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The crisis of International criminal law in Africa:

- *An African perspective on international criminal law and (in)security governance*

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Department of Political Science

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Rukiatu Fatmata Sheriff

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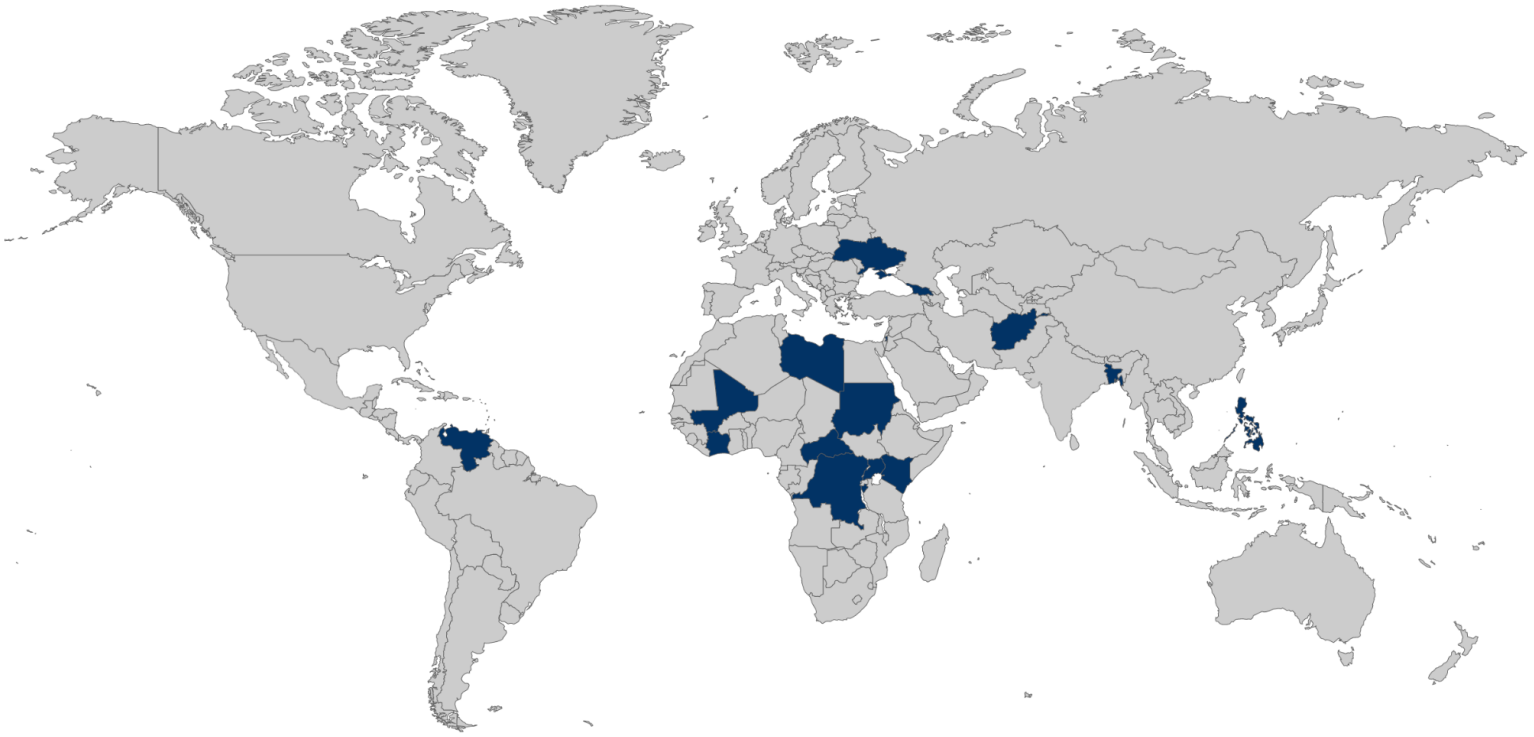

Map of situations under investigation (icc-cpi.int, December 2022).

Acknowledgement

Bismillah Rahman Rahim

My Lord, help me surrender all that I am, so that I can receive all that you seek to give me. Allah, help me to lay down the burden of doubt and to walk freely in faith, trusting that your plans for me will always be greater than my greatest dreams. Allah, forgive me for the mistakes I have made and the mistakes I will make. My Lord please remind me that Your goodness will always be greater than my faults and that Your love will always be greater than my shame. Oh Allah, shine Your light upon me so that my eyes can awaken to Your truth, so that my heart can be illuminated by the reflection of Your beauty, in Your sublime name I pray. Ameen.

Dedication

To the memory of my father, Mahmoud G. Sheriff

To my mother, Mariama J. Sheriff

If there is any merit in this work, it is yours.

Alhamdulillah

Abstract

Since coming into force the International Criminal Court, has been challenged with a series of issues. Criticism, especially, from African states has forwarded the underlying anxieties that riddles this relatively new institution of international criminal justice. More specifically, African states and the regional organ, the African Union, have denounced the Courts functioning on the continent - seeking to restructure a more egalitarian Rome Statute regime. The thesis answers three interrelated research questions 1) What are the complaints by African states against the International Criminal Court? 2) Does the AU Malabo Protocol (2014) and ICC Withdrawal Strategy (2017) signal a rooming disunion between the International Criminal Court and Africa? 3) What are the implications of the contentious provisions and structural shortcomings of the Rome Statute legal regime and institutional order on the becoming of the International Criminal Court? Employing a Third World Approaches to International Law and Postcolonial Ontological Security lens, the thesis makes the overall conclusion that the Other, AU, committed to standing in the face of the master Self, ICC, demanding a more egalitarian international criminal law system serves the Courts operation on the continent.

List of abbreviations

ACJHR	African Court of Justice and Human Rights
ART	Article
AU	African Union
CSC	Critical Social Constructivism
CDA	Criical Discourse Analysis
DHA	Discourse Historical Approach
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
IL	International Law
IR	International Relation
OST	Ontological Security Theory
PCDA	Postcolonial Critical Discourse Approach
PT	Postcolonial Theory
UN	United Nations
UN Charter	Charter of the United Nations
UNSC	United Nations Security Council
SA	South Africa
SS	Security Studies
TWAIL	Third World Approach to International Law

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Chapter 1

1.1. Introduction

The wave of internal conflicts and wars at large on the African continent has not only consumed people and resources, but it has also forwarded their underlying reasoning and effects on global security and on the governing systems mandated to attend to such under international law (Odero 2011; Mgbeoji 2006; Ba 2017). In 1998 the international community welcomed the creation of the first permanent International Criminal Court ('ICC' or 'Court'), which came to life on July 1st 2002 by means of the successful adoption of the Rome Statute of the International Criminal Court (Rome Statute) (Bachmann and Sowatey-Adjei 2020; Manirakiza 2021). The adoption of the Rome Statue signaled a collective commitment to the creation of a permanent international criminal court that would function as the last judicial means to ensure accountability for the most serious violations of international criminal law (i.e. genocide, war crimes, crimes against humanity, and aggression) (Rome Statute 1998: Article 5 (1)).

The Court's mandate is thus attached to the absence of domestic justice mechanisms or promptitude towards long-term peace, stability, and transitional justice objectives in the aftermath or amidst serious conflict and violence (Gissel 2018; Labuda 2014; Bachmann and Sowatey-Adjei 2020). At the time, it was a paradigmatic move away from the *ad hocism* of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia, and in pursuance of many of international law's newborn convictions that underscored: the outright evil of specific deeds, the unequivocal obligation to penalize them and the conviction of á Humanity beyond sovereigns (Megret 2016:197; Odero 2011:148-50; Powderly 2019; Ba 2017; Gissel 2018; Hall 1998; Labuda 2014). The many atrocities committed in the 1990s, and the freedom from liability that shaped their wake served as catalyst for the continental support of the Court in Africa (Omorogbe 2019; Bachmann and Sowatey-Adjei 2020; Odero 2011).

Africa, albeit not the only place where international crimes have been committed, has seen some of the most heinous crimes during both colonial and post-colonial era - various causes such as the civilizing mission, armed conflict and other political social crises have resulted in the protraction of crimes like slavery, apartheid in South Africa, the Rwandan genocide, war crimes and crimes against humanity in Burundi, Sudan, Uganda, Sierra Leone,

South Sudan, and other politically charged atrocities (Manirakiza 2021). The aptitude that comes of such anxiety inducing milieu contoured the continents path to becoming the Courts largest regional Membership, making the continent to be "*overrepresented among the Court's states parties relative to other regions*", with indeed its first signatory being an African country, Senegal (Labuda 2014:289; Odero 2011:148; Cherif 2016; Manirakiza 2021; Mégret 2016; Powderly 2019; Jalloh et. al 2011). The Court's jurisdiction is treaty based, as such, a non-Signatory state can only come before the Courts by consenting to the exercise of the its jurisdiction with regards to a particular crime (Bachmann and Sowatey-Adjei 2020). Yet, the jurisdiction can be employed without consent of the relevant State through Article 13 and 15 of the Rome Statute that allows for referrals by the United Nations Security Council (UNSC) by means of Chapter Vll of the United Nations Charter (UN Charter). In essence, the cornerstone of the ICC's mandate is to enforce and precipitate compliance with particular norms of international law intended at barring and obstructing violence on a larger scale (Song 2012; Odero 2011). This provision has muckled with the Court's mandate pushing it into a crisis of legitimacy (Murithi 2012:4).

Two decades after its founding, the Court has undergone growing pains. There are serious disagreements on the content of the existing legal regime, the risks it presents and the way in which rules and principles are interpreted, implemented or applied to specific situations and cases (Johns & Werner 2008:783-6). African states have individually voiced their dismay for what has been framed as the Court's bias against or targeting of African leaders, which has prompted their collective disapproval formulated in the Common African Position on the ICC, pursuant to the Constitutive Act of the African Union (AU) (Bachmann and Sowatey-Adjei 2020:251). This position stipulates that one of the objectives of this continental organization is "*to promote and defend African common positions on issues of interest to the continent and its people*" (Art. 3 (d), a position that constitutes a regional federation of protests against the Court's work by all African states, except Morocco (Bachmann and Sowatey-Adjei 2020:251; Manirakiza 2021). This contention has stayed more than a decade, yet it never grows boring, with African states concurrently moving beyond word exchange, which has advanced concerns of an "*Afrexit*" as AU put forward their withdrawal strategy prompting member states signatories to exist the Statute en masse (Maupas 2010; Manirakiza 2021; Bachmann and Sowatey-Adjei 2020; Omorogbe 2019).

1.2. Problem area and research question(s)

The cumulative consequences of numerous recent developments has cast international criminal law and its institutions, like that of the ICC, into an unprecedented endangered condition (Powderly 2019:5). Although African states remain overrepresented among the Court's ratifying states comparative to other regions, the attitude towards the ICC is rather dismal and sober (Labuda 2014:249; Apiko & Aggad 2016:1). No contention has forwarded the chronic anxiety of this enterprise like the controversy with ICC, its African member-states and at large the AU. The growing pains of the stalemate between these two institutions, ICC and AU, has brought out what some term "the crisis of international law" (Domingo 2009; Scharf et al. 2011; Mammadov 2015). Although appearing devoid of some of the anxiety that contours the international legal disciple's proceduralism and corporeal facileness (Robinson 2013), this international criminal justice enterprise as this thesis seeks to unfold, is this present faced with a deep existential anxiety (Robinson 2013; Megret 2016). An anxiety that unveils the obvious sense of 'crisis' at the core of the international criminal law undertaking that threatens to make the cosmopolitan fantasy a thing of yesterday (Robinson, 2013; Megret 2016:197; Odero 2011:148-50; Powderly 2019; Ba 2017). Deemed in crisis, the continuation of the revolutionary international criminal justice project at large, and especially in an African context, stands questioned (see Cassese 2012; Zaum ed, 2013; Schimmelfennig et al. 2020; Lenz et al. 2020). The AU's proposition of amendments to the Statute of the African Court of Justice on Human and Peoples' Rights seeks to give this regional Court jurisdiction over the same crimes as the ICC via the Malabo Protocol (2014); discernment of underachievements and unproductiveness in the failure of high-profile cases ; the collective condemnation formulated in the Common African Position ; and the ICC Withdrawal Strategy (2017) all of which brings into question the ICC relevance on the continent (Ba 2017; Powderly 2019; Megret 2016). This signals a political message about legitimacy concern on the merits of the ICC's position on the question of immunities, accenting critical cavities in the service submitted by international law in Africa and inequality in the absence of judicial independence (e.g. Omorogbe 2019; Vasilev, 2015; Stahn, 2012; Jacobs, 2015; van Sliedregt 2016).

Thus the thesis highlights that in lieu of the chosen theoretical framework, and what we have learned so far, is the danger of a continuous anxious community, a prolonged sense of ontological (in)security for both the Court and Africa, and the questioning of institutional 'becoming' (Robinson 2013; Megret 2016; Ba 2017). Adopting a postcolonial view of

ontological security as a security of becoming, not only forward a deeper understanding of the layered anxiety happening on various levels about identity and becoming at large, more than that it provides an explanation to what follows when the archetype source of ontological (in)security, the Other, becomes the transformative agent of how we understand the intricate lacework of ontological (in)security that the Self and the Other is caught in (Untalan 2020:41; Kinnvall and Nesbitt-Larking 2009). This thesis essentially is a result of an interest in discourses about the anxieties that are produce of such, employing the contention between African States and the ICC before 2020 as exemplary. Given this preluding discussion, this research project proposes the following the main research question:

1. What are the implications of the contentious provisions and structural shortcomings of the Rome Statute legal regime and institutional order on the becoming of the International Criminal Court?

