of the AU Commission, signifying a desire to play a more assertive role within the Union (Murithi, 2013: 4). Scheduled for 9 May 2009, an invitation to President al-Bashir to the inauguration of President Jacob Zuma caused an overnight diplomatic scandal. SA would be obligated to arrest him immediately under its *Rome Statute* onus. President Zuma had to give a clear response on what he will decide to do if al-Bashir showed up for his inauguration. President al-Bashir did not grace the event, advised that Zuma will be obligated to arrest him (Sudan Tribune, 2009).

Du Plessis et. al (2013: 4) observe that SA's position on the ICC had been clear and consistent then. It affirmed its commitment to keeping its legal obligations to the ICC. Yet, SA found itself in the same quagmire in June 2015 when al-Bashir attended the AU Summit, ultimately flying out from a military base in Pretoria while the issue of his arrest was being deliberated by domestic courts (Rabkin, 2016). The courts maintained that Zuma was obligated under the *Rome Statute* to arrest the president. The AU unflinchingly expressed its gratitude to President Zuma for not cooperating with the ICC. Hailemariam Desalegn, Prime Minister of Ethiopia, expressed his solidarity with the SA government's stance not to arrest and handover Sudanese

President (Tekle, 2015) and Ugandan Museveni called the court 'useless' and applaud Zuma on the move. In October 2016, the SA government announced its intentions to withdraw from the ICC.

Unlike most African countries, institutions in SA are fairly concrete outside the AU watch. As discussed earlier, within a strong autonomous domestic polity, logics of appropriateness will overcome though within the limits imposed by specific roles. Actors will still calculate the course of action that will maximise their interests. President Jacob Zuma is infamous for testing SA institutional limits, particularly the courts. On 22 February 2017, Zuma and other members of his administration are ordered by the High Court in Pretoria to immediately revoke the notice of withdrawal from the ICC specifying the Executive Council does not have the power to annul international agreements (Bateman, 2017). Murithi (2013, p. 4) observe that while Botswana has been consistent and resolute in its support for the ICC's jurisdiction, SA has played a more nuanced diplomatic game due to its key role within the AU. Being a continental leader, this does not bode well with the ICC.

The camp that is against the ICC seems to be dominating discussions on the future of the AU with the ICC. Out of 55 states, a minority seem to enter reservations on the decision for mass withdrawal. Africa boasts one of the largest bloc of member states to the *Rome Statute* and could potentially leverage with certainty its position, but thus far has not been successful (MacNamee, 2014, p. 7), rather it has been more effective in managing conflicting preferences of its member states. The rhetoric that the ICC is an extension of western imperialism seems to dominate the decision making processes of the AU, not the logic behind the arrest warrant of the two sitting HoS. The contractual obligations of the *Statute* are sacrificed for norm violating leaders trying to escape international prosecution.

In the real world, as demonstrated by Brunsson, political and action organisations do not exist independently. Every organisation must demonstrate features of both political and action organisations. Both are required to endorse the inconsistent values of international community and produce effective coordinated action. In so doing, it faces the logic of consequences and appropriateness - conditions for OH development. In both the al-Bashir and Kenyatta case studies and at the centre of the AU's distress is notion that the ICC search for justice should be pursued in a way that does not endanger the promotion of peace. The assertion stems from a

conviction that the ICC jeopardises protracted violent conflicts. Hence, the constant request to the UNSC to defer the indictments and arrests of both presidents.

In the case studies, key interlocutor remained al-Bashir and Uhuru Kenyatta in the negotiation for peace as sitting HoS. Murithi (2013, p. 4) makes this assertion that in many situations, the question of sequencing a response is crucial. In essence, peace project surpasses the justice discussion. As presented in the prosecutor *v.* Omar al-Bashir, the AUHIP led by former SA president Thabo Mbeki was hosting negotiations in Darfur when the ICC was handing down warrants of arrest. Almost on all of the Assembly's 'decision on the Activities of the Peace and Security Council and the State of Peace and Security in Africa' is the state of fragile peace in Darfur. Up to date, peace remains extremely fragile and stakes very high (particularly in situations where war is intermingled with natural resources). Darfur continues to have recurrent violent clashes. Towards the end of November 2016, a meeting was convened by the AU in Addis Ababa between the government, SLM/A led Minni Minnawi and the JEM. This meeting was not particularly successful; rebel groups still withheld information of their location. However, there has been progress made to avert violent conflicts between the government and militia group. Three Sudanese rebel groups declared a six-month unilateral cessation of hostilities alongside the government (United Nations Security Council , 2016). The mandate of UNAMID in Darfur expires in June 2017.

