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**The Contention between Africa and the International Criminal Court:
Withdrawals, Justification, and Impacts on the Court**

By: Desalegn Yehouala

Addis Ababa

January 2018

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**Thesis Submitted in Partial Fulfillment of Master of Laws Degree (LL.M) in Public
International Law**

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Addis Ababa

January 2018

Declaration

I, the undersigned, declare that this thesis is my original work and has not been presented for a degree in any other university and that all sources of materials used for the thesis have been appropriately acknowledged.

Desalegn Yehouala

January 2018

Conformation

This thesis is submitted for examination with my approval as an advisor to the candidate.

Wondemagne Tadesse (Dr.jur.)

January 2018

Dedication

Dedicated to my late brother Amanuel Yehouala

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Above all I would like to thank God for giving me the patience and determination to accomplish this work. I also wish to express my special thanks, sincere gratitude and deep appreciation for my advisor Dr. Wondemagne Tadesse for his continued input and encouragement, dedicated supervision, guidance, helpful suggestions and constructive criticisms offered throughout the study. It was a privilege to work under the guidance and the invaluable assistance of him in the course of completing this thesis. The academic and professional spirit he demonstrates will inspire me in my future life and career.

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List of Acronyms and abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AUPSC	African Union Peace and Security Council
CIL	Customary International Law
CICC	Coalition for the International Criminal Court
CSO	Civil Society Organizations
ECOWAS	Economic Community of West African states
JHSS	Journal of Humanities and Social Science
RECs	Regional Economic Communities
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IHRL	International Human Rights Law
IMTFE	International Military Tribunal of the Far East
IMTN	International Military Tribunal at Nuremberg
IOM	Independent Oversight Mechanism
ISS	Institute for Security Studies
NGOs	Non-Governmental Organizations
OTP	Office of the Prosecutor
SADC	Southern African Development Community
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties

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Abstract

The International Criminal Court (ICC) is the first permanent treaty based international criminal court, governed by the Rome Statute, established in 2002, intended to end impunity for the perpetrators of the most serious crimes of international concern: the Crimes of Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression.

The Role of African States and Civil Society Organizations in the formation of the ICC were so great and they contributed much to the preparations leading up to the diplomatic conference in Rome at which the Statute of the ICC was concluded. Over the years, however, the relation between the Court and Africa changed and African states positions shifted from support to the ICC to hostility resulting in accusations of selective justice against Africa.

However, various complaints have been directed against the Court from within Africa: complaining that the ICC is a hegemonic tool of western powers which is not independent and it is an institution targeting or discriminating against Africa focusing only on Africa that undermining African efforts to solve its problems. As a result, the AU has adopted a hostile stance toward the Court and has called for its member states to implement a policy of noncooperation with the ICC.

With this in mind the paper critically examines the contention between African States and the ICC, the reasons for African states withdrawal and its viability and impact upon the Court, primarily by examining Africa's contribution to the creation of the ICC and by assessing the current state of play of Africa and ICC relationship. Then, the paper will examine the justifications invoked by African states to withdraw from ICC and analyse whether the allegations are justifiable. The research also examined the legal framework of withdrawal from ICC and the possible impact of the calling for withdrawal by African states.

Based on this analysis this paper concludes indicating possible ways to ease the growing tension between Africa and ICC and recommending possible course of actions to be followed by African States and the ICC that it is important for all the stakeholders in the justice process to look at the fight against impunity as their main objective and withdrawing from the Court is a loss for the victims of grave crimes and for the Court itself. Also, mass withdrawal from the ICC will hurt Africans more than the ICC because with the highest incidence of systemic and human rights violations globally, Africa, more than any other continent, needs the ICC.

Key words: Africa, ICC, Withdrawal

Chapter One

Introduction

1.1. Background of the Study

In response to commission of “heinous crimes”¹ in the territory of the former Yugoslavia and Rwanda, the United Nations Security Council (here after UNSC) established an ad hoc tribunal for each of these actions which had the greatest effect on the decision to call the conference which established the International Criminal Court (ICC) in Rome in 1998.² This development concluded in the establishment of a permanent court, the International Criminal Court (here after ICC or the Court)³ which is the first and the only permanent international institution established by a multilateral treaty for the purpose of investigating and prosecuting individuals accused of the most serious crimes of international concern listed under the ICC Statute.⁴

In July 2002, the Rome Statute of the ICC came into force⁵, and marked an important occurrence in international criminal justice that would hold accountable those responsible for gross violations of human rights and international humanitarian law.⁶

Thus, during the Rome negotiations for the creation of the ICC, the representative of the then Organization of African Unity (OAU) remarked that Africa has a special interest in the establishment of the ICC and strengthening the determination of Africa to support ICC⁷ for the fact that for centuries its people had suffered human rights atrocities such as slavery, the injustice

¹ As per Article 5(1) of the Rome Statute, ICC has jurisdiction over War crimes, Crimes against Humanity, Genocide and the Crime of Aggression.

² Makau Mutua, “The International Criminal Court in Africa: challenges and opportunities”, Norwegian Peace building Centre, Noref Working Paper, (2010), P.1-7; see also International Criminal Court, “Understanding the International Criminal Court”, (2013), The Hague, The Netherlands, P.1.

³ Philipp Kastner, “Africa-a fertile soil for the International Criminal Court?”, Journal of International Peace and Organization, Die Friedens-Warte, (2010), PP. 131-159.

⁴ Executive council; Thirty Ordinary Session; 22-27 January 2017, Addis Ababa, Ethiopia, Progress Report of the Commission on the Implementation of the decisions of the Assembly of the African Union on the International Criminal Court, EX.CL/1006(XXX) Rev.1 A

⁵ See MakauMutua, cited above at note 2, P. 2

⁶ Max du Plessis, “The International Criminal Court that Africa wants”, Institute for Security Studies, Pretoria, South Africa, Rematai Nathi Printing, (2010), P.6.

⁷ Alebachew Birhanu Enyew, “The relationship between the International Criminal Court and Africa: from Cooperation to Confrontation?” Bahir Dar University Journal of Law 3(1), (December 2012), P. 110-112

of South African apartheid, the long anti-colonial struggles against European imperialism, and other terrible acts of war and violence which continue to exist despite the continent's post-colonial phase.⁸ These facts provoked feelings of indignity and anger that were tied to the inaction of the international community.⁹ With these realities in mind, the various leaders of African states initially saw the ICC as an inspiration of freedom and a solution for their continent's injustices.¹⁰

Thus, the African states played a great role in supporting the realization of the Court and this has been mirrored in the fact that Africa has the highest regional representation to the Rome Statute.¹¹ As of 27 October 2017, 123 states have ratified or acceded to the Rome Statute. Burundi had ratified the Statute, but withdrew effective 27 October 2017. Thus, 33 of States parties to the Rome Statute are Africans. The African region played a great and active role in the realization of this Court.