The thesis is aided by the following two subquestions

2. What are the complaints by African states against the International Criminal Court?
3. Does the AU Malabo Protocol (2014) and ICC Withdrawal Strategy (2017) signal a rooming disunion between the International Criminal Court and Africa?

In what follows is a contextualization of the issue under study, which is the stalemate between the ICC and AU.

1.3. Background

In what follows the thesis presents a contextualization of the case under study, which is the stalemate between the ICC and AU. AU has criticized the political manipulation of the Court, what it sees as a double standard of the kind of justice the ICC allots, and its neo-colonial attitude, consequently embracing a series of measures to prohibit effective prosecution of African leaders before the ICC including the 2009 dictum of non-cooperation with the ICC in the effectuation of the warrants for Al-Bashir and Gaddafi. A decision that allowed then President Al Bashir to make a series of travels to ICC state parties without arrest between 2010-2016 (Omorogbe 2019; Ba 2017; Bachmann and Sowatey-Adjei 2020; Chigara and Nwankwo 2015). The relationship between the two, ICC and AU, first became complicated

following the UNSC decision to refer the Darfur situation in Sudan in 2005 for war crimes and crimes against humanity in 2009 and genocide in 2010. Followed by Libya in 2011 for crimes against humanity (UNSC Res. 1593, UN Doc 31 March 2005; UNSC Res 1970, UN Doc 26 February 2011). The Resolutions effectively hinges all states, both signatories and non-state Parties to the Court, to 'comply fully with and provide any necessary assistance to the Court and the Prosecutor' (UNSC Res. 1593, UN Doc 31 March 2005; UNSC Res 1970, UN Doc 26 February 2011). Such proved to be contentious since the two are non-Signatories to the Rome Statute of the Court, the constitutional framework for the Courts operation (Omorogbe 2019; Ba 2017; Manirakiza 2021; Akande 2009:341). Yet, given the legal frame of Chapter VII of the UN Charter and Art. 13 of the Rome Statute in which these referrals were made, the ICC was given jurisdiction over the two situations (Odero 2011). These provisions gave assent to the denouncement of the five permanent Security Council members, who as it would be argued by critics, serves situations of others to the ICC while sheltering their own citizens (Ba 2017:49). Acting in accordance with the UNSC referrals, the Court commenced an investigation into both situations, which lead to the indictment of some senior State officials, including both countries' Head of State, then President Omar Al-Bashir of Sudan, and the then Head of State of Libya Colonel Muammar Gaddafi. However, proceedings against Gaddafi was discontinued after his assassination in October 2011 (Odero 2011; ICC 2009; ICC 2010; ICC 2011). Consequently, the ICC obliged all state parties, including the 33 African states, to the Rome Statute to cooperate in achieving both warrants (Odero 2011; Manirakiza 2021; Jalloh et al 2011; Dyani 2012).

Thereafter, the ICC Prosecutor, on his own accord, instigated a criminal examination into the situation in Kenya regarding the 2007-2008 post-electoral political violence which precipitated the indictment and prosecution of then President Uhuru Kenyatta and his then Vice-President William Ruto (ICC 2011; Ba 2017; Odero 2011). However, bearing in mind that the AU was actively engaged in the political processes seeking to settle the crises of all states of, Sudan, Libya and Kenya, they condemned the ICC pursuit since these was thought to thwart and impair the continental organ's aims towards reaching sustainable peace settlements and risked prolonging the violence in especially Sudan (Odero 2011:150). As such, the cases by the AU and its member States are seen as mirrors of the geopolitical dynamics of the UNSC that hide states like China, the United States, and Russia from ICC referrals (Bosco 2014; Ba 2017). Against this backdrop, the AU refused to cooperate and rejected the warrants, arguing for the subsistence of immunity for non-Signatory Head of

states regardless of the crime as established by the foregoing International Court of Justice (ICJ) 2002 Arrest Warrants case (Du Plessis 2012; Omorogbe 2019:288). The AU further advanced that this limitation is well known by the Rome Statute as pr. Art.98 that states:

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

As such, underlying the concurrent strained relation and crisis is the lack of credence in the aptitude of the ICC to make due on the justice that it is mandated to, independent from geopolitical dialectics (Odero 2011; Kersten 2016; De Vos 2016; Nimigan 2021; Nkansah 2014).

1.4. Research design and chapter outline

This research project is structured as follows: Chapter one will introduce the research and provide background and historical contextualization to the relationship between the ICC, African States, and the African Union in its current stalemate. The chapter will also problematize the area of interest and present the research question(s) and the significance of the study. Chapter two will set the stage for the analysis and discussion by forwarding a state of the art that is critical and investigative of various aspects of the phenomena under scrutiny. Chapter three will then construct a theoretical framework. The aim of this chapter is to advance a theoretical lens to understand the study findings through. Chapter four will then detail the methodological reflections, explaining the empirical cornerstone of the data analysis. This will especially underscore the analytical choices and considerations when working with discourse analysis and discourses at large. Chapter five presents the analytical findings from the discourse analysis underpinned by the theoretical framework. Chapter six will discuss concepts from the theoretical framework amalgamated with key points from the state of the art bringing forward research results of significance and generalization. This chapter is a summary chapter that concludes and gives consideration to the research findings bringing the research back to what the study set out to do through its research question(s).

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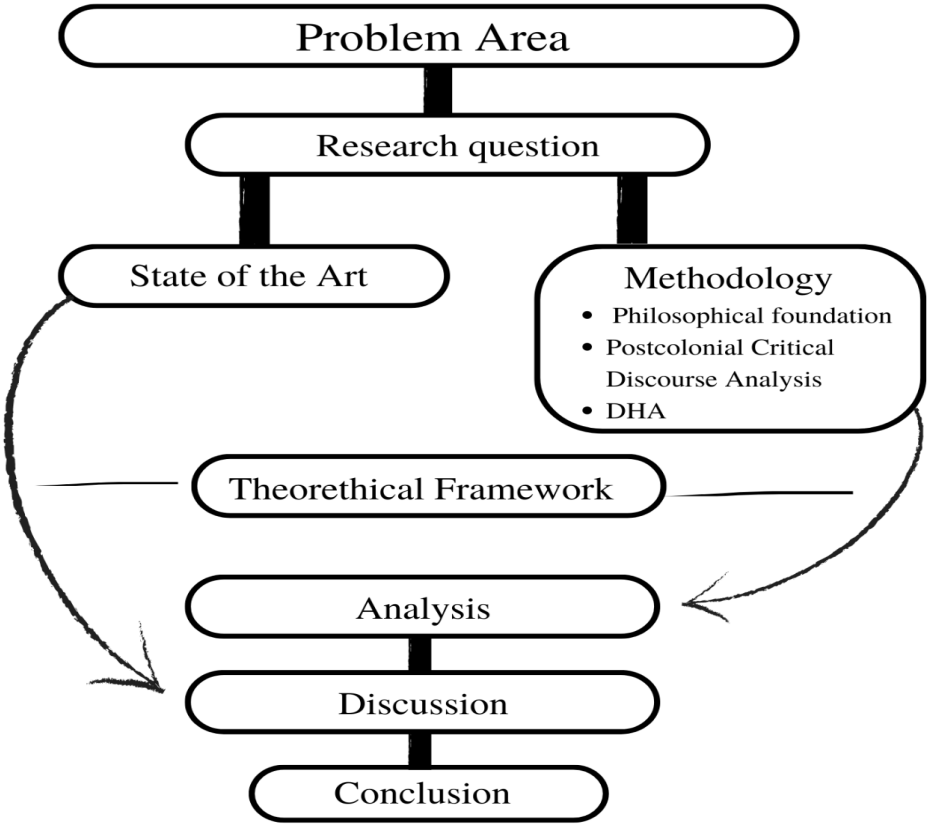

***Fig. 1**: Research design by author.*

1.5. Significance of study

The ICC has for more than a decade now been taken to task for its existential inauthenticity i.e. the calling to question if its living up to promises made in its process of becoming especially through its contention with the African Union and African states at large. The research is indeed relevant to the concurrent circumstances of the AU’s proposition of amendments to the Statute of the African Court of Justice on Human and Peoples’ Rights (ACJHR) empowering the African Court with the same rights as the Rome Statute via an International Criminal Law Section (the Malabo Protocol) 2014. More to that, the relevance of the study is also seen in the AU’s collective withdrawal strategy and indeed three states, South Africa (SA), the Gambia and Burundi officiated their intentions to withdrawal, with, Burundi, being the first African country to actualize their intention to exit the ICC. This withdrawal became effective in October 2017 (Ssenyonjo 2017).

Chapter 2

2. State of the art

In what follows, this thesis underscores its hybrid nature, a concerted and interdisciplinary approach that places it amongst budding literature on the ICC and its relation with the AU, its Member States and by extension the non-Signatory African States referred to the ICC. It is underscored by and seeks to contribute towards core theoretical debates brought forward by the disciplines International Relations (IR), Historical Sociology and International law (IL). Drawing from these fields, this chapter aims to unfold what lies beneath the contentious ICC-AU relationship and in this process pay attention to what such essentially tells us about the mores of international criminal law (ICL).

This section thus reflects on the most prominent matter of discussions that serves to unfold Africa-ICC relations and at large (in)security governance in the context of Africa. The thesis recognizes the impactful and indeed excellent endowment made by a multitude of critical analyses, which comprises of, but are not limited to Krishna (1993, 2014); Paolini (1999);); Ling (2002, 2014); Inayatullah and Blaney (2004); Slater (2004); Grovogui (1996, 2006); Pasha (2005); Barkawi and Laffey (2006); Zarakol (2011); Persaud (2001, 2016); Crawford (1994); Tickner (2003, 2008); Bilgin (2008, 2010); Gruffydd Jones (2006); Shani (2008, 2015); Agathangelou and Ling (2009); Biswas (2014); Shilliam (2015); and Vitalis (2015); Muppidi (2012, 2016); Sabaratnam (2013); Acharya (2011). All scholarships that have influenced this research project considering that they attend, although to various extent, to the necessity of taking the field of IR to task for its lasting Eurocentrism and further creating a scene for non-Western perspectives and voices. The amalgamation of the discussions set forth paves way for analyzing the engagement of the historical status hierarchies in the international system and institutions (e.g. ICC) that is the outcome of this international law system.

2.1. IR, norm diffusion, modernity and (in)security

Albeit intrinsically divided on a multitude of issues; that is the lack of a consensual ontological, epistemological and methodological attitude, the burgeoning diversity and

plurality of IR scholarship has forwarded various analysis to perennial questions in the field on actors, issues, causes and consequences (Odoom and Andrews 2016; Smith 2009; Bilgin 2008, 2010). Whilst the critical introspection within the field has brought forward a surge in intellectual pluralism, IR has been reprimanded for lacking the 'international' in IR, thus bringing into question its wider applicability (Odoom and Andrews 2016; Smith, 2009; Bilgin, 2008; Acharya 2004, 2011, 2013; Jabri 2012; Hobson and Sajed 2017). Here underpinning Tickner's (2003) point on how the world outside the west can function as an agent of IR knowledge rather than an object of IR study - thus serving insights for the development of IR scholarship and policy way beyond the continent. The suggestion is not that IR has been fully devoid of the world outside its Western-centric parameters (see Brown 2006), rather it is that the Third World exists on the fringes of the discipline (Smith 2009).

The Constructivist literary body, although pioneering in its move away from IR's overemphasis on materialism towards ideationalism through the explanation of norm dynamics and change (Finnemore and Sikkinik 1998). This IR branch, is amongst those known for neglecting manifestations of social stratification and instead underscore the "social" element of the international system (Bloomfield and Scott 2017; Acharya 2004; Payne 2001; Bilgin 2008). Many have therefore forwarded that the Constructivist research program on norms in the international system has provided a multitude of cases, yet scarce in this curriculum is the emphasis on the power dynamics that backbone socializing relationships as their forthright research cornerstone (Johnston 2001:493; Finnemore and Sikkinik 1998; Risse Ropp and Sikkinik 1999; Bloomfield and Scott 2017; Payne 2001; Hoffman 2010; Acharya 2004, 2011, 2013; Bloomfield 2015). Of course I am not inferring that constructivists and in large those who examine socialization altogether repudiated that the relationship of inequality is foundation to the process of socialization. Rather it is known that the like of e.g. realist consider socialization to be a mechanized exercise by which systemic limitations compels the frail to mimic the champions of international system or that of Ikenberry and Keohane of the neoliberal approach who underscore the preferences of hegemonic champions (Waltz 1979:118-128; Ikenberry 2001). Both underpinned by rational-choice models. Even so, some have argued that, given the scarce literary focus on the power discrepancy that backs norm internalization, in much of the constructivist curriculum vitae such is reasoned as a rather noncontroversial spur for socialization, and not even a plausible means to the socialization process in essence (Zarakol 2011). To the extent that even nuanced and critical norm constructivist scholars like Johnston propagate this arrangement (Johnston 2001:499). In plain, there is scantily any examination of how a

relationship contoured by inequality may be extant in spite of successful socialization, never mind mentions of or admittance to the perennial inequality in the process of socialization itself (Acharya 2004, 2011, 2013; Bloomfield 2015). The backhanded effect of such is that power dynamics is explained away with apriorism, i.e. independent to the socialization process. To this Zarakol underscores that, parenthetically, constructivist indifferences to the power gulf as it pertains to socializing relationships proceed from their pursuit of contrawising normative conformity (ibid.:15-16).