The ethnic-violence that prevailed in Kenya warranted an international response, particularly when both parties had gotten to a stalemate in negotiations. The AU mediated the process that ended up in a PSA. The instability in Kenya had a greater impact in the region, surrounded by Ethiopia, South Sudan, Uganda, Tanzania and Somalia. The complexity of coalition parties in Kenya made it intricate to negotiate peace without a legitimate government (figure). The decision by Kenyatta to surrender power to his deputy president William Ruto to attend to his case at The Hague deserves to be recognised. Kenyatta and Ruto were in opposition in the 2007 elections. In answering why he acted with such fervour towards the ICC, Kenyatta recalled, '…in an unequal world, only a common set of rules governing international conduct could keep anarchy at bay' (Kenyatta, 2014, p. 4). The 2013 elections were declared peaceful by international election observers such as the Carter Centre (The Carter Centre, 2013, p. 6).

For well over 5 years, the AU has appealed to the UNSC to defer cases, without a response. Essentially, this lack of response undermined any legitimate reasons from the UNSC. It is this

lack of response from the UNSC that compelled the AU not to cooperate in securing the arrests (Fehl, 2014: 15). Consequently, the AU has interpreted this lack of response as a deliberate effort to undermine African institutions and the dominance of western powers. The AU had besought its members that are closer to UN ranks to advocate on this matter, but their efforts remained fruitless. For instance, Assembly decision Assembly/AU/ Dec.334(XVI), implores the African members of the UNSC to place this matter on its agenda of the Council.

On the part of the AU, beyond the perpetual pledge to fight impunity and entrenching further mechanisms such as article 46(a) of the Malabo protocol to make this impossible, it does not seem resolute to act against these perpetrators. Even though in their communication, they continually highlight the need for perpetrators to be brought to justice and avoid human rights violations. There are countless victims of grave human rights violations and IDPs who have not seen the perpetrators account for their atrocities in Africa. Du Plessis et.al (2013, p. 2) perceive that the victims of those crimes want justice. Unfortunately, African political leaders are the ones complaining, not the victims. The fact that the ICC is not indicting leaders in other parts of the world does not resolve the negligence on the part of African leaders to hold these perpetrators accountable.

The AU has been alarmed that some non-African states (primarily EU) were misusing the principle of universal jurisdiction which, according to them, is a direct violation of the international norm of sovereignty and territorial integrity of states. On a number of communications, the Union urged member states to use the principle of reciprocity to guard themselves against the exploitation of the principle of universal jurisdiction (Assembly of the African Union, 2012, p. 1). Founding documents of the AU including the Constitutive Act and the Protocol establishing the AU PSC claim the very same thing intervention in domestic affairs of states in situations of genocide, war crimes and crime against humanity. Yet the Union is not willing to cooperate with the ICC to end impunity on the continent- it is reproducing contradictory statements.

The different camps within the AU are responding to the ICC, yet they have consented to the jurisdiction of the court. Nigeria clarified that AU member states have signed unilaterally for the ICC's jurisdiction therefore it should be an autonomous decision to leave, irrespective of 'Africa's common position'. They argued that the ICC remains the only court to prosecute international crimes against humanity, genocide, and war crimes. Botswana supports this view

undeniably. The integrity of the camp that is against the ICC jurisdiction is questionable: Yoweri Musuveni has been the president of Uganda since 1986; Robert Mugabe at age 93 has been in power since 1987 and the President of Burundi, Pierre Nkurunziza, has been in office since 2005, and President Jacob Zuma's addition to the list does not improve the argument. Leaders such as these want to remain in power and promote the interests of constituencies that maintain their position which tantamount to hypocrisy.

International norms are often contradictory and the basis for OH. The commitment to non-intervention is usually trumped by a contradictory international norm of universal human rights which alters the domestic institutional structures of other states. In the same breath, the commitment to fighting impunity is also sacrificed for sovereignty. In Darfur, the AU alluded to conflicting parties to hasten steps towards bringing to justice all perpetrators of gross human rights abuses- yet they were determined to trump peace over justice. What is more evident is that the AU is shielding African leaders committing mass atrocities and given a free pass.

Civil wars and violent conflicts in Africa are persistent. Consequently, human rights abuses are prevailing. During times of violent conflicts governments frequently lack the capacity to deliver services to the entire parts of the country, hence more people in the Darfur died because of malnutrition. According to The UN Refugee Agency (2017) Sub-Saharan Africa hosts more than 26 per cent of the world's refugee population. This is discussed in the case studies on the number of IDPs in Darfur and Kenya in the 2007/8 post-election conflict. The disastrous war in Darfur has claimed too many lives since 2003 and over 1400 lives in Kenya should matter.

Again, the cultural and normative dimension of organisations' environments increasingly outweighs technical (or material-resource) environments as determinants of formal structure. OH should not only be seen as source of dysfunction, it allows organisations to manage irreconcilable pressures that might render the organisation incapable of effective action and threaten its survival. Organisations face conflicting institutional and technical environments. Political organisations must safeguard a certain degree of legitimacy in the eyes of its environments in order to attain resources.