But, later from the cases that all accused persons presented before the Court were Africans has raised speculation and suspicion about prosecutorial justice.¹² Growing number of African states begun to see these patterns of only pursuing African cases and started to question ICC's independence and impartiality.¹³ Further, African governments have raised many objections to the way the ICC is run and made claims about the independence of some of the Court's organs, including the Office of the Prosecutor.¹⁴ These accusations have led to progressively worsening

⁸ like the Rwandan genocide; see Jonny Makhatini, "Diplomacy for Democracy", The Department of International Relations and Cooperation (DIRCO), Diplomatic Training, Research and Development, (2012), P. x.

⁹ See Philipp Kastner, cited above at note 3, P.3

¹⁰ Uchechukwu Ngwaba, "The ICC, Africa and the travesty of International Criminal Justice", Casade Council on African Security and Development, (2015), P.1-2.

¹¹ See Max du Plessis, cited above at note 6, P. 7. See also the Rome Statute of the International Criminal Court, see also the 67th ordinary session of the council of ministers held in Addis Ababa, Ethiopia, cm/ Dec.399 (lxvii), (25-28 February 1998); African Commission on Human And Peoples' Rights, resolution on the ratification of the treaty on the international criminal Court (1998), ACHPR/ res.26(xxiv) 98 (31st October 1998)

¹² Cole, Rowland J. V, "Africa's relationship with the International Criminal Court: more political than legal", Melbourne Journal of International Law; Academic Journal, Vol. 14 Issue 2, (2013), P.670

¹³ Christopher Torchia, South Africa's move on ICC raises concerns of African exodus, UNICEF, (2016), available at: (<http://bigstory.ap.org/article/89f2f64bacc34073aee7aa22adf0de30/south-africa-withdraw-international-criminal-court>).

¹⁴ Allan Kibet Cheruiyot, "How the International Criminal Court (ICC) has failed in Africa"; a thesis submitted in part fulfilment of the requirements for the award of bachelor of laws degree, Kabarak University (2014), PP.7-11.

the relationship between ICC and the African states.¹⁵ This perception was further exacerbated by the indictment of President Omar Hassan Ahmad Al Bashir of Sudan. Consequently, the African Union (AU) has resolved to cease cooperation with the Court with regard to the arrest of Al Bashir.¹⁶

As a result, countries like South Africa, Burundi and Gambia decide to withdraw from the International Criminal Court by justifying reasons of selective justice, targeting weaker and poor states mainly in Africa¹⁷ even if Gambia and South Africa reversed their decision latter. Consequently, African head of states and governments passed a resolution and put a collective withdrawal strategy from the ICC. Therefore, the purpose of this study is to examine the contention between African countries and ICC withdrawals and its impact on the Court.

1.2. Statement of the Problem

As clarified in the background above, the strong stand in support of the ICC that characterised Africa's earlier position¹⁸ on international criminal justice is, however, less evident today. Many arguments have been made focusing on the systematic imbalance in international decision making processes which resulted in unreliable application of the rule of law. The decisions of the UNSC are made on the basis of the interests of its permanent members rather than the legal and justice requirements.¹⁹ Needless to say these interests are not always in line with the interests of Africa, thereby leading to a perception of a double standard against African states. In this regard, questions about which states are under the ICC's jurisdiction²⁰ and the process of selectivity of cases as well as the role of the UNSC and its referral and deferral mechanisms under article 16 of

¹⁵David Hoile, International Criminal Court (ICC) Europe's Guantanamo Bay for Africa, The Africa Research Centre, (2010), P.1-23, see also the African Union, Withdrawal Strategy document-restricted circulation, Version 12.01.2017,P.2.

¹⁶Gwen P. Barnes, "The International Criminal Court's ineffective enforcement mechanisms: The indictment of President Omar Al Bashir", Fordham International Law Journal, Volume 34, Issue 6, Article 4, (2011), P.1601.

¹⁷DaglouMakumbe, "African Response to the International Criminal Court. Implications for International Legal Justice", Journal of Humanities and Social Science (IOSR-JHSS) Volume 20, Issue 8, Ver. IV (2015), PP. 16-23.

¹⁸DapoAkande, Max du Plessis and Charles ChernorJalloh, "An African expert study on the African Union concerns about article 16 of the Rome Statute of the ICC", Position Paper, Institute for Security Studies, Tshwane (Pretoria), South Africa (2010), P.7.

¹⁹See David Hoile cited above at note 15, P.20-23.

²⁰See International Criminal Court cited above at note 2, P.11.

the Rome Statute raises queries about perceived fairness of the international justice system as a whole.²¹

As a result, various complaints have been directed against the Court from within Africa: complaining that the ICC is a hegemonic tool of Western powers which is not independent²² and it is an institution which is targeting or discriminating against Africa focusing only on Africa that undermining African efforts to solve its problems.²³ Moreover, in a string of decisions from 2008-2016, the AU Assembly has criticised some of the ICC's prosecutions and investigations.²⁴ Thus, irrespective of whether more African countries will withdraw or not, the 2016 South Africa, Burundi and Gambia notifications of withdrawals is indicative of dissatisfaction over the ICC.²⁵ It is relevant to explore why the very countries that were yesterday at the forefront in the establishment of the Court to fight against impunity are today no longer interested in it. Primarily, the first thing that motivated the mind of the researcher is the interest to understand the contention between the African States and ICC, and the nature of the withdrawal strategy forwarded and its impact on the Court.

Further, it is worth mentioning to highlight whether criticisms of the ICC by the AU and other African critics are justified on ICC-Africa relationship, and whether the allegations of bias are plausible. It also seeks to address from the legal perspectives the allegation that the Court is biased against Africa. In addition, addressing whether showing up factors pushing African countries to withdraw from ICC and indicating possible ways to ease the growing tension between Africa and ICC is also vital. Besides, attempting to provide insight about how serious the mistrust between the two parties is another issue that this paper is going to shed light on.

1.3. Research Questions

The paper seeks to address the following research questions.

²¹ See David Hoile cited above at note 15, P.23.

²² David Hoile, Justice Denied the Reality of the International Criminal Court, The Africa Research Centre, 26 York Street, London W1U 6PZ, (2014), P.3.

²³ Max du Plessis, The International Criminal Court that Africa wants, Institute for Security Studies Monograph 172, Pretoria, South Africa, (2010), P. vii

²⁴ *ibid*

²⁵ See Philomena Apiko&FatenAggad,"The International Criminal Court, Africa and the African Union: What way forward?", (2016), P.5.

- i. What was Africa's contribution to the creation of the ICC?
- ii. What is the current state of play between African and ICC relationship?
- iii. What are the justifications raised by African countries for withdrawal from the ICC and are the reasons legally plausible/ credible?
- iv. Is there a legal framework for collective withdrawal from the ICC? And if so, what would its impact be on the Court?
- v. Are there mechanisms helping to ease the growing tension between Africa and ICC?

1.4. Objective of the Study

1.4.1 General Objective

The general objective of this study is to critically examine the contention between African States and the ICC, the reasons for African Countries withdrawal and its viability and impact upon the Court.

1.4.2 Specific Objectives

- i. Examine Africa's contribution to the creation of the ICC;
- ii. Assess the current state of play of African leaders and ICC relationship;
- iii. Examining the justifications raised by African countries for withdrawal from ICC and plausibility of these reasons;
- iv. Explore the possibility of mass withdrawal from ICC and examine its impact upon the court;
- v. Indicate mechanisms to ease the growing tension between Africa and ICC ;and
- vi. Recommend possible course of actions to be followed by African States and the ICC.