This inattention to the inevitable laminating potential of international norms and overall socialization in constructivist scholarship is obscuring since most normative expectations facilitates discriminative outlines and power structures (Acharya 2004, 2011, 2013; Zarakol 2011:1-16). So much so that social norms, even those that are prima facie "non-malignant", are bound to conjure predicative identity complexes (Zarakol 2011:15). This is because norms in essence are instruments of power in that they give forth the power dynamics in the system and can be expected to keep such in existence as they are to enhance them (Zarakol 2011:15-17; Acharya 2004, 2011, 2013). As such, the backend of socialization is alienation or otherness, which is underscored by an insider-outsider arrangement.

Much can be said about why efforts of constructivist scholarship on internalization and socialization have flatlined as it pertains to the stratifying trails of these processes. For starters, with the supremacy given to Western states in IR overall, and for pilot constructivist of norm dynamics scholarship, the "hard case" of identity transformation wherein 'good' global norms triumphs over 'bad' indigenous ontology and customs took center stage (Acharya 2004:239). Since it was only a short while ago that constructivist literacy, underscored by an underlying 'liberal bias', predominantly emphasized the propagation of norms, which principles they commonly agreed with like gender mainstreaming, peace, democracy, human rights, etc., theorizing the influence of such "socialization" on state and organizational identity as anything but positive has been difficult (Finnemore and Sikkink 1998:516-20; Johnston 2001:492-4; Acharya 2004 2013; Hobson and Sajed 2017). The underlying implication of agreeance to the principles of these norms by scholars is the restricted focus on persuasion, an undertaking that surmise a sort of willful exchange in socializing engagement between equals that might not naturally mirror the historical development of contemporary international system (Johnston 2001:492-4; Hobson and Sajed 2017; Jabri 2012 2016). Moreover, this accent sequels an emphasis on simplistic and narrow-issue norms that demonstrably portray norm diffusion as a "persuasive" processes

"targeted" towards repressive regimes, rather than as a broader shift and deeper cleft in world views (Nwankwo & Chigara 2015:247; Zarakol 2011; Bilgin 2010; Acharya 2004, 2013, 2017). As such, the rationalist risk-benefit and maverick methodological interpretation of this persuasive constructivist scholarship comes not as a surprise (see e.g. Checkel 2001:555-8; Martin 1992; Keohane 1984). The failure to forthright address the historical seriousness of these hierarchies by Constructivist scholarships obscures the latent and deep-structured source of contemporary (in)securities (Zarakol 2010, 2011).

2.2. Security studies - a postcolonial moment when?

The glaring inattentiveness paid to the particular cultural and historical genesis of the contemporary international system can be credited as the most flagrant omissions in mainstream IR (Hönke and Müller 2012; Hobson and Sajed 2017; Bilgin 2010; Appeltshauser 2016; Acharya 2014). Appeltshauser (2016) explains that the gross emotional charge that most people have payed, especially those forced or integrated to become members of a system of states with 1) particular cultural traditions; 2) with ordinances created without them; 3) norms that they at most were unacquainted with; 4) major players whom inferred and overtly categorized them as subservient; 5) and the ontology of which induced a feeling of insufficiency and being without – is discharged as immaterial to international affairs in traditional IR scholarship. Furthering this Adler & Zarakol (2021) argues that coming to age in the international system under the guise of an imaginary and imagined "developed" West with comparative "underdevelopment" and the integration into this system has forwarded an existential fear of being gulped by a cavernous abyss of "otherness" and later to be offcut counting as nothing, which comes with its own terrors of humiliation, grievances, insult, imposed inferiority to say the least. As such, Barkawi & Laffey (2006) calls for a much needed 'postcolonial moment' bringing to attention IR's subfield Security Studies (SS) remission of layered existential anxiety instigated by European expansionism and at large 'third world security predicament' (see Ayoob 1995).

Without this, the scholarship falls short in responding to what Zarakol (2010, 2011) makes plain i.e. the asymmetrical development of the international system, identity pressure, and the ontological (in)security of 'outsider' states as they navigate the conceptualization of their identity within the bounds of a structure that until recently gave legitimacy to their colonization and exclusion. Thus, the scholarship in large is accused of imposition,

preconceptions and gross omission of the complex (in)security subtleties of the postcolonial world – a world that many have argued are burdened to securitize by means of foreign frameworks that cares little for layered existential threats and are resultant of a post-World War ll "decolonization" attempt to further a hegemonic order that serves Western states' liberal democratic agenda, social and cultural norms (Zarakol 2010; Untalan, 2010; Barakawi & Laffey 2006; Cash & Kinnvall 2017; Bilgin 2016). Mbembe and Nutall advance from an African frame that the charge of scholarship is not just to display the falsity of knowledge proceeding from a given European case (2004:345-9), and because the continent has come to be known in research circles and larger debates as the 'dark continent', 'failed', 'other' and overall as an object outside of the world more extensively than any other region, scholarship should instead aim to engage with the African experience in a way that divest from an essentializing comprehension of differences (Mbembe and Nutall 2004:345-9). And so this research aims to contribute to the developing litetraure that seeks to rescue Security Studies (SS) from the chokehold of political realism.

2.3. Rescuing Security Studies from political realism

The mushrooming attention paid to postcolonial approaches within the larger field of international relations towards curbing the confines and challenges of dominant Western-centric approaches that has as their case study, namely European experiences, clothed as universal to global politics, glancing at the subfield of SS it is clear that efforts towards foregrounding a post-colonial research agenda remains scarce (Bertrand 2018; Barkawi & Laffey 2006; Howell and Richter-Montpetit 2020; Hönke and Müller 2012). IR scholarship and its sub-domain SS, backboned by the security dilemma of political realism, have traditionally foregrounded physical (in)security issues of political entities. The supremacy given to the state, exteriorization, fixity, objectification and the overall physicism of dangers, omits a contextual analysis that goes beyond the veneers of physical threats and calls to the fore ontological concerns that moves states undertaking in and at large (Mitzen 2006; Browning & McDonald 2011; Peoples & Vaughan-Williams 2021; Bertrand 2018; Bilgin 2010; Howell and Richter-Montpetit 2020).

As such, Zarakol (2011) explains that stigma for states and individuals are the same; as it contours and incentivizes every following engagement (ibid.:4). The ensuing reality of lacking all that which the "West" has defined itself as e.g.; sufficiently "modern", Christian,

developed, democratic, industrialized, enlightened and secular, has meant that states in the post-colony are forced to meet the grim face of stigma (ibid.). While equaling to the measurements of modernity is a back-breaking task at large – which, even with its universal language, has a clear Western genealogy and is thus underscored by set premises about orthodox social and institutional configurations – divested from the feeling of inauthenticity, it is next to unattainable to fully be genuinely non-Western (Zarakol 2011:6). She underscores that the treatment of such markers within IR scholarship as objective assessment is to disregard that social dynamics is foundational to international relations. As such, to spotlight the socially constructed origins of the international system is to showcase the physical conditions that manifest as problems to be managed and overpowered (Zarakol 2011).

Therefore, taking the concept of postcoloniality serious does not point to homogenizing at random or to the extent that considerations about differences becomes impossible, instead it is to grasp difference against a critical background that scrutinizes the underlying entanglements of power and political purpose (Hönke and Müller 2012:384; Hobson and Sajed 2017; Appeltshauser 2016; Jabri 2016). Considering that a substantial volume of SS scholarships' notice is inextricably devoted to social and political development in large parts of the world – that is to say the postcolonial world in and afar from the 'modern West' – and the following denouements beside threats that such developments are conjectured to designate for global security and stability, the negligible body of literature on the non-Western world, particularly Africa, has subpoenaed critiques parading and attributing this scarcity to the chokehold which political realism has on IR at large, divulging the existing hierarchical epistemic/power dynamics (Kinnvall 2004, 2006, 2016; Appeltshauser 2016; Barkawi & Laffey 2006; Mitzen 2006 a, b; Acharya 2014; Utalan, 2020; Croft 2012; Innes 2017). Indeed, in a world contoured by IR's realist genesis and contemporary liberal humanitarianism donned by Western frames – that is to say, the state, physicism, exteriorization of threats and the supremacy of the liberal-democratic order, the complicatedness of non-Western (in)security many have argued ventures dematerialization in this extensive field of literacy (Hobson and Sajed 2017; Barakawi & Laffey 2006; Browning & McDonald 2011; Zarakol 2011; Zarakol 2010; Kinnvall 2004; Mitzen 2006 a, b; Steele 2008; Utlatan 2020; Croft 2012; Innes 2017).

The theoretical pledge of critical security study approaches to a Coxian kind of problem-solving theory forswear standardized social, power dynamics and the co-option of

‘human security’ by strong states bearing liberal humanitarianism (Peoples and Vaughan-Williams 2021; Browning & McDonald 2011:244; Utalan, 2020:49; Zarakol 2011; Cash and Kinnvall 2017). To this Cash & Kinnavall (2017) takes a bid at the critical approaches of SS, advancing that paradoxically the critical subset of SS curriculum whose chief intent is ‘deepening’ and ‘broadening’ security concepts stand charged with failing to estrange from the supremacist eurocentric base of the field as they seek to ‘universalize’ the objectives of enlightenment and emancipation. Without care for ontological questions, ‘critical’ approaches endanger core strives of those denigrated to the outskirts by mainstream IR (Peoples and Vaughan-Williams 2020:51; Browning & McDonald 2011:244). The criticism of the methodological categories with Western-centric underpinnings is not a pester to renounce all Western theory (if that at all is possible), rather it is a quest, especially for those sworn to ‘broaden and deepen’ critical security studies, to stay ‘committed to theory’ to call out the lacunae by challenging the ‘fictitious universalism’ (Bourdieu 2000:65; Howell and Richter-Montpetit 2020; Jabri 2012) of [Western] theory (Jackson 2003:73).

Thus, the burgeoning scholarship of Ontological Security Theory (OST) that has arguably advanced security of the Self and overall ‘becoming’ to the frontstage of IR discourse becomes relevant. Aiming to divorce IR discourses from the confines of political realism and the elementary emotion that underscore anarchy, OST offers avant-garde tools to address the management of anxiety in the pursuit of self (Cash and Kinnvall 2017; Untalan 2020; Kinnvall 2004, 2016; Kinnvall & Mitzen 2020). Introduced to IR by Huysmann (1998) and more extensively build on by scholars like (Manners 2018 ; Mitzen 2006a, 2006b; Steele 2008; Browning and McDonald 2013; Kinnvall 2004, 2006; 2016; Chernobrov 2016; Zarakol 2010) to name a few, OST has traditionally sought to explain the Self’s actions and less insistent on accenting the normative value of undoing differentiation as an ambience of ontological security (Untalan 2020:42). And more to that explain the order, routines, and stability inducing practices that states and their agents employ in their pursuit to secure their ‘becoming’ in an international system underpinned by anarchy (Huysmans 1998; Mitzen 2006; Steele 2008). These perfunctory accounts have brought forward affective nuances of security pursuit e.g. identity threats, dread, pride, status, and anxiety, which all those in their pursuit of such security bears in their confrontation with ‘Others’ (Kinnvall and Mitzen 2017; Mitzen 2006; Steele 2008).

OST has been instrumental in discerning conduct negating normative survivalist principles of SS, advancing that agents at times have a preference for attending to the existential dread

they feel more so than conserving corporal security (Mitzen 2006; Browning & McDonald 2013:236-44; Barkawi & Laffey 2006:329; Untalan, 2020:49). More to that, OST has been proven itself essential in expounding on how identity indicators assist actors, indeed those otherwise peripheralized, manage existential anxiety and the state of ontological (in)security (see e.g. Zarakol, 2010; Kinnvall and Mitzen 2017 ; Mitzen and Larson 2017). Yet, even this scholarship is scant of critical and layered considerations for asymmetrical relationships and ignores the effects of hierarchy-in-anarchy international order not to talk of the existential dread which postcolonial states and their citizenry are faced with, indeed due to duress agency and marginal self-worth caused by colonial history (e.g. Bilgin 2016; Stoler 2016).

Somewhat disappointed by these shortcomings of IR and its subfield SS, I with this paper, hope to examine what seems eminently absent from this body of scholarship, that is the existential dynamics in which the entrepreneur West of the international system and its Eastern and Southern latecomers is bounded by (Zarakol 2011). Accrediting much to critical and postcolonial OST, which have brought anew avenue to unfold both threat perception and indeed the underpinning ontological nature of such - escaping the mendicity of a monolithic security paradigm that is neglectful of the complicated dynamics of (in)security governance, the pursuit of becoming, and international pertinence - escaping the mendicity of a monolithic security paradigm that is neglectful of the complicated dynamics of (in)security governance, (Kinnvall 2004, 2006, 2016; Untalan 2020; Zarakol 2010; Agius 2017; Appeltshauser 2016; Innes 2017; Barkawi & Laffey 2006; Shani, 2017; Barkawi, 2016). Even so, marginal heed is paid to imagining ontological security pursuit as a state of mutual co-existence between the Self and the Other (Untalan 2020). With such imagination, a postcolonial approach provides an explanation to what follows when the archetype source of ontological (in)security, the Other, becomes the transformative agent of how we conceptualize the international and hence ontological security at large (ibid.).