It is this legitimacy which compromises the credibility of the AU. Developing states wish to conform to the principle of universal human rights, but lack the necessary resources to protect their citizens from perpetrators even in cases where they are willing to act. The Hissène Habré

case demonstrates the constraints facing the AU in its resolve for universal human rights and the protection of African citizens from crimes against humanity. The dependency on foreign funding to prosecute Habré gives an illustration of the choice on the menu for the AU. The budget presented by the AU and EU was $11.7 million (€8.59 million) to prosecute Habré (Human Rights Watch, 2010) which was funded by the EU, AU, Chad, the US and various European countries.

In February 2009, the Assembly of the AU in Assembly/AU/Dec.240(XII) was appealing to its member states, the EU and partner countries and institutions to make their contributions to the budget of the case by paying these contributions directly to its Commission (Assembly of the African Union, 2009). In July of the same year, it articulated its disappointment in member states failing to make voluntary contributions to the budget on Habrés case in Assembly decision (Assembly of the African Union, 2009). The following year, January 2010, the Assembly decision Assembly/AU/Dec.272(XIV) noted that despite its previous Summit decisions calling on all member states to make voluntary contributions to the budget there has been no positive reactions from the majority of the Union's members (Assembly of the African Union, 2010). Mid-July 2010, the Union decision Assembly/AU/Dec.297(XV) was still pleading for member states to extend the necessary support to the Government of Senegal in the execution of the AU mandate to prosecute and try Habré (Assembly of the African Union, 2010).

It was only in 2011 that the Union was reminding those that pledged funding at the Donors Round Table held on 24 November 2010 for this case to disburse funds on time (Assembly of the African Union, 2011, p. 1). Briefing the media in Addis in 2013, the Legal Counsel of the AU Commission confirmed that the 'trial is important for the AU. It shows our willingness to fight impunity and shows that we have adequate African mechanism to address African issues'. On the question of funding, Ms. Diarra recalled that the pledges made in 2010 by Africa and the international community, were confirmed in 2011. In January 2015, the Union's Assembly issued a decision on the Hissène Habré case, Assembly/AU/Dec.546(XXIV), applauding AU Partner countries and institutions for their financial support to the AEC, namely: Belgium, France, Germany, Luxembourg, Netherlands, USA, EU and the UN Nations Office of the High Commissioner for Human Rights (Assembly of the African Union, 2015). The EU is by far the largest donor of the AU. It is the institution that has weighed down the Union the most on the abuse of universal jurisdiction.

In 2015, the Executive Council of the Union gave a breakdown of the AU's budget as follows, contribution of member states stood at US$1,439,410.41, and AU partners had contributed $29,598,304.51. The budget for the ACHPR (currently operational without the 'Expanded court') was $9,857,665 in the same year (Executive Council of the African Union, 2015, p. 1). In the same communication, the EC emphasised the importance of the Union to become financially independent. In July 2016, the EC presented the breakdown of the budget as US$205,149,538 from members and US$576,958,511 to be raised from foreign partners (Executive Council of the African Union, 2016). It is needless to mention that it is not always the case that partners and members alike meet their financial obligations. The main AU member states (Tier 1 level) that contribute are Nigeria, SA, Egypt and Algeria with Angola dropping to Tier 2 at the beginning of 2016.

The majority of states that are contesting the jurisdiction of the ICC are not the ones bearing the funding project of the Union. This reiterates the earlier argument that global governance norms are constantly irreconcilable to local conditions and available resources. Although the AU is resolute to fighting impunity and bringing to justice perpetrators of human rights on the continent, the institution is highly dependent on foreign donors to execute its mandate. This compromises its own principles and ideals, particularly the autonomy of the organisation- ultimately leading to OH. These widely held norms can be inconsistent with action (funding) necessary to achieve organisational goals (justice, peace, human security). Currently, the AU is convincing the international community that it is meeting the environments norms, while it can also demonstrate that its management is busily engaged in organisational activities (Brunsson, 2002, p. 195).

6.3 CONCLUSION

The two cases selected underscore the complexity within the international criminal justice system. Although both cases under investigation have collapsed or been shelved pending new evidence, they illustrate the resolve on the part of the ICC to prosecute (African) states. Undeterred by the number of times the AU requested the Court to allow for national mechanisms (Kenya) and peace negotiations (Sudan), a period of more than 5 years elapsed while the AU requested engagement with the UNSC to defer situations. To which the UN

Security Council did not respond. This compromised the legitimacy of the ICC as a 'Court of last resort' and underlined the asymmetries of power within the international system.