1.5. Significance of the Study

This study provides background about the contention of Africa and ICC and also serves as a spring board for scholars and researchers inspired to conduct in-depth research on the area under study. The relationship between Africa and the ICC still remains controversial for some reasons, and it is important for all the stakeholders in the justice process to look at the fight against impunity as their main objective. Therefore, this study serves in recommending some of the ways to narrow the contention between ICC and African states by citing these findings. Moreover, it

gives insight for policy makers and legal experts to utilize the findings and recommendations of this study.

1.6. Methodology

This research employed a doctrinal based research method which involves examining both primary and secondary sources of law. Mainly, the following primary sources are used: The ICC Statute, Constitutive Act of the African Union and legal instruments such as treaties, resolutions, agreements, communiqué and decisions were assessed and reviewed.

Furthermore, to strengthen the information obtained through primary sources, secondary sources were examined. Secondary sources such as literatures, research reports, books, periodicals, and newspapers focusing on the issues under study were studied. Besides, decisions taken by AU and UN, their minutes and reports in relation to the issue were consulted. To understand recent and current information that is relevant to the issue, internet sources were also used. The researcher has chosen this design because he has found it most suitable to achieve the specified objectives of the research.

1.7. Limitation of the study

Every research has limitations and this particular one is no exception. As the researcher was bounded by time constraints and limited access to AU, he was not able to collect empirical data through interviews and focus group discussions from pertinent authorities of AU and ICC even if, semi-structured and unstructured interviews are so vital to gather information. Besides, in order to seek out additional guidance regarding the potential emergence of a new norm of customary international law, the study was constrained by the lack of clear documents on collective withdrawal.

1.8. Scope of the Study

Though there are many issues surrounding the relationship between African states and the ICC, this study focuses on the contention of the two parties with particular focus on the legal domains of African states withdrawal from ICC and its impact on the Court. The study also focuses on assessing the very reasons why several African countries are decided to withdraw from ICC.

1.9. Organization of the Study

The study comprises five chapters. Chapter one is an introductory chapter incorporating background of the study, statement of the problem research questions, research objective, significance, methodology, limitation of the study and scope of the study. The second chapter addresses literature review, mainly focusing on overview of the Origins and Development of the International Criminal Court: its establishment and jurisdiction. In chapter three it was explained theoretical issues of withdrawal from ICC and its impact on the Court. Chapter four on the other hand, present issues on ICC and Africa; the nature and content of claims Africa raises as part of ongoing initiative for withdrawal from the Court were also dealt. Besides, possible impacts of African states withdrawal also included in this chapter. Finally, Chapter five presents the conclusion and recommendations that the researcher believes to be way out of the problem.

Chapter Two

General overview of ICC and Africa

2.1. Introduction

This chapter deals with explaining a general overview of the ICC and Africa. Primarily, it provides a presentation of the origins and development of the International Criminal Court i.e., historical overview of why, when, and where was the ICC established and who involved in the establishment of the Court. Besides, the chapter deals Africa's early relationship with the ICC; emphasizing on the role of African States and Civil Society including institutions in the formation of the ICC. On top of this, it also tries to provide certain explanations about the legal basis and procedures for instituting prosecution before the Court. Furthermore, it also deals with the role of ICC in Africa. The chapter also devoted to identify the major critics against the ICC. The chapter winds up with concluding remarks.

2.1. Origin and Development of the International Criminal Court

The idea of establishing a permanent international criminal court is not new¹, thus, it goes back to the 19th century² and the effort continued until the First World War.³ Following the end of World War I, in 1919 at Versailles, a Peace of Versailles was concluded among the Allied and Associated powers and Germany⁴ which was part of an effort to try and punish the leading figures responsible for war crimes and crimes committed during the war.⁵ A special note in the

¹ Ved P. Nanda, "The Establishment of a Permanent International Criminal Court: Challenges ahead", *Human Rights Quarterly* 20, by John Hopkins University Press, (1998), PP. 413-428.

² Christiane E. Philpp, "The International Criminal Court: A brief Introduction", *Max Planck Year Book of United Nations Law*, Volume 7, (2003).

³ See Laura Barnett, "The International Criminal Court: History and Role", *Legal and Legislative Affairs Division*, Library of Parliament Research Publications, (2008), P.3. United Nations treaty Collection (UNTC), Chapter XVIII 10 Penal Matters, Rome Statute of the International Criminal Court, Rome, 17 July 1998, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en, (p.1)

⁴ See Treaty of Peace with Germany (Treaty of Versailles), Treaty and protocol signed at Versailles June 28, 1919; see also Catherine Lu, "Justice and Moral Regeneration: Lessons from the Treaty of Versailles", *International Studies Review*, Vol. 4, No. 3 (autumn, 2002), PP. 3-25.

⁵ Antonio Cassese, *International Criminal Law*, (3rd ed.), Oxford University Press, (2003), P.24-25.

development of international criminal law was Article 227 of the Treaty of Versailles⁶ which authorized the creation of a special tribunal to try Kaiser Wilhelm II.⁷

The next great momentum in the development of international criminal law was World War II which the Nazi Germany launching an aggressive military movement and committing atrocities.⁸ It was after the end of World War II that an effort to create a permanent international criminal court and the establishment of the two ad hoc International criminal courts⁹ took place to try the major suspects of the Axis powers (Germany and Japan).¹⁰ At this time, serious effort was made by establishing the International Military Tribunal at Nuremberg (IMTN) and the International Military Tribunal of the Far East (IMTFE) which were a breakthrough in the development of international criminal law.¹¹

Thus, in the aftermath of World War II, the International Military Tribunals sitting at Nuremberg and Tokyo were established where, each of the major Allied powers¹² appointed a judge and a chief prosecutor.¹³ With a few variations, the Tokyo Charter was almost identical to that of Nuremberg,¹⁴ and both the Nuremberg and Tokyo trials advanced the international rule of law¹⁵ which is commonly called the models of modern international criminal law.¹⁶

⁶ See Treaty of Peace with Germany (Treaty of Versailles), cited above at note 4, PP.136-137; see also William A. Schabas, "The International Criminal Court: A commentary on the Rome Statute", Oxford University Press, (2nd ed.), (2016), P.1199.

⁷ Wilhelm II (1859-1941), the German Kaiser (emperor) and king of Prussia from 1888 to 1918, was one of the most recognizable public figures of World War I (1914-18). With World War I under way, the Kaiser, as commander in chief of the German armed forces, retained the power to make upper-level changes in military command. See at John C. G. Röhl, "Kaiser Wilhelm II, 1859–1941, A Concise Life", Biography & Autobiography, Cambridge University Press, (2014).

⁸ The Inter-allied Declaration, Punishment for war crimes: a document issued by the Inter-Allied information and relative documents, Volume 1 of London Committee, St. James's Palace, London, (1942), P.3-9.

⁹ See Stojanka Mirceva, "Why the International Criminal Court is Different", Peace and Conflict Monitor, Global Policy Forum, (2004), P.1.