It should be noted that the intended postcolonial outlook attends not only to the legacy of colonialism and its entangled ontology (e.g. Young 2012), more than that and in agreeance with Epstein it offers an eccentric and post-Eurocentric scene for imagining international relations, and for practises of situated critique (Epstein 2014; Agathangelou and Ling 2004).
It is argued that the behavior of African states in relation to the ICC is best unfolded through the premise which Postcolonial OST and its unfolding of Otherness makes available. The theoretical premise for this is connected to a historical emphasis on how historical

power-struggles have contoured the content of ICL and its material manifestation, e.g. the ICC. The thesis is silhouetted secondly by a critical intervention in the form of a postcolonial outlook on OST that sets the scene to discuss the historical status hierarchies engagement in the international system and provide an outfall from a relation that is otherwise characterized by a Fanonian master-slave quasi-contention. It is argued that the theories together provide analytical tools to fully unfold this less expounded aspect of security-seeking. It allows care for how international criminal justice norms as illuminated by the ICC is interconnected to identity and interest - an approach like this is valuable for explaining commitment, withdrawal, or reversion to the Court at many joints of its lifecycle.

In what is to come, I will highlight the theoretical premise that in my view furnishes this inquiry with the basis for taking on the above deficits, and supplies SS scholarship with more consideration for the postcolonial condition. At the very least, the above illuminates that a postcolonial outlook is necessary for surpassing the prevailing Western-centrism SS research program.

Chapter 3

3. Theoretical Framework

The theories Ontological Security Theory (OST) and Third World Approaches to International Law (TWAIL) are very relevant for this thesis. In this section, I provide an explanation to ontological (in)security and struggle theory on two levels. I also present an amalgamation of theories that form aspects of the TWAIL as well as provide a Postcolonial outline of the theory of Ontological Security.

3.1. Third World Approaches to International Law

TWAIL has two main objectives. First, is to visualize the colonial structures of IL, which create and re-create distorted and unfair power relations in the international order. The second, is to defang IL of "*its imperialist and exploitative biases against the global South*" (Gathii et al. 2010:9; Mickelson 2008:357-8). Unfolding the main tenets of TWAIL, Mutua (2010) has described the approach as both a political tool for critical examination of IL and an intellectual movement that refutes liberal international order governed by traditional international law (ibid.:31). Since, TWAIL originated in the era of the decolonization movements, its understanding of the premise of IL as "predatory" and "domineering" is contoured by resistance and a vigorous denouncing of what is believe to be an illegitimate legal establishment that breeds domination and imperialism (Mutua 2000; Bedjaoui 1979; Elias 1972; Ba 2017). Gathii (2000) has explained that "*Third World positions exist in opposition to, and as a limit on, the triumphal universalism of the liberal/conservative consensus in international law*" (ibid.:2067), against what is understood as an illegitimate and vulturine system paramount for the upkeep of imperial expansionism, false universalism and foisted subjugation of non-Europeans (ibid.:2067). Therefore, TWAIL deems itself a necessary oppositional project for the reimagining of the law of nations, and further to eject IL of its racial and hegemonic precepts and prejudice, so as to alternate a universal body underscored by inclusivity and empowerment (Gathii 2000:2067; Gathii 2011:26-34).

The approach is not contoured by a clear doctrine or formal bounds, but it does have amalgamating factors of viewing IL that hails it under an umbrella that is applicable to this study. Mutua explains that TWAIL is guided by three objectives: 1) tasked with

understanding, deconstructing and unpacking how international law is bent for the creation and propagation of a racialized order of international norms and structures that subordinate non-Europeans to Europeans; 2) when an understanding and proving of the imbedded power relations of the rules of international law has been reach, the aim is to construct and serve an inclusive and egalitarian normative legal assembly for international governance; 3) by means of scholarship, policy and politics the condition of "underdevelopment" in the Third World is used as a learning point to transformation (Mutua 2000:31).

Further, TWAIL is underscored by a perennial wariness of IL as an apparatus for the civilizing mission that lives on as a menace and a revenant of the colonial past both extant and absent, alive and deceased through concurrent initiatives like "development," democratization, human rights and "good governance", initiatives that perpetually beleaguer the project of ICL in profuse African "incarnations" (Mutua 2000:31-4; Rossi 2018:404-5; Anghie & Chimini 2003:86; Ba 2017). From this perspective, IL throughout history has been underpinned by complexes of superiority. They are vexed by the fact that the Global South is endlessly in struggle if not for political independence against imperialism justified by IL; then is resistance to the geopolitical materiality of the new liberal world order that "bend international law similar to the rules of colonialism" (Sornarajah 2016:1987). Moreover, they argue that African states never in totality gained absolute sovereignty at their independence, which is owed to the manipulation of the Western discourse of IL, and so colonial hierarchies of domination remained after independence (Grovogui 1996, 2001). This record shows that IL is politically charged and thus a mirror of the entangled relationship between IL and international power politics (Grovogui 1996, 2001). Chimni (2006) as such explains that the anxiety for "recolonization" continues to plague the third world, and resistance against it is the twailist goal (ibid.:3). And "*[t]the postcolonial condition as such elucidates the persistence of the colonial intellectual legacy in the supposedly neutral and universal settings of knowledge production and policy-making*" (Grovogui 2013:231).

In view of this, TWAIL explain this struggle as leveled at safeguarding and securing Africans' dignity, freedom and rights from continues bondage politically, legally and economically, from the West, and the UN that is issued as "*the neutral, universal, and fair guardian of the new order*" (Okafor and Ngwaba 2014:94; Mutua 2000-33-4; Cheru 2012:268; Finlay 2015:24; Manirakiza 2018; 401; Ba 2017). As such, these writers underscore the transformative potential of IL, and in the paradigm of law as a way to constrain power (Anghie and Chimini 2003:101).

The discussion so far recalls Untalan's (2020) explanation about the State and its importance. According to her, states are more than sovereign beings engaging with one another because of a power vacancy, rather their interaction is hinged on their "roles" in this hierarchical structure that is the international system (ibid.:44). A hierarchy wherein the regimens of powerful players command and/or condition the roles of those at the bottom of this system (ibid.:44). The understanding is that although the aim is to draw attention to the complex nuances of anxiety on the continent, this attempt does not appear enough to avow the analytical and practical significance of Otherness with TWAIL given that in a globalized world, with all that we have come to know, the Other cannot only rely on their fantasy of unbounded agency and a parallel, although often antagonistic, existence with the master Self (Untalan, 2020:47). This reasoning explains the AU "Otherness" as it pertains to the ICC and UNSC selves, with emphasis on the ICC-AU contentious relationship. Against this background Epstein (2018) points out that tangible experiences between the Self and the Others are indispensable to disconcert the unequal relations. An outlook that postcolonial Otherness provides.

Accordingly, this thesis advances from the position that postcolonialism pertains to the processes of decolonization wherein the previously colonized, African states, after gaining independence, are still undergoing a period that sort of portrays a recolonization through an imperialist structures of economic and political domination which surfaced after independence (Young 2001:57).

3.2. Ontological Security and the Postcolonial Other

Ontological Security Theory introduces us to the subject's security of 'becoming' as it pertains to their environment (Gidden 1990 1991; Laing 2010). The concept of Ontological Security was first introduced by the psychiatrist R. D. Laing and furthered extensively through the works of Giddens, who advanced that individuals and societies require ontological security to subsist with modernity (Giddens 1991). He explains that while modernity, enigmatically, fashion contrasting and relegating modalities amplifies anxieties and estrangement between people and societies, it also sets forth inescapable risk and perils (Giddens 1991:22).

For instance, in a post-World War II era that is marked by liberal humanitarianism's endeavor to craft a new political order, which Beck (1992) refers to as a 'risk society', ontological

security necessitate crafting relationships that are underpinned by mutual trust and the doing away with otherness so as to attend to matters that concern the collective (cf. Giddens 1990:131; 1991). Such encourages the move away from egotistical 'I' towards a more collectivist 'We' emboldened to deal with existential anxiety (Untalan, 2020:42). An approach that recognizes that the ontological security of the 'Self', the ICC, is deeply intertwined with that of the 'Other', the AU, and thus disjoining the Self from its exogenous milieu where the social is intrinsically brought to life by the 'Other' is undesirable (Untalan, 2020:42).

Postcolonialism advances that the nation-state structure is cocooned by the colonialist project of rendition and infantilization of the Other (Doty 1993; Bhambra 2010; Zarakol 2010; Browning 2015). More to that, it tells how the routines of Western actors reproduce Othering, so much that even supposing a change in identities and identification, the hierarchical interaction persists (Untalan 2020:44). This is the case with former colonial powers becoming hegemon or previously colonized states becoming reliant on the affluence and protectorship of its former colonial master turned hegemon (Zarakol 2011; Ba 2017; Appeltshauser 2016; Mgboji 2006; Stoler 2016).

Postcolonial OST argue that postcolonial states and their citizenry are situated in a tumultuous existential (in)security that is warranted by their frustrated agency and lack of self-worth brought into question by the unremitting legacies of colonial encounter (Stoler 2016; Appeltshauser 2016; Hobson and Sajed 2017; Vieira 2019). Where a non-Postcolonial approach is blinded to the layered enmity between Self and Other synthetically assembled in singularity, postcolonial OST's emphasis on mutualism and at large "we" elicited by issues inevitable to the two, Self and Other, restructures our ability to understand veiled dynamics of ontological (in)security (Nandy 1988; Stoler 2016; Hobson and Sajed 2017;). Such conceptualization of "we" lessens the feasibility of the "*return of the repressed"*, verily mending the cleavage between the Self, and Other, and further deterring the Other's jeopardization of their being as they endeavor to dare the powerful Self which could elicit physical harm and collective damming of ontological security for all (Untalan 2020; Zarakol 2010). In the case of the ICC-AU relationship, such mutualism allows for the ICC to close upon the UNSC and its geopolitical manipulation, and in return gain awareness of the practice and power. While postcolonial hybridity provides grounds for the Other to disturb the powerful Self's security of being, peripheralization and Otherness persist if state

construction and hierarchy underpins traditional readings of ontological (in)security (Untalan 2020:48). Nevertheless, the purpose of a Postcolonial OST is to deliver on the promise of critical security study, to broaden the the possibilities of a clear sense of Self, excluding from non-purely identitarian outlook, which provides the means for durable consolidation of the Other into the Self (Untalan 2020:45; Epstein 2014).

Postcolonial OST holds that a stable sense of becoming does not come from binaries, rather such is provided for by their disintegration. Ling (2002) thus explains that a key objective of a postcolonial outlook is the regression of the immobilizing aftermath of "*conquest and desire*" so as to make way for mechanisms of coping and continuity. And at the same time, managing postcolonial existential dread brought on by European expansionism (Krishna 1999; Mgbeoji 2006). The AU's as they realizes their state of Otherness as a states of in betweenness or intersectionality, pushes away binarity, which in turn advance an 'interstitial' being readied for agential innovativeness unbounded by Westphalian homogeneity and stationarity (Hobson and Sajed 2017; Crenshaw 1989; Untalan 2020:48). And in this space of postcolonial Otherness, a site of many vying subjectivities, the AU emerges as a strong force of becoming, a reflexive alternative, different from the everlasting stigmatized Other or a resentful derivative of the dominating Self (Zarakol 2011; Fanon 2008; Ling 2002; Untalan 2020). As the Other endure interstitial metamorphosis, they discover that stepping out of the master Self's shadow offers an outlet away from a relation that is otherwise characterized by Fanonian master-slave quasi-contention (Fanon 2008; Ling 2002; Untalan 2020:48).

What is fundamental to the teaching of postcolonialism and OST is an understanding that the Other is essential to the remodeling of the Self and a co-constitutor of the social (Untalan, 2020:48). It allows for temporal and geographical intersections since history and other spaces totes instruments that give room for reintroduction and transformation (Untalan 2020:48). Further, contrary to the dominant Self, which deflates such learnings and trust in mutation to uphold its supremacy, the introspective postcolonial Other understands that the redrafting and reforming of their subjectivity calls for a broad-minded engagement with the dominant Self and its Otherness (Untala 2020:48). Such is not deemed a frailty rather it inducts to the mutual stands of power where no individual bloc of authority reigns, verily mutualism is the cornerstone of ontological security for the Self and the Other since it authorizes a collectivist "we" reading of problems (Untalan 2020). To that Zanotti explains that coercive assembly

underneath a collective "I" or the insistence on homogeneity illuminates that "*Downplaying ambiguity is indeed itself a technique of power*" (2013:298), and so Postcolonial OS's advancement towards an interval site of hybridity emancipates the Self and Other from stringent, homogenizing identification. And so in freeing itself from the questioning of its legitimacy and the ensuing ontological (in)security that forwards, the ICC has much to learn from its Other, the AU (Megret 2016).

Understanding intersectionality and the hybridity it breeds explains the reclamation of the political that necessitate an understanding of both local and global structures of dominion and power as wells as their entangled and dependent intersections, turning the international into an arena for agency excretion, by the Other, so as to bring forward and knit together alternating discourses (Jabri 2012: 2, 80-9). Fanon's master-slave dualism, which upholds an OST underpinned by routines and continuation of stable identities, ceases to exist when the subject accepts Otherness as a means to knowledge and reformation (Untalan 2020; Fanon 2008). And so, when this happens, the ontologically secured and intersectional Other does not topple in the nearness of the dominant Self or grief its Otherness, rather they procures credence in their capacity to make strides in their in-between-ness and to elude the essentializing rubberneck of the master Self (Untalan 2020).