The cases also highlighted the resolve of the AU to maintain peace in Africa without offering justice to the millions of victims on the continent. The case studies emphasised a sticky principle of sovereignty in Africa. Further, it illuminated how an emergent norm of human security has not been fully endorsed by Africans - or is being sacrificed for norm violating leaders. Furthermore, the cases underscored the divisions within the AU on this often hailed 'African common position'. The AU is being influenced by the camp that is against the jurisdiction of the ICC, even though most states in this category are not funding the project. The case studies verified the response of the AU towards the ICC, producing more contradictions and inconsistencies. The AU output is to mainly produce decisions; decisions are counted as organisational outputs. Ultimately, politically inclined organisation sets its bar by what it says, verbally or in writing directed at the external environment. Even in instances when peace has been achieved, justice is not pursued to conciliate the victims of rape, murder, torture and burning that happened in Sudan and Kenya. The Omar al-Bashir and Uhuru Kenyatta cases typify the development of organised hypocrisy that is persistent within the AU.

The ICC is an international judicial system infiltrated by the politics of the UNSC; a product of its affiliation on deferral of cases. Countries of the South regularly highlight that the UNSC is not representative of the 21st Century international system. It is exceedingly dominated by an ancient power bloc (NATO) with France, USA and UK as the P5 of the UNSC. MacNamee (2014, p. 7) affirms political influences have clouded the noble work of the Court, particularly on the selection criteria of cases. Moreno-Ocampo was not well received by his African counterparts, for refusing to engage with them. To the point that Jean Ping, AU Commission chair in 2011 declared, 'frankly speaking, we are not against the International Criminal Court. What we are against is Ocampo's justice – the justice of a man'. (Davis, 2015). Primarily, with the exception of Georgia, situations under investigation are in Africa.

Is there a legitimate explanation why the atrocities in Aleppo, Syria have not been referred to the ICC? This is in spite of allegations that Russia committed war crimes in Aleppo. This is in addition to alleged crimes committed in Crimea during the Russian (contested) occupation and the subsequent annexation regardless of Ukraine's occupation. Russia, a member of the P5 of the UNSC, has since sought to withdraw its membership from the ICC as a signatory that

hitherto failed to ratify the *Rome Statute* establishing the ICC (Mandhai, 2016). Fehl (2014, p. 10) identifies the demeanour of British troops in Iraq subsequent to the 2003 Anglo-American military intervention. Moreno-Ocampo declared not to pursue the investigation because alleged crimes were not within the jurisdiction of the ICC to investigate. Bensouda opened the case in 2014 on alleged crimes committed by British nationals which include murder, torture and ill treatment from 2003-2008 in the Iraq conflict and occupation (International Criminal Court, 2014).

Another NATO affiliate to withdraw its signature from the *Rome Statute* establishing the ICC is the USA. The US has maintained under the Bush administration that it does not want to compromise its foreign troops for prosecution of crimes committed abroad in countries such as Iran, Iraq, Libya, Afghanistan and many parts of the world. More so, the US would not want to compromise their sovereignty with international criminal justice obligations. The often blurry lines between humanitarian intervention and regime change would implicate the US and its NATO allies in Libya of 2011 led by France. The AU stood divided on the 'no fly zone' and 'all necessary measures' to protect civilians and subsequent Resolution 1973 for military invasion (United Nations Security Council, 2011). This led to the ruthless killing of Prime Minister Muammar Gaddafi, on African soil on the watch of the AU; rigging havoc for the Libyan states up to date.

It is now up to Bensouda to prove whether the powerful will perpetually dominate the weak (African) states as the AU argued. Some contend that her appointment was a move to coddle Africans and detach from Ocampo's infamous legacy. Bensouda has elucidated her mandate as exclusively for international criminal justice, not of regional allegiance. She has also admitted to the complexity of the mandate of the ICC to prosecute without political interference.

The paper aimed at exploring this new trend of inconsistencies and contradictions within the AU relating to its relationship with the ICC. Again, to understand why these contradictory behaviour emanates from the Union. My study provided a theory guided approach applying OH. As noted earlier, in order to preserve high and inconsistent values we must be willing to handle them on more bureaucratic ranks, rather than relating them to accomplishment of action and results. Values are better suited to handling in talk than in action, and by reference to the future rather than the present - the AU typifies this hypocrisy. Organised hypocrisy permits us

to understand how the inconsistencies arise within international organisations, it does not however give a solution to this problem. This would have to be sort elsewhere as a basis for future research. Underpinning OH as a basis for ineffectiveness permits a better diagnosis of the causes of dysfunction within the AU and other international organisations. There are many instances of organised hypocrisy in the operation of the AU. In recent times, the Union has suspended Madagascar, Guinea, Mauritania and Egypt on the basis of unconstitutional change of governments (Salau, 2017). There have been ambiguities in this regard. Understanding the sources of failure within the AU permits finding 'African solutions for African problems'.

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