¹⁰ See Steven R. Ratner and S. Jason Abrams, "Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy", Oxford Clarendon press New York, (1997).

¹¹ Guénaél Mettraux (ed.), "Perspectives on the Nuremberg Trial", European Journal of International Law, Vol. 21, Issue 4, Oxford: Oxford University Press, (2010).

¹² The United States, the United Kingdom, the U.S.S.R. and France.

¹³ Zachary D. Kaufman, "The Nuremberg Tribunal V. The Tokyo Tribunal: Designs, Staffs, and Operations", The John Marshall Law Review, (2010), P.753-759; See also London Agreement, 'Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal', 82 U.N.T.S. 280, entered into force 8 August 1945 (London Agreement), Article 14.

¹⁴ See Laura Barnett, cited above at note 3, P.1-2.

Following Nuremberg and Tokyo tribunals, the United Nations General Assembly (UNGA) had given the International Law Commission (ILC) the assignment to come up with legal frameworks for the establishment of Permanent International Criminal Court¹⁷ but the Cold War made impossible any significant progress.¹⁸

By 1992, it was clear that international criminal justice was on the international community's agenda when the UN Security Council passed Resolution 780,¹⁹ establishing a Commission of experts to investigate international humanitarian law violations in the former Yugoslavia.²⁰ In the early 1990s, two ad hoc tribunals were created as subsidiary organs of the UN Security Council: the International Criminal Tribunal for Yugoslavia (ICTY),²¹ formed in 1993, and the International Criminal Tribunal for Rwanda (ICTR),²² founded in 1994. These tribunals followed the work of the Commission of Experts and saved worldwide recognition and reliability that gave support to the process for establishing a permanent international criminal court.²³

In 1994, the ILC submitted a draft Statute for an International Criminal Court to the UN General Assembly.²⁴ On April 1998 an amended draft Statute was also submitted by the preparatory committee on the establishment of an International Criminal Court which was founded in 1996, half a century later than it was tasked with mission, and it made ready the draft Statute to the conference which was held in Rome, Italy.²⁵ It should be noted that the UN Diplomatic

¹⁵ UNSC, The Institutional Framework: International Criminal Courts and Tribunals, Council Report Cross-Cutting Report, Security Council report.org, (2015), PP.4-8.

¹⁶ See Christian Tomuschat, "The Legacy of Nuremberg", Journal of International Criminal Justice, Oxford University Press, (2006), PP.1-6;

¹⁷ Ved P. Nanda cited above at note 1, PP 431-436.

¹⁸ See M.CherifBassiouni, "The United Nation Commission of experts established pursuant to Security Council resolution 780(1992)", reprinted from the America journal of international law, Vol., 88, No.4, (1994), PP. 10-15.

¹⁹ See the United Nations Security Council, Resolution 780 (S/RES/780 1992)

²⁰ *Ibid.*

²¹ Louise Arbour, "The Prosecution of International Crimes: Prospects and Pitfalls," Washington University Journal of Law and Policy, Vol. 1, 1999, p. 16; see also United Nation Security Council, Resolution 827 (1993), 25 May 1993. The International Criminal Tribunal for the former Yugoslavia (ICTY) was created pursuant to Resolution 827, the "ICTY Statute."

²² United Nations Security Council, Resolution 955 (1994), 8 November 1994. The International Criminal Tribunal for Rwanda (ICTR) was created pursuant to Resolution 955; the "ICTR Statute."

²³ M. CherifBassiouni, The direct enforcement system: history of International Criminal Investigations and Prosecutions, introduction to International Criminal Law, Vol. 1, International criminal law series, ((2nd Rev. ed, 2012.), PP.535-543.

²⁴ International Law Commission, Draft Statute for an International Criminal Court, 1994.

²⁵ The UNGA Res. 51/207, (1996), adopted at the 88th plenary meeting 17th December 1996, For the Mandate of the Preparatory Committee

Conference of Plenipotentiaries held in Rome, Italy from 15 June to 17 July, 1998 governments approved and adopted the ICC Statute.²⁶

Consequently, on 1st July 2002, the ICC was officially established as a permanent tribunal to prosecute individuals for the crime of genocide, crimes against humanity, war crimes,²⁷ and the crime of aggression (though it was unable to agree upon a definition of it). The Court can only prosecute crimes committed on or after 1 July 2002, the date the Rome Statute of the ICC entered into force.²⁸ 123 states have ratified or acceded to the Rome Statute²⁹ and 32 countries had signed but not ratified the Rome Statute.³⁰ And six out of ten of the world's most populous countries are not members of the Court and its members represent less than of the world's population in which over seventy per cent of the world's population is outside the Court's jurisdiction.³¹

2.2. Africa's Early Relationship with the ICC

Africa, as a continent, supported the idea of the ICC long before the latter's birth. This support was illustrated by Senegal which was the first country in the world to ratify the Rome Statute and symbolically topped African State support for a permanent ICC having jurisdiction over the "most serious crimes of concern to the international community as a whole"³² and authorizing its national government to ratify the Rome Statute in 1999.³³ The Democratic Republic of Congo was

²⁶See the Rome Statute of the International Criminal Court and Final Act, (with an annex Containing the resolutions adopted by the Conference), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, (1998), Official Records, Volume I, Final documents, United Nations, New York, (2002), PP.1-7.

²⁷ See Judith Kelley, "Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Non surrender Agreements", The American Political Science Review , Vol. 101, No. 3, American Political Science Association, (2007), P.575.

²⁸David Hoile, "Justice Denied the Reality of the International Criminal Court", The Africa Research Centre, Africa Research Centre Communications House, (2014) see also Dominic Mcgoldrick et.al., (ed.) "The Permanent International Criminal Court Legal and Policy : Issues", Hart Publishing ,Oxford and Portland Oregon, (2004),P.1.

²⁹ See the UN Treaty - Rome Statute of the International Criminal Court "The States Parties to the Rome Statute-Chronological list"

³⁰ Nicholas Waddell and Phil Clark (ed.), "Courting Conflict? Justice, Peace and the ICC in Africa", The Royal African Society, (2008), PP. 13-21.

³¹See David Hoile "International Criminal Court (ICC) Europe's Guantanamo Bay for Africa" The Africa Research Centre, (2010);countries like The United States, China, Japan, India, Pakistan, Israel, and Turkey have not ratified it and thus are not under the jurisdiction of the Court

³² See the Rome Statute of the International Criminal Court Preamble, (1998), 2187 U.N.T.S. 90.

³³ See Charles ChernorJalloh, "Africa and the International Criminal Court: Collision Course or Cooperation?", North Carolina Central Law Review , Vol. 34,203, Florida International University College of Law, (2012), PP. 204-205.

also the 60th State to ratify the Rome Statute, thereby allowing it to enter into force.³⁴ Further, amongst a group of countries that signed the ICC Statute at its adoption in Rome on July 17, 1998, the ratification made by the West African state demonstrated a strong awareness of the significance that the accomplishments of the ICC would imply for the world as a whole and for Africa in particular.³⁵ Thus, addressing the role and early relationship of African states and African Civil Society and Institutions in the formation of the ICC is crucially important.