In this vein, postcolonial OST is built on a ternary of interdependent scheme for managing anxiety. First, postcolonial reflexivity, which is developed by an acknowledgement of competing and overlapping outlooks, establishes the myriad of worlds we inhabit (Untalan 2020). The hybrid Other levitates in the between of discursive strategies shared with the Self, while at the same time employing its "Otherness" to alter understandings of secure ontological milieu both within and exogenously for the dominant's established hierarchy (Ling 2002; Untalan 2020 Hobson and Sajed 2017;). Second, the hybrid Other is a being of multiplicity, a trait that permits the Other to dodge absolutizing frames of the master Self (Nandy 1989). As such, more so than acceding to OST's own agent-structure or exogenous-endogenous debate, postcolonial OST recognizes the agential power of the state and alternative dominant Selfs as possible allies (Untalan 2020:47-50). And at last, such mirrors Spivak's anti-essentialist notion of strategic essentialism seeing that the Other, while indeed differentiated internally, involved in an essentializing and somewhat standardizing of their external public image, forwarding a group identity in a reduced, collectivist manner so as to reach an identified aim (Spivak in Eide 2010). An act of strategic resistance that not

only view the state as an organization surrounded by and engaging with various agents, but also unveils forms of national and international governmentalities engaged in weakening plurality (Spivak in Eide 2010; Untalan 2020; Nandy 1988).

Such accentuates a category of resistance that prices interstitial surprises more so than routines and transculturation over whiteness (Untalan 2020:49). On IR's non-Western Eurofetishism, Hobson and Sajed pinpoint that "interstitial surprises" interrupts the "romanticized resistance hero", the discourse of "security as silent" and "silent victim" paradigm that is underpinned by political realism (2017:548). In this way interstitial surprises come forth in the "shadowy space of (...) everyday practices (...) which are all too often read (or dismissed) as 'silence." (Hobson and Sajed 2017:549). However, the happening of interstitial surprises may occasionally present itself at which point the collection of these individual acts may have a transformative imprint on the established power hierarchy, that is the international system - thus causing ontological transformation and change (Hobson and Sajed 2017:549). Furthermore, rather than delving into romanticized deleterious and estranging fantasies, the grudge of the Other is dictated at layered processes of agency reclamation (Hobson and Sajed 2017; Untalan 2020; Vieira 2019; Eberle 2017).

A postcolonial OST outlook enables the thesis with an understanding that albeit the frequent violent employment of 'Othering' on the AU and African states at large as a legitimizing apparatus by the 'Self', the ICC as an extension of the UNSC, the issues facing IL are shared. Moreover, the historical notes and understanding of the motives of the AU's struggle forwarded by the TWAIL approach provides the background for the layered anxiety of African States. Along with the TWAIL tenets, Africa is engaged in the longstanding struggle of deconstructing and condemning the international system and especially international criminal justice system in its existing form. And OST underpinned by TWAIL, take notice that with the vehemency of the current discursive episteme, a much needed hybrid being is called for, both for the Other and the master Self. An outlook like this gives credence to the Other's ability and agency despite the master's order of things - "Because I am an 'Other' I can know things that you cannot know and do things that you cannot, or are unwilling to do." (Untalan 2020;49). It is paramount to make clear that the merging of ambiguity into ontological security does not extricate the Other from the manifolded insecurities and ontological question that comes with experiencing existential dread, neither does it favor the Other - instead the objective is to present the Other with adequate clearance to maneuver the

hierarchical international system and free itself from the confining outlook of ontological (in)security underpinned by political realism, where the pursuit of ontological security is only attainable by endowing the principles of the master Self (Untalan 2020:49-50).

And so, even if obvious issues arises with the pursuing theories of anxiety advanced with the human subject in design to institutions, fields like the ICJ with a discrete existence, holds attributes that allows such analysis: a kind of (shared) subjectivity and autonomy, a sense of being and verily of becoming, a large repertoire of desire and fear, and an ongoing pursuit of meaning (Megret 2016:198-199). With the amalgamation of the two theories, this thesis understands that the postcolonial condition, its continuity and the meaningful impact of this condition extends far beyond the institutions of ICC, it reaches contemporary global power structures (Ba 2017). In using this exemplary, the aim is not to advance an exhaustive account of the discursive strategies employed towards continuity, rather it is to showcase AU and its African members "hybridity" to manage anxiety induced by colonialism through a quest for mutual coexistence (Untalan 2020:50).

Chapter 4

4. Methodology

The aim of this chapter is to explain the larger philosophical and methodological commitments of this thesis. The chapter also presents Postcolonial Discourse Analysis (PCDA) as a methodological skeleton, relying on Postcolonial Theory (PT) and Critical Discourse Analysis (CDA) that accentuate the need to scrutinize international criminal justice discourse by situating postcolonial power relations at the core of research pursuit. The case chosen for answering the research question is the stalemate between the ICC, African states and the AU. With the understanding that the postcolonial influences both existences within the previously colonizer-colony relationship (Memmi 2003). Moreover, the chapter unfolds the empirical material delimitation of this research. Following this, the section forwards the cornerstone tools for the analysis, attending to discourses as a "site of struggle, where forces of social (re)production and contestation play out" (Lazar 2007:4).

4.1. Philosophical Foundations

Gissel (2014:88) exempted query into the dealings of the ICC from methodological limitations, since the ICC does not demand a particular ontological, epistemological and/or analytical method for analysis. The thesis as such is underscored by a sub-variant of the larger Constructivist philosophical paradigm, namely Critical Social Constructivism (CSC). Although CSC share in much of the core and interdependent premises of the wider Constructivist paradigm, Weldes et al (1999) emphasis on "crisis" or (in)security in IR is a lacuna in the Constructivist genre which very much features in this research's endorsement of the subvariant. The properties of CSC, which this research appreciate in terms of 'why' and 'what' questions, has especially to do with its re-visiting of concerns of state, identity and (in)security in IR, and how such qualities advance further "critical" acquaintance with IR (ibid.). CSC explains that "crisis" are not simply representation of mental, political, social, or stratified categories as discerned by Wendt (1992) or Doty (1993). Instead for CSC "crisis" is recognized as cultural artifacts in that they are produce of and in set social practices and cultural resources – "*that* [they] *in and through the 'codes of intelligibility,* (Hall 1985:105) […] *both construct the reality we know and endow it meaning*" (Weldes et al 1999:57). This recognition unfolds the value-ladenness inherent in knowledge production and that all

knowledge claims are subject to deconstruction and reconstruction (ibid.; Kincheloe 2005). CSC inducement to understand knowledge production processes takes discourses of (in)securities as "representations of danger," which essentially means that rather than attending to the objects of (in)security and (in)securities themselves as predetermined, natural and at large as ontologically distinct entities, CSC holds that these are communally constituted cultural and social constructions (Das 2009; Bentley et al. 2007; Kincheloe 2005).

The epistemological questions which CSC enables the research to query into, begins with question of anxiety and rationalization framework that support the preservation of conservative premises; scrutinizing how such anxieties and rationalization are manifested and the cultural vernaculars that set the scene for them (Weldes et al 1999:xi; Das 2009:973). Such allowances were paramount for the researcher's quest to "*flip [the] strategy on its head*" and differ from conventional SS that takes as their vantagepoint a set of pre-determined entities that essentially binds examination to answer, "*how can they be secure*" (Weldes et al. 1999:10).

It is important to note that the researcher's lived experience is not only attested in the ontological assumptions made about what constitute "reality", but extensively also in which aspect of "reality" is dignitary of being examined (Smith 2009:273). And so, in underlining how "disciplinary objects of knowledge have been shaped by broader relations of power," (Weldes et al. 1999: 23), this project through the lens of CSC unveils the cultural power of construction and security practices that saturates the ICJ system, a valuable variable in explaining the current conundrum facing the international criminal justice apparatus of the ICC. Again, it is worth noting that the research strongly believes that the notion of neutrality as it pertains to social issues is problematic, since it does not acknowledge that knowledge is socially and historically constructed and valuationally based (Lazar 2007:6). This understanding is influential for the researcher's choice of analytical strategy. Chouliaraki and Fairclough makes clear that ideological sympathy is integral to CDA, yet this does not undermine the analytical strengths since CDA interpretations provide explanations and not subjective renditions (Chouliaraki and Fairclough 1999; Carvalho 2008:162).

4.2. Method

There exists an array of discourse analysis strategies, take for example Discourse theory of Laclau and Mouffe, Potter and Wetherell's Discourse psychology, Critical discourse analysis by Norman Fairclough, or the one which this research paper employs, Postcolonial Critical Discourse Analysis. The underlying premise which they all agree to is "*[the] starting point that our ways of talking do not neutrally reflect our world, identities and social relations but, rather, play an active role in creating and changing them*" (Winther Jørgensen & Phillips 2002:1). PCDA amalgamation of PT and CDA is underpinned by the understanding that the two disciplines share set objectives and ethics, although unrelated, they share the same understanding of power and through their own means aim to expose subjugation and power asymmetries (Bhabha 1985; Hall 1997; Prakash 1995; van Dijk 1993).

4.2.1 Postcolonial Critical Discourse Analysis

PCDA research enquiry must therefore be curious, by any means and of course depending on the research question, about how the postcolonial relation is overt (or not) in the conclusions. Moreso, PCDA advances from the understanding that these interpretations warrants examination that take into account the historical setting and the socio-political processes that contours their formation and propagation in e.g. international criminal law discourses - and examining this against the backdrop of postcolonial relations and how this shapes discursive mores in the pursuit of PCDA (Sabido 2019). However, much of this belongs to a wider historical contextualization. This is why Martin and Rose argue that the most advantageous means to an understanding of the larger historical context of a text in terms of the economic, cultural and social changes, at the macro-level is to probe both the text and circumstances that fences it from a discourse-historical approach (2003:29 in Sabido 2019). Sabido concurs with Martin and Rose by pointing out that "*colonialism and postcolonialism should figure among the historical developments that they enumerate, since these two practices have played a crucial role in shaping contemporary power relations and structures around the world*." (2019:26).

In attempting to answer the research question of this essay, the thesis takes to Wodak's (2009) Discourse-Historical Approach (DHA) as an approach in CDA that is appropriate in so far as it considers the historical socio-political contexts that texts are produced in (in Sabido 2019). DHA is expressive of PCDA pursuit to bring forward more than a descriptive

outline of cultural problems. Surely, the reason and condition wherein discourse is produced are dependent on their context, hence the significance of such context as we seek to understand the social conditions that enveloped the manufacturing of, and are in existence in, discourse (van Dijk 1993 in Sabido 2019). Accordingly, Nunan's emphasis on the non-linguistic or experiential context where "the discourse takes place", and s "*the type of communicative events […]; the topic; the purpose of the event; the setting […]; the participants and the relationships between them; and the background knowledge and assumptions underlying the communicative event*" (Nunan 1993:8 in Sabido 2019:33), this kind of context refers to the extra-textual circumstances that encircle the manufacturing of text which must be taken seriously (ibid.).

I must note that for PCDA the "critical" temperament of the analysis is provided by the postcolonial perspective, meaning that the "critical" attitude is placed on the part of the those with less power, and aims to unveil the manner in which such postcolonial, asymmetrical relations of power are reproduced discursively (Sabido 2019:32). The approach is underpinned by a rejection of impartiality given by PT in essence, TWAIL, for example, assume a necessary position in the era of decolonization and beyond to oppose the 'domineering' premise of ICL to reimagine the ICJ system free of its racial and hegemonic maxims (Mutua, 2000; Bedjaoui, 1979; Sabido 2019).

DHA is a three-dimensional approach that firstly identifies the specific contents or topics of a specific discourse. Secondly, examines the discursive strategies. And thirdly, investigate the linguistic means and the specific context-dependent of linguistic realizations (as symbols) (Reisigl and Wodak 2008:93). There are various strategies that must be accounted for when analyzing a specific discourse and related texts. In pursuit of a heuristic approach DHA asks five questions:

1. How are persons, objects, phenomena/events, processes and actions named and referred to linguistically?
2. What characteristics, qualities and features are attributed to social actors, objects, phenomena/events and processes?
3. What arguments are employed in the discourse in question?
4. From what perspective are these nominations, attributions and arguments expressed?
5. Are the respective utterances articulated overtly; are they intensified or mitigated?

In line with these five questions, DHA details five kinds of discursive strategies. These strategies are understood as intentional plan of practices, discursive practices, which are employed in pursuit of a particular social, political, psychological or linguistic aim (ibid., 2008:94). The discursive strategies are situated at various levels of linguistic organization and complexity (Reisigl and Wodak 2009:94 in Sabido 2019).

Strategy	**Objectives**
The strategy of 'referential/nomination'	This aim of which is "discursive construction of social actors, objects/phenomena/ events and processes/actions
The strategy of 'predication'	The aim of which is "discursive qualification of social actors, objects, phenomena, events/ processes and actions (more or less positively or negatively)"
The strategy of 'argumentation'	The aim of which is "justification and questioning of claims of truth and normative rightness"
The strategy of 'perspectivization, framing or discourse representation'	The aim of which is "positioning speaker's or writer's point of view and expressing involvement or distance"
The strategy of 'intensification and mitigation'	The aim of which is "modifying (intensifying or mitigating) the illocutionary force and thus the epistemic or deontic status of utterances"

(Reisigl and Wodak 2008:95 in Sabido 2019).

These strategies are combined with the theoretical framework so as to understand the case in question. PCDA is thus deemed as a relevant framework for analysis since the case of study is a relationship that is contoured by the postcolonial era, which calls for an analysis that takes into account context and historical development. The discursive strategies provide the means to be attentive to postcolonial discourses manufactured within a postcolonial relationship. PCDA through DHA enables the research project to examine the concurrent stalemate between the ICC and the AU. The conundrum is contoured by set ICJ discourse, that is, specific constructions of the "international criminal justice system" and ways of being as it pertains to it. The discursive strategies are viewed as agential innovativeness and moves - a sort of a dog whistle tactic to garner support for political messaging. Epstein (2010) explains that security matters are structured by particular understandings of the ICJ system and of states' requests to be secured (Epstein 2010). However, these discours strategies may be uttered by the states - but as is most often the case with African states in the name of Pan-Africanism, utterances

and dictum are spoken and directed by their primary regional body, the African Union, where the member states take on anti-ICC and anti-neocolonialist resistance discourse initially structured by the AU (Epstein 2010; Ba 2017). As such PDCA helps bring forth the historically disregarded relations of the (post)colonial core to its rightful place in understanding the impact of ICJ discourse (Epstein 2010:342-3). Permitting the analysis to voyage astride the various levels of analysis, state level and institutional, so as to make out the appropriate speakers-actors (ibid.).

4.3.Empirical material and delimitation

This research project employs mainly desktop study. That is, it will depend mainly on secondary data without fieldwork, which is a qualitative research approach underpinned by a review of literature. Indeed, primary and secondary sources include international case law from international tribunals, treaties, academic books relevant to the research subject. It is important to note that international law is looked at as an exceptionally powerful language wherein issues, blame and liability, resolution and correctives are devised (Anghie and Chimni 2003:101). More to that, international law is an arena of controversy, and the discourse that is the outcome of such is not merely a way of advancing arguments, rather this has significant implications for how everyday people exist. (ibid.).

The chosen material consist of mainly discourse provided by high ranking serving AU Head of State officials, high standing AU officials, former Presidents, Vice Presidents, in either the Ordinary Sessions of the Assembly of the Union, official events, or in other official publications like the Union's Decision on Africa's Relationship with the International Criminal Court, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, UN Depositary Notifications. Moreover discourse provided by the Rome Statute and the UNSC Resolutions is of key value to this research. Given that the research pertains to discourse brought forward by international governmental organizations and their officials looking at them as actors, within these institutions, and not subjects, the thesis does not make much ethical considerations beyond what has been brought forward above in the philosophical section. Further, the thesis is investigating material that is readily available and that has been disseminated for public consumption, also the researcher is not herself involved in the production process in the sense of making interviews or any other empirical material.

The research is aimed at the relationship between African states and the ICC more so than the ICC and the larger world. That is to say the study does not make much mention of

the ICC engagement with other states or continents, and if so, it is done with comparison in mind so as to forward certain features of the relationship between the ICC and Africa. Moreover, this research project provides by no means an exhaustive historical, sociological, anthropological and psychoanalytical insights into the African post/colonial experiences. Also, building on generalizable arguments to *all* aspects of (post)colonial Africa, the international criminal law system and international criminal justice discourse is outside the range of the study.

However, the strength of the thesis lies especially in its quest to not only critically scrutinize leading security narratives by bringing forth the historically disregarded relations of the (post)colonial core to its rightful place in understanding the impact of international criminal justice discourse, but indeed to also establish the extensive impact of the postcolonial condition far beyond the institutions of ICC.

Additionally, it should not go unsaid that the thesis is aware of the mechanism of cultural oppression and psychological misery that African post-independence elite have actively appropriated in regards to the violent and exploitative security blueprint inherited from the colonial state, which the situation in Darfur illustrates (Mgbeoji 2003, 2006 in Appelthasuer 2016:250-3). This focus can perpetuate the silence of the voices of the African populace, given the many heinous experiences of the citizenry of the continent, civilians are often the biggest losers, which occurs on a multitude of levels (ibid.). Yet this is underpinned by a focus on investigating discourse in IR, meaning the study is about social significance and thus the emphasis is place on text by actors thought to be "*authorized speakers/writers of a dominant discourse … and so [they] could provide evidence of a discourse as a social background for meaningful disputes among speakers of the discourse*." (Milliken 1999:233).

All the delimitations steam mostly from time and space constraints.

Chapter 5

5. Analysis

This chapter lays bare the complaints forwarded by Africa, whether be it the AU, individual African states or other relevant personalities against the ICC. The AU's ICC Withdrawal Strategy does not unfold extensively the grounds for which African states should withdraw collectively, yet states heeding to this call have forwarded their motivation that is based on the concerns that the AU has been articulating in numerous resolutions, meriting its complaints to the Court. The AU has denounced what it deemed the political manipulation of the ICC, its neocolonial attitude and the double standard of the kind of justice that the ICC serves. More than that the Union has since taken a series of proceedings which seems intended to make the prosecution of African leaders before the Court ineffective and provide equitable implementation of ICL. The chapter first scrutinizes two of the grievances that includes; the view that the ICC has a double standard and is prejudiced against Africa; and whether the ICC is injurious to sustainable peace consolidation on the continent. Second, the chapter analyzes the many efforts propagated by the AU in pursuit of divorcing the two institutions to understand the sentiments that underpins AU's fight which took the shape of denunciation, withdrawals and threats to eject from this once widely supported institution.

5.1. Africa's bone of contention with the ICC

5.1.1. A double standard?

The understanding of the ICC as prejudiced against Africa is more than a decade old now, and has with time grown greater owing to recent threats of mass withdrawal by African states from the ICC and the amendments to the ACJHR (Domingo 2009; Scharf et al. 2011; Mammadov 2015; Johns & Werner 2008:; Ba 2017).

Of the various situations brought before the ICC, the larger part of these are placed on the African continent, that is ten of them, with recent cases in Colombia, Honduras, Republic of Korea, Iraq/United Kingdom and Bolivia that are yet to pass preliminary examinations (icc-cpi 2022). And thus, until recently, all cases brought before the Court for formal investigation or prosecution have had an Africa focus with an African individual being the persecuted, which has forwarded concerns that the ICC was negligent to actors from powerful

States who pardoned, abetted in or otherwise made possible the perpetration of the most heinous crimes (Spies 2021). Many African leaders and personalities at large have thus argued that this provides substantiation to assume that states on the continent are victims of a politicized and unjust Court (Gissel 2018; Labuda 2014). The double standard and asymmetrical operation of ICL is explained by racial inequality and imperialism (Manirakiza 2021:406; Lekkerkerker 2017). Moreover, the double standard argument has especially been accented by the remiss of the UNSC to refer other cases that might be of relevance to the Court, e.g. North Korea, Sri Lanka, Syria, Palestine, Iraq/UK, outside of the continent indeed because of political reasoning with states like Russia and China using their veto power to interdict a resolution meant to refer the situation of Syria to the Court given that the Syria is a strategic partner in the region (Manirakiza 2021:405-6). This finds rest with the directive of TWAIL, as it seems that Africa is caught in a continuous struggle of deconstructing and condemning the international criminal justice system in its current form (Anghie and Chimni 2003). Within the AU membership, there is a collective understanding that the IJ system is inequitable - with an excessive attention paid to Africa and aims for African leaders (Ba 2017; Manirakiza 2021; Spies 2021). This discernment is enlarged by the role and place dedicated to the UNSC, an institution that is looked at as missing legitimacy and aims to only safeguard the assets of major powers (Manirakiza 2021:406).

In 2005 when the UNSC adopted Resolution 1593 referencing the 'repair or restoration' of international peace and security under Art. 39 of the UN Charter, they obliged all states including non-Signatories to the Court (Jalloh et al. 2011:13). This proved to be controversial since sitting heads of states under IL normally enjoy absolute immunity from foreign criminal jurisdiction (Akande 2009:334), and given that usual immunity, it was argued that although cushioned in "repair and restoration rhetoric", the reasoning behind the resolution was much deeper (ibid.; Ba 2017; Manirakiza 2021; Lekkerkerker 2017). The Sudanese representative to the UN Mr. Elfatih Erwa at the time of meeting and adaptation of Resolution 1593 argued that: *"As long as the Council believed that the scales of justice were based on exceptions and exploitation of crises in developing countries and bargaining among major Powers, it did not settle the question of accountability in Darfur but exposed the fact that the ICC was intended for developing and weak countries and was a tool to exercise cultural superiority.*" (S/PV.5158 2005:12). This is important to note, in the case of Sudan "the spotlight has been on the Sudanese government while the role of other actors involved in the militarization of the preceding civil war has been largely overlooked" (Lekkerkerker 2017:13).

Verily, this sealed the Otherness of the AU and since brought forth a lavine of discourse vehemently insistent on the Court bias. In 2008 the attitude of the otherwise supportive AU, changed with then AU Chair Jean Ping as he advanced lamentation about the large amount of African indictees by the ICC while accessenting that the AU "*[is] not against international justice, "[but] It seems that Africa has become a laboratory to test the new international law*." (BBC 2008). In this vein referentially shaping the Court's action through a colonial lens as underpinned by the lack of legitimacy and instead foisted testing ground for power state. This resonated with Rwandan President Paul Kagame in 2008 as he argued that "*with icc all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak there is always some rope to hang you*" (Kezio-Musoke, 2020). He further referred to the Court as a "*fraudulent institution [...] made for Africans and poor countries* [saying that Africans] *did not realize what they were signing up for when they ratified the Rome Statute*." (Lamony 2017).

This was further echoed by then Rwandan Foreign Minister Louise Mushikiwabo noting the ICC as "*a political court*" and that Rwanda has "*never believed in its jurisdiction*" (Lamony 2017). The strategy of intensification, argumentation, predication and nomination is used here. The consequence of such is the characteristic which these two African officials are attributing to the Court, underpinned by fear of recolonization. Thus, the ICC is overtly shamed and named through language of imperialism and expropriations. There is a reference to the historical trajectory wherein Africa is made a playground for political experimentation barren of any consideration of its repercussions. Adding to this in 2013 another AU chair, then Ethiopian Prime Minister Hailemariam Desalegn pointed out that:"*African leaders have come to a consensus that the [ICC] process that has been conducted in Africa has a flaw," and "[t]he intention was to avoid any kind of impunity [...] but now the process has degenerated to some kind of race hunting*." (Laing 2013). Here he laments the 'racist' aspect in the practice of prosecutorial discretion that is underscored by an outlook towards black bodies and charged with neo-colonialism and neo-imperialism. And thus entrenching in the Courts fabric the malignancy of structural racism.

In similar vein, then Kenyan President Uhuru Kenyatta addressing the 2013 AU's Extraordinary Session grieved that instead of being a pharos of justice, the Court has transfigured into a means to forward the interest of the West. He advanced that the ICC "*stopped being the home of justice the day it became the toy of declining imperial powers.*

And has since been rendered; a painfully farcical pantomime, a travesty that adds insult to the injury of victims" (Kenyatta 2013). This was reiterated as he denounced the Court postulating that "*We would love nothing more than to have an international forum for justice and accountability, but what choice do we have when we get only bias and race-hunting at the icc*?"(Kenyatta, 2013). And reminded his peers that *"[t]he founding fathers of African Unity were conscious that structural colonialism takes many forms, some blatant and extreme, like apartheid, while others are subtler and deceptively innocuous* [...]" (Kenyatta 2013). Against this same backdrop, Ugandan President Yoweri Museveni, deplored that he had at the outset backed the Court, but argued that "*they have turned into a vessel for oppressing Africa again so I'm done with that court. I won't work with them again*" (Miriri 2014). The latter brings forth the use of the discursive strategies of nomination, predication, argumentation and framing. The discursive strategy of nomination is especially prevalent in Kenyatta's construction of the place of race at the ICC. This is bound to discursively qualify the Court as engaged in the complex process of racial production, an institution that otherwise cushions itself as spearheading the global justice movement and fights against extreme forms of discrimination. The strategy of augmentation is indeed also to be found in Museveni's point justifying his claims of truth to not cooperate with the Court going forwards on grounds of neocolonialism.

Furthermore, is the UNSC insistent on the asymmetrical practice of ICL as the case in point, referring to the Sudan and Libya Resolution (Resolution 1593 of Sudan and Resolution 1970 of Libya), that methodically kept citizens of state, in particular military personnel of involved states, outside of the jurisdiction of the ICC, apart from those referred to in the Resolution (S/Res 1593 2005:6; S/Res 1970 2011:6). In this context of commenting on the resolution then US representative to the UN Mrs. Patterson remarked that the US had no objection to the Darfur resolution arguing that *"[w]e decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties*" (S/PV.5158 2005:3). And so, it seems that US backing of the Court is only in readiness "when it advances US interests, in exchange for which the ICC avoids prosecutions that the US might oppose" (Branch 2017:32; Bosco 2014). Calling a shovel, a shovel, it seems that, had Resolution 1593 been underpinned by equitable measures in the sense that it called all prospective international criminal suspects, the US might have interdicted. This further feeds

the assumption of the double standards given that the Court paid no minds to query the lawfulness of the exemption from the situations referred to it, and addresses the issue of the marriage between the Court and the UNSC in terms of the ICC's indebtedness to the Council when heeding to the Council's referral or if they have discretionary power to pass on situations brought before them by Art. 13(b) and 16 of the Statute (Manirakiza 2021:405-7). And so it seems that maintaining the AU's ontologically insecure is essential for sustaining US superiority - it revels in its status as superpower and now bends international law to explicitly imperial practices (Anghie 2005:274). With the above in mind, the referral of the situation in Sudan and Libya brings to question if an institution that in essence is contoured by such geopolitical dynamics ever will mirror the demands of law or justice by and large or if the UNSC will continue to mediate the self-interest of its perennial members (Sreenivasa 2008:102).