2.2.1. The Role of African States in the Formation of the ICC

The Role of African States in the formation of the ICC was so great and they contributed much to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome Statute of the ICC was concluded.³⁶ In the period up to the Rome diplomatic conference, several ICC related events were organized in Africa. To illustrate, in September 1997, ten basic principles that they wanted to be included in forming the ICC were set out by fourteen states of the Southern African Development Community (SADC).³⁷ Furthermore, an important declaration, the ‘Dakar Declaration’ for the Establishment of the International Criminal Court was adopted in February 1998 where representatives of 25 African states met in Dakar calling for an effective and independent International Criminal Court.³⁸ In this Declaration, it was noted that national legal systems have failed to hold perpetrators accountable for gross violations of international law and it confirmed a commitment to the establishment of the Court and finalizing the Court’s Statute at Rome Conference.³⁹

³⁴ See Nicholas Waddell and Phil Clark, cited above at note 30, PP.55-60.

³⁵ See Charles ChernorJalloh cited above at note 33, PP. 204-205.

³⁶ Max du Plessis, “The International Criminal Court that Africa wants”, Institute for Security Studies, Monograph 172, (2010), P.6.

³⁷ Dakar Declaration for the establishment of the International Criminal Court in 1998, Dakar, 6 February, (1998), available at(<http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf>), last visited on April 4, 2017.

³⁸ See Max du Plessis, cited above at note 36, P.7

³⁹ Alebachew Birhanu Enyew, “The Relationship between the International Criminal Court and Africa: From Cooperation to Confrontation?” Bahir Dar University Journal of Law 3(1), (2012), PP.1-4.

Regional organizations like the South African Development Community (SADC) and the Economic Community of West African States (ECOWAS) have made rigorous efforts in encouraging their member states to implement the ICC Statute.⁴⁰

SADC in its support for the ICC, experts from the REC met in Pretoria in September 1997 to discuss their negotiation strategies and to agree on a common position in order to make a meaningful impact on the outcome of negotiations which provided motivation for a continent-wide consultation process on the creation of the Court.⁴¹ The participants of SADC agreed on a set of principles that were later sent to their respective ministers of justice and attorneys-general for endorsement.⁴² These principles includes: the ICC should have automatic jurisdiction over genocide, crimes against humanity and war crimes, the Court should have an independent prosecutor with power to initiate proceedings *proprio motu*; there should be full cooperation of all states with the Court at all stages of the proceedings and stable and adequate financial resources should be provided for the ICC and states should be prohibited from making reservations to the Statute.⁴³

As a result, SADC ministers of justice and attorneys-general issued a common statement that became a primary basis for SADC's negotiations at Rome and these principles also appeared in the Dakar Declaration on the basis of the principles submitted to them.⁴⁴

In addition, in 1993 African states also played a prominent role in making the Rome Statute which can be explained by the participation of Lesotho, Malawi, Senegal, South Africa and

⁴⁰Chikeziri Sam Igwe, "The ICC's Favourite Customer: Africa and International Criminal Law", The Comparative and International Law Journal of Southern Africa , Institute of Foreign and Comparative Law, Vol. 41, No. 2 (2008), P.309.

⁴¹See Sivu Maqungo, "The establishment of the International Criminal Court: SADC's participation in the negotiations", African Security Review 9(1) (2000), PP.2-5.

⁴²*Ibid*

⁴³Max du Plessis, cited above at note 36, PP.7-8.

⁴⁴See the Dakar Declaration cited above at note 137 see also Mochochoko, Phakiso, "Africa and the International Criminal Court, African perspectives on international criminal justice", Ghana, Africa Legal Aid, (2005), PP.248-249.

Tanzania, in the discussion of a draft Statute by the International Law Commission to the UN General Assembly.⁴⁵

Besides, in July 1998 during the drafting of the Rome Statute, forty-seven African countries were present at the Rome conference and majority of them also voted in favor of adopting this Statute.⁴⁶ Furthermore, most of them have also taken steps to implement enabling legislation to make it applicable in their respective domestic laws.⁴⁷ Africans took the lead in either chairing or coordinating various issues during the Rome conference that can be exemplified by which the Lesotho delegate was elected as one of the vice-chairpersons of the conference and also coordinated the formulation of Part 9 of the Rome Statute⁴⁸; and South Africa was a member of the drafting committee of the conference and coordinated the formulation of Part 4 of the Rome Statute.⁴⁹ In general, as evidenced by the high number of African parties, African states led the way in signing up to the Rome Statute and Senegal was the first country to ratify it and further Côte d'Ivoire, accepted by declaration the ICC's, not then even a party to the Rome Statute.⁵⁰

⁴⁵ International Law Commission, Report of the International Law Commission on the Work of its 46th Session, UN GAOR, 49th session, Supplement No.10, UN Doc A/49/10 (1994) chapter II(b)(f) ('Draft Statute for an International Criminal Court'), See also Coalition for the International Criminal Court, 'Africa and the International Criminal Court', Fact Sheet, (2009).

⁴⁶ S.M. Monageng, "Africa and the International Criminal Court: Then and Now", T.M.C. Asser Press and the author(s) G. Werle et al. (eds.), International Criminal Justice Series 1, (2014), PP.13-20

⁴⁷ See The International Criminal Court Bill (Uganda) Act No 18 of 2006, (2006); see also International Crimes Act 2008 (Kenya); see also see Stone and Max du Plessis, The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries, Report, Institute for Security Studies, (2008).

⁴⁸ Rome Statute, cited above at note 33, Part 9, Article 86-102.

⁴⁹ See Max du Plessis, cited above at note 37, P. 7. Rome Statute, cited above at note 33, Part 4 refers to 'Composition and Administration of the Court', Article 34 -52.

⁵⁰ Miriam Abaya, "No place for immunity: the arguments against the African criminal Court's article 46b is", Temple Int'L & Comp. L.J. (2016), PP.189-200; See also the dates of African State ratification of the Rome Statute: Senegal, 02 February 1999; Ghana, 20 December 1999; Mali, 16 August 2000; Lesotho, 06 September 2000; Botswana, 08 September 2000; Sierra Leone, 15 September 2000; Gabon, 20 September 2000; South Africa, 27 November 2000; Nigeria, 27 September 2001; Central African Republic, 03 October 2001; Benin, 22 January 2002; Mauritius, 05 March 2002; Democratic Republic of the Congo, 11 April 2002; Niger, 11 April 2002; Uganda, 14 June 2002; Namibia, 25 June 2002; Gambia, 28 June 2002; United Republic of Tanzania, 20 August 2002; Malawi, 19 September 2002; Djibouti, 05 November 2002; Zambia, 13 November 2002; Guinea, 14 July 2003; Burkina Faso, 16 April 2004; Congo, 03 May 2004; Burundi, 21 September 2004; Liberia, 22 September 2004; Kenya, 15 March 2005; Comoros, 01 November 2006; Chad, 01 January 2007; Madagascar, 14 March 2008; Seychelles, 10 August 2010; Tunisia, 24 June 2011; Cape Verde, 10 October 2011; and Côte d'Ivoire, 15 February 2013.