More to the point on the US, Resolution 1593 on Sudan mentions "*the existence of agreements referred to in Art. 98-2 of the Rome*" (S/Res 1593 2005:4), which are the "bilateral" arrangement between the US and various nationals, as well as ICC signatories (Jalloh 2017). Consistent with Art. 98(2) rooted agreements, Rome Statute parties cede to not extradite US nationals to the Court if warranted - this mention koshers these otherwise illicit agreements that can be deemed dictums of non-cooperation (Jalloh 2017:191). This showcase the exclusion and inclusion of African states in the creation of the ICC identity in relation to powerful players like the US. Within the prism of the postcolonial condition, IL is both inclusive and exclusive - its laws have consistently excluded its colonial Other from its classification of protection (Megret 2009:1).This forwards abundantly the strategic bending of the Court within the UNSC to the will of greater powers and in situations where the ICC jurisdiction is foisted on them, they employ their veto option to inoculate themselves and their affiliates from the extent of the Court, a discretion not present to Africa and other peripheralized states (Manirakiza 2021:405-7; Harrison 2001; Okafor and Ugochukwu 2014).

Heeding to the AU's call of a collective withdrawal from the ICC, the withdrawing State Burundi, and those who intended withdrawal, here referencing Gambia and South Africa (SA), stationed their decision in the same disquiet of prejudice and selective justice contoured by geopolitical dynamics of the UNSC, and in some measure, the discordance of international norms (Manirakiza 2021:405-7). Although SA and Gambia retired their notice of withdrawal, the former under the decision of the Gauteng High Court, and the latter subsequent to the 2017 change of government. The Burundian Minister of Justice, Aimée-Laurentine Kanyana

justified their withdrawal in the name of securing Burundi's sovereignty and independence, given that "*Burundi ratified [...] with the main objective of promoting and protecting human rights. [Albeit the] ICC has become an instrument of pressure and destabilization for poor countries*." (Uwimana 2016) and more to that the Court is directed by "superpowers some of whom have not even ratified the Rome Statute" (Nahimana 2016).

Kanyana here employs the strategy of predication aiming to discursively qualify the Court and its dealings negatively. More to that she justifies Burundi's withdrawal as the normative right course of action given ICC subjugation and destabilization of poor states. This strategy in the context of a state that has consolidated their withdrawal is huge blow to the Court's discursive construction given that it is harder to refute accusation of structural racism and colonialism in a situation where a pledge to anti-racist universal jurisdiction necessitate systemic exertions to undermine racist structures rather than simply calming a by and large denial of the existence of inequality. In the same fashion, in 2016 SA reasoned their attempted withdrawal arguing that "*[t]here is [a] perceptions of inequality and unfairness in the practice of the ICC that do not only emanate from the Court's relationship with the Security Council, but also by the perceived focus of the ICC on African states, notwithstanding clear evidence of violations by others.*" (SA Withdrawal Depository notification 2016:2). They further called to question the deepening cleft of legitimacy underpinning the mores of the Court saying that "*the ICC will persist so long as three of the five permanent members of the Security Council are not State Parties to the Statute*." (SA Withdrawal Depository notification 2016:1). In the case of the Gambia, as he served Gambia's declaratory notification on withdrawal from the ICC, the then Minister of Information & Communication Mr. Bojang explained that "[*t]here are many Western countries, at least 30, that have committed heinous war crimes against independent sovereign states and their citizens since the creation of the ICC and not a single Western war criminal has been indicted*" (Aljazeera, 2016). He further reasoned for the attempted withdrawal project saying that it "*is warranted by the fact that the ICC, despite being called International Criminal Court, is in fact an International Caucasian Court for the persecution and humiliation of people of colour, especially Africans"* (ibid.).

Both SA and Gambia are seen using the strategies of augmentation, predication and intensification. SA especially rooted their attempted withdrawal in unfair treatment of African states by the Court and indeed the UNSC a relationship which it discursively argues is meant to negatively affect the courts predictions on the continent going forward. Similarly, but more overtly, Gambia's predication and nomination of the Court as a "*Caucasian Court*"

is meant to discursively construct and qualify the ICC as one that is racially biased and selective in its deliverance of justice. Towards this, Mr. Bojang justifies Gambia and Africa states at large normative truth claims of righteousness and emancipation.

Other high-profile African personalities have voiced the same concern, for example late Archbishop Desmond Tutu, with regards to former Prime Minister Tony Blair and President George Bush, in condemning the disproportionate implementation of IL that licensed that "*Robert Mugabe should go the International Criminal Court, [but] Tony Blair should join the international speakers' circuit, bin Laden should be assassinated, but Iraq should be invaded, not because it possesses weapons of mass destruction, [...] but in order to get rid of Saddam Hussein" (Tutu, 2012) questioning* " [o]*n these grounds alone, in a consistent world, those responsible for this suffering and loss of life should be treading the same path as some of their African and Asian peers who have been made to answer for their actions in the Hague*." (ibid.).

Maintaining identification with the UNSC, then ICC Chief Prosecutor Fatou Bensouda sacked these allegations arguing that rather than geopolitics, she is directed by the law and evidence (Eze 2014:74-77). She also made known that the majority of the situations presented before the Court came about by self-referral by the concerned State parties selves (BBC 2012). And yet, some have argued, that the quickness of the Prosecutor to undertake those investigations, conjugated with unilateral query and selective prosecution, subvert the merits of the enterprise - more to that situating the institution in the context of international criminal law and the international justice project, against the scenery of the postcolonial condition, the arguments questioning the systems applicability not just for Africa but all non-western at large seems salient (Ba 2017:46-50). The underpinning ontology of this is a positivist jurisprudence, such is negligent to colonialism since colonialism was not a feature among sovereign "equal" entities - a precedent that merited conquest and dispossession (Ba 2017). Bensouda's argument as such seems devoid of the larger normative framework that governs the structures and mores of IL. This positivistic approach is also devoid of contextualization of consent within a larger normative framework, such outlook does not grasp the structures and practices that perpetuate oppression and patriarchic IL regulations (Anghie and Chimni 2003:98). The negligence to the political aspects of international norm-setting, reading and implementation, Bensouda trope a classic positivistic tale that pays no mind to the layered ways whereupon "consent" can be extorted from the weak Third

World beings (ibid.). More to that, it lacks an understanding of how a few 'domineering' states can obstruct actions that serves the larger international community as seen in the US "bilateral" agreements and the vetoing by China and Russia of the Resolution on Syria that would refer the situation to the Court (Anghie and Chimni 2003:98; Manirakiza 2021:405-6). The prism of the postcolonial condition is alive here as criminality of US intervention in Libya or Russian and China in Syria is allowed to be free by the ICC who either does not have the determination or resources to take on such breaches of ICL and human rights transgressions (Ba 2017:56).

5.1.2. Justice or Peace?

The second contention point forwarded by African states and especially the AU in disagreement with ICC practices, is the contention of destabilization, advancing that the Courts excessive focus on the continent compromises peace processes which at large confines the continent within a cycle of wars, violence and (in)security (Du Plessis 2010).

Prior to the becoming of the Court, international criminal justice underpinned by ad hocism, intervened post-conflict, that is in the shape of tribunals like the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia. And yet, as was argued in the creation of the ICC, these ad hoc tribunal fell short in permanence and universality given that their primacy was national rather than universal (Ba 2017:56). In the wake of these ad hoc Courts, similar arguments was forwarded in terms of the failure of the international criminal justice enterprise to bring Western coalitions within arm's length, with then prosecutor of the 1999 NATO Serbia bombing campaign, which is largely viewed to have surpassed the limits of international humanitarian law and forwarded more than five-hundred civilian casualties (Koskenniemi 2002), arguing that "[...] *it was impossible to investigate NATO, because NATO and its member states would not cooperate with [the tribunal]. They would not provide us access to the files and documents [...] I had collided with the edge of the political universe in which the tribunal was allowed to function*" (Del Ponte 2009:60). Such are illuminative of what TWAIL argues as it pertains to colonial legacies and imperial interest, which remains alive in the praxis of IL. This says much about the postcolonial condition in regards to how IJ facilitates that the crimes of the Statue are perpetrated by certain people, read Third World, and those are the one that IL is seeking to govern (Ba 2017:52). And so, the West is vindicated from the ability to facilitate heinous

crimes of this nature (Grovogui 2015:104). The legitimacy of the Court is thus tested by its ineptitude to at least create the impression that the positivist notion which it rests on can also allow the West to be perpetrators of crimes as stated in its Statute (Struett 2008:165). The interpretation that can be yielded from this is the patronizing assumption that Third World states lack the proficiency and means to attend to crimes on the scale of mass atrocities, while international courts are pointless for developed and powerful states since their domestic judiciary body are not only proficient but there is a willingness to deal with crimes of these nature (Ba 2017). And so it appears that the Court is only appropriate for "unwilling" Third World People (ibid.).

And yet it was hoped by many African states that the ICC would usher in a paradigmatic shift, indeed in its near universal jurisdiction, permanence and mandate to intervene amidst conflict. Yet especially in reference to the Darfur situation - it has been argued that beyond the double standard of the Court, the ICC work on the continent is strenuous to peace processes (Du Plessis 2010). Preceding the issuance of the Al-Bashir warrant in 2009, the decision-making organ of the AU for the prevention, management and resolution of conflicts, the Peace and Security Council (PSC), petitioned for a twelve months deferral by the UNSC according to Art. 16 of the Statute, arguing that such would: "*allow the Council, under its primary responsibility for the maintenance of peace and security, to set aside the demands of justice at a time when it considered the demands of peace to be overriding*. *If the suspension of legal proceedings against a leader will allow a peace treaty to be concluded, precedence may be given to peace. [...] Any suspension of the proceedings is only temporary*." (Cryer 2010:170). A query that was unheeded by the UNSC. The AU denoted deep concern "t*hat the request by the African Union to the UNSC to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the icc, has neither been heard nor acted upon*." (Assembly/AU/Dec.245(XIII) Rev.1:9). Here we see the AU make use of the strategy of perspectivation to situate itself as involved in sustainable peace consolidation on the continent that the Resolution 1593 is positioned as undermining. The strategy of argumentation is also employed towards accenting the AU's normative truth of rightness that it is the AU that is dedicated to ending the suffering of the citizenry of the continent and that their flexibility allows peace to precede.

In lieu of this the AU decided given "[...] *that the request by the African Union has never been acted upon, the AU Member States shall not cooperate pursuant to the provisions of*

Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan" (Assembly/AU/Dec.245(XIII) Rev.1:10). The strategy of intensification is then used to firstly aggravate the Court/UNSC inaction as it appertains to sustainable peace consolidation on the continent given the AU's many request for deferral that remains unanswered or at least taken serious, and secondly to justify what is deemed as normatively right which is the dictum of non-cooperation. And in 2010 then AU Chair, Jean Ping, argued that: *"[w]e have to find a way for these entities [the involved parties in Sudan] to work together and not go back to war,"[...] This is what we are doing but [former Chief ICC Prosecutor] Ocampo doesn't care. He just wants to catch Bashir. Let him go and catch him [...] We are not against the ICC. There are 30 African countries who are part of the ICC [...] But we need to examine their manner of operating*." (Sudan Tribune 2010). Ping discursively employs intensification, the aim of which is to intensify the illocutionary dictum of non-cooperation issued by the AU, and thus accentuate the epistemic force of the AU decision. More to that the strategy of argumentation and perspectivation underpinned the above to firstly establish the Union's involvement in peace furtherance on the continent, discursively justifying their righteousness claim that follows that the ICC, and especially Ocampo, is too rigid in their pursuit of what the AU deems as non-constructive and incentive application of IL.

This grumble went beyond Sudan, given that President Museveni of Uganda in lieu of the Juba peace negotiation with the rebel groups, Lord Resistance Army , and weary that the issuance of warrants would put at stake these negotiations, appealed for the Court to dismiss indictments against the rebel group (Nouwen & Werner 2010). Such was left unattended - and as a consequent, as foreseen, the group hightailed the peace talks and would only return as far as warrants were out of the picture (Schaefer and Groves 2009). With no possibility of amnesty and the imminent presence of prosecution by a judicial body larger than the national judicial system, the process was damned (Mamdani 2005). In the same vein, during the Libyan War, with the military intervention in Libya, the UNSC approved a no-fly zone on 17 March 2011, the Prosecutor promptly issued an warrant for Colonel Muammar Gaddafi - a decision that proved to be mistimed since the AU was in the midst of negotiation to halt the war, given credence to AU's grievance that the criminal justice enterprise on the continent complicates sustainable peace consolidation and in some instances deepens strife (Hayner 2013).