At a meeting on 27 February 1998, the Council of Ministers of the OAU (now the AU⁵¹) took note of the Dakar Declaration and called on all OAU member states to support the creation of the ICC and this resolution was later adopted by the OAU summit of heads of state and government in Burkina Faso in June 1998.⁵² During the Rome conference, participating African delegates had two guiding documents: the SADC principles and the Dakar declarations in which both documents were in line with the principles of the ‘like-minded group’, the members of which were committed to a Court independent from UN Security Council control, staffed by an independent prosecutor, and with inherent jurisdiction over the core crimes of genocide, crimes against humanity and war crimes.⁵³ The other important contribution of OAU was in 2000 condemned the perpetration of crimes (crimes against humanity, war crimes and genocide)⁵⁴ on the continent and undertook to cooperate with relevant institutions set up to prosecute perpetrators in its 36th ordinary session of the Assembly.⁵⁵

In relation to Africa’s contribution and early support for the idea of a Permanent International Criminal Court and its influence at Rome in 1998 where the ICC’s Statute was drafted, South Africa’s role was so greatly important. South Africa was signed and ratified the Rome Statute on 17 July 1998, thereby becoming the 23rd state party and passed the implementation of the Rome Statute of the International Criminal Court Act 27 2002 (‘ICC Act’).⁵⁶ South Africa was the first state in Africa to implement the Rome Statute’s provisions into its domestic law, and it has moreover created a dedicated unit-the Priority Crimes Litigation Unit, staffed by experienced prosecutors-to tackle the crimes outlawed under the Statute.⁵⁷

⁵¹ See the African Union (AU), which replaced the former Organization of the African Unity (OAU), was formed in 2000 through the Constitutive Act of the African Union (the Constitutive Act of the AU). The Constitutive Act of the AU was adopted by the then OAU Assembly of Heads of State and Governments in Lomé, Togo, at the 36th ordinary session of the Assembly from (2000); see also “The African Union, Prosecution of International Crimes and the Question of Immunity of State Officials”, University Van Pretoria, P.159

⁵² Max du Plessis, cited above at 36, P.7-8.

⁵³ Mochochoko, Phakiso cited above at note 44, P.250.

⁵⁴ Human Rights Brief, “Updates from the International Criminal Courts”, Centre for Human Rights and Humanitarian Law, American University, Washington College of Law Vol. 12, Issue 2, (2005), PP.33-38.

⁵⁵ Declarations and Decisions Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, AHG Decl.4 (XXXVI), 36th session, AU Doc AHG/Decl.1-6 (XXXVI) (2000).

⁵⁶ Max du Plessis, cited above at 36, P. 8.

⁵⁷ *Ibid* P.7.

Further, the killing that fascinated Rwanda in 1994 and reasonably feared similar incidents flying in to the unknown future⁵⁸; and the need to find ways to prevent powerful countries from preying on weaker ones were the realities that pushed the Africans in to motivation to strong support for the establishment, signing and ratifying of the ICC.⁵⁹

2.2.2. The Role of African Civil Society and Institutions in the formation of the ICC

The ICC negotiations demonstrate the participation of a variety of global civil society actors in an international conference or lawmaking process. One hundred thirty African non-governmental organizations re-affirmed their support for the ICC and called upon African governments to lend further support to the system.⁶⁰ The Coalition for the establishment of an International Criminal Court aiming to encourage governments to ratify the Rome Statute is formed by African Non-Governmental Organizations (NGOs)⁶¹ and their Western counterparts.⁶² In this regard, more than 800 African Civil Society Organizations (CSO) were members of the Coalition for the International Criminal Court (CICC), and 21 African countries have national coalitions for the ICC that actively work on implementing Rome Statute provisions into national legislation and strengthening the Court's activities in Africa.⁶³ Thus, some 90 African organizations joined the NGO CICC and promoted in their respective countries for the early establishment of an independent and effective International Criminal Court.⁶⁴

⁵⁸ International Panel of Eminent Personalities, Rwanda: The Preventable Genocide, Organization of African Unity (July 7, 2000).

⁵⁹ John Mukum Mbaku, "International Justice: The International Criminal Court and Africa", Africa Growth Initiative Foresight Africa: Top Priorities for the Continent in 2014, the Brookings Institution, (2016), PP.9-11.

⁶⁰ Kai Ambos, "Civil war crimes often go unpunished: a refugee camp in North Darfur", Global Governance, (2013), P.1.

⁶¹ For detail see Consilium "The European Union and the International Criminal Court", General Secretariat of the Council, Belgium, (2008), PP.29-32.

⁶² Coalition for the International Criminal Court, "Dakar Declaration for the Establishment of the International Criminal Court in 1998", (1998), (<http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf>); last visited on April 12, 2017.

⁶³ Coalition for the International Criminal Court, "The road to Rome and beyond: Key Moments in the Establishment of the International Criminal Court a Timeline of the Establishment and work of the International Criminal Court", Factsheet, PP. 2-3.

⁶⁴ *ibid* P.19,

Further, African civil society played a great role in the negotiation and establishment of the ICC and in encouraging African states to ratify the Rome Statute.⁶⁵ Civil society organizations across the African continent are working to end impunity and protect the right to truth and justice for victims of atrocities.⁶⁶ For these organizations, the Rome Statute provides standards for prosecuting grave crimes which can be drawn upon to help establish such high standards as the norm, rather than the exception, in the region.⁶⁷

The role played by African NGOs and institutions during the negotiations is further evidence of civil society's support.⁶⁸ In this regard, the African Commission on Human and Peoples' Rights (ACHPR) showed its commitment to the ICC by repeatedly calling upon African states to ratify the Rome Statute and take legislative measures to make the Rome Statute applicable in their domestic laws.⁶⁹ On top of this, it adopted a resolution calling on African states to domesticate and implement the Rome Statute in 2005.⁷⁰ Furthermore, African NGOs also assisted in the development of the Court's Rules of Procedure and Evidence⁷¹ that indicate the history of strong and consistent support for the Court in Africa from civil society.⁷²

⁶⁵ See William R Pace and Mark Thieroff, "Participation of Non-Governmental Organizations" in the International Criminal Court: The Making of the Rome Statute -Issues, Negotiations, Results, Roy S Lee,(ed.), Boston, Kluwer Law International, (1999),P. 392

⁶⁶ William R Pace and Mark Thieroff, cited above at note 65, P.391.

⁶⁷ UN General Assembly, The obligation to extradite or prosecute(*aut dedere aut judicare*), Final Report of the International Law Commission, Adopted by the International Law Commission at its sixty-sixth session, The report appeared in Yearbook of the International Law Commission, (2014), vol. II, Part Two, PP.1-19.

⁶⁸ See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Non-Governmental Organizations Accredited to Participate in the Conference , Note by the Secretary-General, UN Doc A/CONF.183/INF/3 (1998); See also The NGO Coalition for the ICC in the Making of the ICC available at: (<https://nccur.lib.nccu.edu.tw/bitstream/140.119/33686/10/53003110.pdf>), last visited on April 20 2017.