In similar vein, in regards to the Kenyan case, the AU accented that the novel warrants for President Kenyatta and his Deputy Ruto posed a threat to the: "*sovereignty, stability, and peace in that country and in other Member States as well as reconciliation and reconstruction and the normal functioning of constitutional institutions*" (Ext/Assembly/AU/Dec.1 2013:5). Furthermore, the AU reminds the ICC of Kenya's part as "*a frontline state in the fight against terrorism at regional, continental and international levels [...] the proceedings initiated against the President and the Deputy President of the Republic of Kenya will distract and prevent them from fulfilling their constitutional responsibilities, including national and regional security affairs*" (Ext/Assembly/AU/Dec.1 2013:6). In both cases, the AU through its member states, Kenya, Uganda, underscore the larger continental efforts towards effective security governance and the application of a sensitized ICL regionally, stressing involvement by the strategy of discourse representation and predication. Essentially, taking a dig at the Court for not recognizing the many efforts of the AU and further qualify the Court as one that is not truly dedicated to peace consolidation on the continent or at large. The illuminated contention has indeed charged the ICC legitimacy - African grievance towards the Court; whether the Court agrees with the Union and its many personalities; if they are 'real' or imagined, they undoubtedly have been brought to life. As such the AU continues to stress that "justice and reconciliation [...] are inextricably linked and should therefore be approached, conceptually and procedurally in an integrated manner[...] (PSC/AHG/2(CCVII) 2009:16). The point is in an imperfect world international law must be applied with caution and care for the imminent aims of peace, security and stability and not just with an insensitive pursuit of justice and accountability because the AU "attempts to prosecute [...] might put the search for peace [...] at risk, prolong the suffering [...] and destabilise [...] the region" (PSC/AHG/2(CCVII) 2009:242). Selective, harsh, insensitive, Afro-centric operation by the UNSC is guaranteed to aggravate a collective African resistance as shown above (Spies 2021:431).

5.2. African Solution to African Problems - Africa's 'Collective' Way

As such we find ourselves questioning the aim of the AU project 'African exodus and amendments to the Statute of ACJHR (Malabo Protocol)' in pursuit of emboldening the regional Court with an International Criminal Law section (Omorogbe 2019; Rossi 2018). As it stands, the 'Third World' is caught in a perpetual fight for an inclusive and egalitarian international system - the geopolitical reality of today has it so that the struggle for an

egalitarian system continues. As a result, the AU is demanding an independent and truly unbiased institution that thoroughly reviews situations that are underlined by cases of continuous impunity of international evil deeds to come within its effectual jurisdiction (Manirakiza 2021; Spies 2021). As such, the underlying sentiments of the AU and its member states as it pertains to the ICJ enterprise, which the ICC is the manifestation of, is that IL is in need of a refurbishment to mirror the goals of the people rather than a selective few powerful states (Anghie and Chimni 2003:92).

The AU as the organizational body of the continent for a multitude of issues including security, peace and stability, is the mediator of many strife-torn States towards sustainable peace consolidation (Manirakiza 2021). The continent has committed to expanding the jurisdiction of the ACJHR to create an African Criminal Court to bring within the region's jurisdiction the most heinous crimes of International and African law (Manirakiza 2017). In a world contoured by geopolitical selectivity, this ambition denotes the AU and its Members pledge to root out impunity and serve justice, peace and stability as a concerted effort, and yet concurrently, this pledge is threatened by the wait on ratification fledge out the dream of 'African solutions to African problems' (Omorogbe 2019; Manirakiza 2021; Spies 2021; Nimigan 2021). The adoption of the Malabo Protocol has forwarded discussion in the context of regime complexes, which is how two or more institutions bisect around their main objectives and pursuit (Sirleaf 2016:699). It is argued that the strife between the two institutions indeed questions the Court's merits and legitimacy which in turn has opened space for regional creativity (ibid.). Murithi (2014) contended that the continental organ understands its relationship with the ICC as one that is riddled with contention, and so it is on the lookout for new ways to substantiate "*the Court's presence in Africa an irrelevancy in the future*" (ibid.:189). Knottnerus and de Volder underscore (2016) that "*the Protocol has express value [...] even if the Protocol will not enter into force [...] its adoption matters, because it articulates a regional vision on the future of international criminal justice*." (ibid.:377-378). It is argued that the Protocol "*offers the Continent an important, alternative vision of regional criminal justice [...] the regional court could arguably tailor criminal accountability to the context, needs and aspirations of the Continent*" (Sirleaf 2017:71).

As such the Protocol in lieu of all that is presented above can be seen as yet another remembrance of the rooted inequalities. Both the withdrawal project and the Malabo protocol shows us the political mobilization and organization to voice and advance the needs that are fundamental to ensuring broadening and propagating political inclusivity and socio-economic equality (Harrison 2001:387). They send a strong political message questioning the frailty of

the ICC and its provisions. Attending to crimes that are direct remnants of the structural inequality rooted form colonialism, underscores Ba's point that "the postcolonial condition is the one in which the globally disenfranchised navigate the international justice system, which still consecrates the West as incapable of committing criminal acts." (Ba 2017:44). The propositions can thus be seen integrated in discourse that call for 'African solutions to African problems' and situates Africa's upset with the praxis of ICL in the pursuit of Africa-led and Afro-centric alternatives (Nimigan 2021).

However, the development towards actualizing the pledge questions the seriousness of African states, since in the eighth year of its existence only fourteen States have ratified the Malabo Protocol, with Morocco being the latest as of June 2022, that meagerly requires twenty-eight countries to ratify it into force (PAP 2022). Although the Union aimed for African exodus after setting forth all the ailments and injustices that the system continues to foist on Africa, the practice has taken a different turn. In place of a mass exodus from the Court, African State parties to the Rome Statute at the direction or compulsion of the AU tails a reform program geared towards restructuring the Court's legal and institutional system (Manirakiza 2021:413). As it pertinent to the legal regime, the AU has suggested amendments to a number of provisions of the Rome Statute (Art. 16) and the Rule of Procedure - the former amendment was instigated by SA so as to allow the UN General Assembly to defer situations from the Court in situations where the UNSC fails to act on its responsibilities within a period of six months (Manirakiza 2021:413). Another instance of the AU reform attitude is the proposal by Kenya to amend the Rule of Procedure which would allow a defendant to be represented by counsel during their trial (Tladi in Jalloh 2017:175-9).

In so doing, the AU aims for a non-withdrawal approach concurrently with then SA Minister of International Relations and Cooperation substantiating that "*We are discussing our own situation and reviewing [...] that we are actually better off in the icc to transform it from inside rather than standing outside and hurling a whole lot of expletives from outside*." (Manirakiza 2021). At large, the UNSC and Court's callousness to the primacies of Africa, the Union is concurrently in pursuit of a reform agenda of the international criminal justice regime - to truly make it live up to its promise of "never again" (Tladi 2014:2; Manirakiza 2021).

Chapter 6

6. Discussion

The uncertain state of ICJ's ontological security has not gone unnoticed - the field exists in the betweenness of a thick air of layered anxieties all from becoming and being, to the fear of dissolution and death (Megret 2016:197). The previous chapter has revealed the frailty of the Rome Statute regime which makes the Court readily available to follow along the lines of geopolitical dynamics, in particular being made to do the biddings of perennial members of the UNSC. Africa's turn from support to critique has noted what is already intricately aggravating the project of ICJ from within (ibid.). So the question that this points to: Is if international law and by extension the ICC, perpetually in a state of crisis - have a part to play in continuing its issues rather than the answers to these?

The Court whose becoming was thought of as a 'messiah'; birthed in the spirit of "never again" is perpetually troubled given its current functioning. What is perennially challenging the Court is the anxieties of the ICL and the ICJ project which appears as an instrument of the powerful, bended to their will; an allegation that threatens to undermine the legitimacy of the justice project as a whole (Megret 2016:201). In this research project, it was found that the conduct of the ICC and by extension UNSC has proven that IL in essence is a case of interpretation by which the ontological apparatus of the court is subjective to larger international principles, and the 'international compliance scheme' whereby the founders of European principles such as human rights, democracy, peace and freedom, also with the development of the international system have been coined 'international' principles, are on a quest of expanding these to the rest/periphery; seen to be in need of training from their immoral and violent nature (Anghie & Chimini 2003). These are under ICJ framed as the will to 'serve and protect', while providing peace and stability to referred countries and its populations. What lies behind the undermining of legitimacy within ICJ is a matter of how agents are shaped by the norms which IL represents. In this sense, the troubling dynamics that constructs inactions is based on the interpretation of law and the underlying interests, as well as compliance of its actors. Therefore, the case shows that the elasticity within IL creates a hierarchy of value in the sources of law determined by what is most beneficial for the actors utilizing it.

Yet, the concept of Otherness which has been a central concept for this research project also reveals a contention in this basic argument within the foundation of IL and its basis on the rule of law. This is seen in what earlier was argued to be within the process of integration of the Global South into the larger international system, yet what this investigation makes evident is that the concept of Otherness is a pre-existing notion in the ontology of ICJ and ICC operations through the interaction between 'referer' and 'referred' as it builds on the compliance scheme. In this sense, IL is determined by major players who inferred and overtly categorized them as subservient, and the ontology of which induced a feeling of insufficiency and being without (Hönke and Müller, 2012).

The referred countries are put in a position of needing management which highlights that ICJ is nothing more than normative in which IL presents itself as a vessel for power-pooling rather than a justice project. Hence, the legitimacy which African countries are seeking by becoming part of the ICC were never on their premise (Jabri 2012, 2016). This begs the questions of who ICJ is actually for, and to what extent the apparatus of international human rights were meant to cover and has the ability to expand its full purpose to the colonies? This investigation further showed that ICJ presents itself as being unfit to take on newer norms such as 'leave no one behind' when the historical genesis of its creation never has been addressed nor contested by the powerful players, who are also those setting the playing field on the international arena.

For ICJ to gain its full potential requires the undoing of colonialism within IL and calls for a decolonial process of the system, the latter being the process whereby the power to shape and construct is given to those who have since its creation been peripheral. Therefore, the current set-up of the international arena in essence are instruments of power in that they give forth the power dynamics in the system and can be expected to keep such in existence as they are to enhance them rather to protect the rights of all (Zarakol, 2011:15-17), also the reason for why no UNSC permanent member have been referred as they are not entities in need of training, nor management, which shows an inherent ontological inequality and creates a parent/child dynamic within IL rather than sovereign, individual states who must be held accountable for their actions; a condition constructed by the colonial legacies, and points to the fact the ILL never evolved its framework, and perpetually became neo-colonial under-way trickling onto the ICC.

The AU's grievance about the courts functioning has indeed brought to our attention serious institutional frailty especially in regards to inconsistent judgment on layered legal problems pertaining to head of state immunity; non-corporations; and verily the politicization

of the Court by the UNSC regarding their referrals to uphold ICC arrest both for signatories to the statue and non-signatories - all of which must be attended to in lieu of perennially sense of crisis and ontological (in)security. These weakness has doom the Court credibility as a project of justice ordering a disunion between the ICC, the AU and various African member states - laying out the trajectory of the AU denouncement and pursuit to reconstruct an egalitarian legal regime has illuminated cyclical points of contention that must be attended to for effective resolution to play out. This is a privileged moment since it offers an opportunity to avoid the anxiety-inducing "return of the repressed" for both the Other and master Self. The AU's pursuit to (re)gain larger Pan-African backing for the Court, an imperative aspect to urge non-Signatory African states to contemplate endorsing the Court, contributing to the advancing of IJC at large on the continent. This pursuit indeed serves the Court with an opportunity to estimate the acceptance of ICJ norms underpinning the Statute, notably as it pertains to the immunity afforded to sitting heads of states of non-State Parties indicted regarding the UNSC.

The key takeaway is the prioritization of localized/national political concerns in various African states following AU dictum of non-cooperation in regards to arresting Al-Bashir when he visited them. The AU's emphasis repeated employment of human rights and transitional justice discourse as they establish their normative truth claim for noncompliance with the ICC - underscoring "sustainable peace consolidation" and "reconciliation and reconstruction" is aptly in accordance with the pursuit of transitional justice and the internalization of international human right norms, while emphasizing the need for "African solutions to African problems.".

And yet the latter part of the discussion shows us the AU's intention for streamlined merging of ICL instruments - that is even if the development is characterized as essentially anti-ICJ or anti-ICC. The insistence on the values of ICJ that gives credence to the operationalization of the ICC on the continent counter this. It is submitted that the AU is aptly categorizing how non-cooperation with the Statute is what is needed to reach the larger goal of the international criminal justice enterprise which the ICC is an extension of. If anything, it is argued that the intersection and reflexivity of the Other in regards to readings of ICJ might provide grounds for the becoming of the Court on the continent without perennial sense of crisis and anxiety.

Conclusion

In answering the main research question “What are the implications of the contentious provisions and structural shortcomings of the Rome Statute legal regime and institutional order on the becoming of the International Criminal Court?” This research project has sought to argue that the practice of ICJ at large is underpinned by a history wherein IL has been a device that allows the powerful state of the West to outlaw activity and conduct of the Other while fabricating a structure that permits its own action. The analyical empahsis on the Courts interaction on the continent and the critique tha has followed the idea that norms can diffuse asymmetrically is essential in this context. There appears to be two plausible conclusions with respect to AU-ICC relationship: either the proliferation of the norm of noncooperation and a move to national/regional institutions to better attend to ICL in the name of an African solution to African problem; or proper negotiation between the Court and the AU pertaining key areas of contention indeed about the UNSC part in ILC and the meaning of Art. 98. The role of the UNSC pointed to the proliferation and cementing by discursive strategies the demands and responsibilities of state conduct when engaging with the Court.

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