⁶⁹ At its 24th Ordinary Session in October 1998, the ACHPR passed a resolution calling on African states to ratify the Rome Statute and to take 'legislative and administrative steps to bring national laws and policies into conformity' with it. See also Amnesty International, "The International Criminal Court: Checklist for effective Implementation", AI Index: IOR 40/11/00, (2000), P.2.

⁷⁰ African Commission on Human and Peoples' Rights, "Resolution on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court", 38th Ordinary Session, (2015).

⁷¹ International Criminal Court, "Rules of Procedure and Evidence", ICC Doc ICC-ASP/1/3, adopted 9 September 2002, ; see also: Zoe Pearson, "Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law", Cornell International Law Journal, Volume 39, Issue 2, Article 2,(2006), P.250.

⁷² Human Right Watch, ICC: African Countries Support Court, Annual Meeting of Member Countries, (2014), available at(<https://www.hrw.org/news/2014/12/17/icc-african-countries-support-Court>),_last accessed Sept, 2017.

2.3. Legal Procedures for Prosecution before the ICC

ICC has its own legal basis and procedures by which situations are brought before the Court. Therefore, the Rome Statute has provided different mechanisms through which the ICC can exercise its jurisdiction.

2.3.1. Jurisdictions and admissibility

The ICC is only intended to exercise jurisdiction in relation to the most serious crimes of international concern and it is specifically designed to be complementary to national criminal jurisdictions⁷³ in which States Parties emphasize in the Preamble of the Statute.⁷⁴ Here, the intention is that the ICC will only be brought into play where the national judicial institutions of states are unable or unwilling to act or to do so. Article 17 of the Statute which expressly refers to the tenth paragraph of the preamble and Article 1, provides that a case is inadmissible when it is being, or has been, investigated or prosecuted by state, unless that state is or was unwilling or unable genuinely to carry out the investigation or prosecution.⁷⁵ The jurisdiction of the Court will be limited to the categories of the crimes stated under the ICC Statute.⁷⁶

Articles 6, 7 and 8 simply define the Courts jurisdiction for the crimes namely: genocide, crimes against humanity and war crimes respectively. The Court has also jurisdiction over the crime of aggression when a provision is adopted defining the crime and setting out the conditions under which the Court is to exercise jurisdiction in this regard.⁷⁷ Besides, the Court has jurisdiction only over natural persons⁷⁸ pursuant to Article 25(1) of the ICC Statute and trial in absentia is not possible.⁷⁹

In addition, as per Article 8(2) (a) and (b) of the statute, the Court has jurisdiction over grave breaches of the 1949 Geneva Conventions and other serious violations of international

⁷³Dominic McGoldrick et.al. (ed.), cited above at note 28, P.1.

⁷⁴ See the preamble of Rome Statute of ICC, see also Amnesty International, cited above at note 70, P.2-3

⁷⁵ See Article 17 and Article 1 of the Rome Statute.

⁷⁶ See N Boister, "The Exclusion of Treaty Crimes from the Jurisdiction of the Proposed ICC: Law, Pragmatism, Politics", J Armed Conflict Law 27, (1998).

⁷⁷ Rome Statute, cited above at note 32, Article 5(2).

⁷⁸ *ibid*, Article 25(1); see also M Frulli, 'Jurisdiction *ratione personae*' in Cassese et al, above P.527.

⁷⁹ See Rome Statute of ICC; see also DJ Brown, "The ICC and Trial in *Absentia*", Journal of International Law, Brooklyn JIL, (1999) P.763.

humanitarian law in international armed conflict⁸⁰, including violations of The Hague Conventions IV of 1907 and its regulations and some violations of Protocol I of the Geneva Convention.

The Court also has jurisdiction with respect to violations over international humanitarian law in non-armed conflict as per Article 8 (2) (c) to (f) and Article 8(3) of the Statute⁸¹, and it includes the violations of Article 3 of the 1949 Geneva Convention and Protocol II to those treaties as well as certain conduct that would be a violation if it occurred during international armed conflicts.⁸²

Besides, the jurisdiction of the Court is classified into three: subject matter, temporal⁸³ and personal and territorial jurisdiction. Crimes stipulated in Article 5 of the ICC Statute showed ICC's subject matter jurisdiction.⁸⁴ Jurisdiction is also limited *rationetempories* to offences committed after the entry in to force of the Statute, for the crimes committed after 1 July 2002.⁸⁵ It is worth mentioning that if a State ratifies the ICC Statute after 1 July 2002, the Court has jurisdiction over crimes committed by its nationals or in its territory only after the Statute enters in to force with respect to the acceding State, although the State can lodge a declaration with the Court accepting jurisdiction retroactive to 1 July 2002.⁸⁶

Besides, the court's jurisdiction lies also on personal and territorial jurisdiction.⁸⁷ The Court has personal jurisdiction over nationals of States parties who are accused of committing crimes within the subject matter jurisdiction of the Court, irrespective of where those crimes are committed.⁸⁸ The Court can also exercise jurisdiction and prosecute nationals of a non-State parties if that State accepts the jurisdiction of the Court by declaration lodged with the registrar with regard to the

⁸⁰ Rome Statute, cited above at note 32, Article 8(2) (a) and (b).

⁸¹ Rome Statute, cited above at note 32, Article 8 (2) (c) to (f) and Article 8(3).

⁸² See International Committee of the Red Cross, Convention (III) relative to the treatment of prisoners of war. Geneva, 12 August 1949, Treaties, States Parties and Commentaries, Article 3:conflicts not of an international character, available at: <https://ihl-databases.icrc.org/ihl/WebART/375-590006>

⁸³ See article 12 of the Rome statute of ICC; see also Kevin Jon Heller, 'The Rome Statute in Comparative Perspective', Melbourne Law School, Legal Studies Research Paper, No.370 (2008)

⁸⁴ Rome Statute, cited above at note 32, Article 5.

⁸⁵ Rome Statute, cited above at note 32, Article 11 (2).

⁸⁶ *Ibid*

⁸⁷ See Rome Statute, cited above at note 32 article 11-12.

⁸⁸ *Ibid*, see also Abdullahi Aress Mohamed, "The role of the International Criminal Court in enforcing human rights law", Moi University, Eldoret, Kenya, (2014), P. 26.

crime committed,⁸⁹ and where the UN Security Council refers a situation to the Court under chapter VII of the United Nations (UN) Charter.⁹⁰

As explained partially above, the other cornerstone of the ICC Statute is the principle of complementarity which defines the relationship between member states and the ICC.⁹¹ It is only permitted to exercise jurisdiction when national courts are unable, as in Rwanda where agents of the State were committing the crimes and therefore the State was going to protect them⁹², or unwilling to do so.⁹³ Unlike the International Criminal Tribunal for former Yugoslavia (ICTY) and International Tribunal for Rwanda (ICTR), the ICC is based on the principle of complementarity whereby the ICC is subsidiary or complementary to the national courts.⁹⁴ In the case of ICTY and ICTR primacy has been given to the international tribunals and national courts were subsidiary or complimentary, conversely in the ICC's jurisdiction, it only comes next to states' effort to handle the case by their own selves national courts take precedence over the ICC.⁹⁵ Therefore, complementarity applies when a case is brought to the Court by State Party,⁹⁶ when initiated by the prosecutor *motupropiri*⁹⁷ and by the referral of the UN Security Council.⁹⁸ Finally, the principle of complementarity⁹⁹ will be applied not only with regard to States Parties to the ICC but also with respect to States not parties to the ICC.¹⁰⁰

⁸⁹ Rome Statute, cited above at note 32, Article 11(2) and 12(3).

⁹⁰ *Id.*, Art. 12(2) (b).

⁹¹ See article 1 and 17 of the Rome statute, see also Antonio Cassese, cited above at note 5, P. 26.

⁹² See Bourgoin, "Jurisdiction *rationetemporis*" in Cassese et al, 543.

⁹³ Godwin N. Okeke, "The Legality of the Ex Post Facto element in the Jurisdiction of International Criminal Tribunals: A Case Study of Special Court at Sierra Leone", International Journal of Humanities and Social Science Invention, Vol. 2, Issue 4, (2013), PP.54-58

⁹⁴ See Rome Statute of the International Criminal Court art. 17, July 12, 1998, 2187 U.N.T.S. 900; see also John Holmes, The Principle of Complementarity, in *The International Criminal Court: The Making of The Rome Statute-Issues, Negotiations, Results* 41 (Roy Lee ed., 1999); John Holmes, Complementarity: National Courts versus the ICC, in *The Rome Statute Of The International Criminal Court: A Commentary* 667 (Antonio Cassese et al. eds., 2002).

⁹⁵ *ibid.*

⁹⁶ Rome Statute, cited above at note 32, Article 13(a) and 14.

⁹⁷ *Id.*, Article 13(c) and 15.

⁹⁸ *Id.*, Article 13(b) and 52(c).

⁹⁹ See Rome Statute art. 17 cited above at note 94 see also Gamaliel Zimba, "The Application of the Principle of Complementarity in situations referred to the International Criminal Court by the United Nations Security Council and in Self-Referral Situations", the Faculty of Law, the University of The Western Cape, (October 2012), P 22.

¹⁰⁰ Rome Statute, cited above at note 32, Article 18(1)

2.3.2. Referral and Investigation

Upon referrals by States Parties or by the UNSC, or on its own initiative and with the judges' authorization, the Office of the Prosecutor (OTP) conducts investigations for the purpose of finding evidence of a suspect's innocence or guilt.¹⁰¹ As result, it requests cooperation and assistance from States and international organizations, and also sends investigators to areas where the alleged crimes occurred to gather evidence with proper care not to create any risk to the victims and witnesses.¹⁰²

Situations may be referred to the Court in three means. Firstly, when the alleged crimes are committed in the territory of the state, an alleged offender is in the territory of the state, the offender is a national of the state or the victims are nationals of the state, a state party may refer a situation to the Court.¹⁰³ It is most often occurs and the Office of the Prosecutor (OTP) may then investigate the situation¹⁰⁴ to determine whether a crime has been committed under the Statute.¹⁰⁵

Secondly, the OTP may initiate investigations *proprio motu*¹⁰⁶ on the basis of information on crimes within the jurisdiction of the Court by first making an application to the Pre-Trial Chamber to initiate proceedings,¹⁰⁷ and if the Chamber is satisfied with basis for investigations to proceed, it will authorize the OTP to commence investigations.¹⁰⁸

The OTP must notify the state that could possibly exercise jurisdiction over the crimes concerned of their intention to seek the Pre-Trial Chamber's authorization, before approaching the Pre-Trial

¹⁰¹International Criminal Court, Situations under investigation, International Criminal Court Home, The Hague, The Netherlands.

¹⁰² *ibid*, see also Amnesty International cited above at note 69, P.2.

¹⁰³ Rome Statute, cited above at note 32, Article 14; Situations of Northern Uganda, Congo and the Central African Republic were referred to the Court through this mechanism.

¹⁰⁴ Rome Statute article 13; See Harvard Law Review, "ICC Outlines Policies to Improve Prosecutorial Outcomes", The Office of The Prosecutor of the ICC, Policy Paper on Sexual and Gender Based Crimes, Public International Law, (2014), P.793.

¹⁰⁵ International Criminal Court, "Report on Preliminary Examination Activities 2014", the office of the prosecutor, (2014), PP.2-5.

¹⁰⁶ Rome Statute, cited above at note 33, Article 15; The Situations of Cote d'Ivoire and Kenya were initiated at the Prosecutor's own volition; see also Sharon Esther Nakandha, cited above at note 61, PP.7-8.

¹⁰⁷ *Ibid* article 15 of the Rome Statute, See Sara Kendall & Sarah Nouwe, "Representational practices at the International Criminal Court: the gap between Juridified and abstract victimhood, law and contemporary problems", in SSRN Journal 76(3), (2014) PP.235-262.

¹⁰⁸ See article 18 of the Statute, CorrinaHeyder , "The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. opposition to the Court: implications for the International Criminal Court's functions and status", Berkeley Journal of International Law, Vol.24, Issue 2 Article 10, (2006), PP.650-658.

Chamber.¹⁰⁹ The state concerned may, within a month, inform the Prosecutor whether it is investigating the matter in question and request that the Prosecutor defer their investigation.¹¹⁰ If no such information is received from the state concerned the Prosecutor may proceed with investigations after obtaining the consent of the Pre-Trial Chamber.¹¹¹

Thirdly, the UN Security Council, acting under Chapter VII of the Charter of the United Nations (UN Charter), may refer a situation to the Court for investigation.¹¹² The Security Council is somehow influenced by permanent members, several of whom are not parties to the Rome Statute.¹¹³ The process of bringing a case before the ICC involves serious scrutiny of the evidence during pre-trial proceedings¹¹⁴ and the powers of the Prosecutor to commence investigations are constricted and subject to judicial scrutiny.¹¹⁵ Therefore, the primary responsibility of states to prosecute crimes within the Court's jurisdiction is recognized and given preference.¹¹⁶

2.3.3. Pre-Trial Proceedings

The Prosecutor applies to the Pre-Trial Chamber for an arrest warrant¹¹⁷ or summons to be issued in respect of the suspect upon completion of the investigations¹¹⁸ which ensure that the person appears at the trial and to prevent the person from continuing with the alleged or related crime.¹¹⁹ They must satisfy the Chamber that there are reasonable grounds to believe that the suspect committed the crimes in question and the person's arrest is necessary for purposes of

¹⁰⁹ *Ibid*; see also UN Security Council, "Security Council refers situation in Darfur, Sudan, to prosecutor of international criminal Court", 5158th Meeting, Night, SC/8351, (2005)

¹¹⁰ David j. Bederman (ed.), "International decision: International Criminal Court-Appeals Chamber-Rome Statute-Article 17-Complementarity-Article 19-Challenges to jurisdiction or Admissibility of a case-Kenya Situation in the Republic of Kenya", American Journal of International Law, (2012).

¹¹¹ *Ibid*

¹¹² Rome Statute, cited above at note 32, Article 16; see also Lawrence Moss cited above that Situations of Darfur and Libya were referred to the Court by the UN Security Council; see Chapter VII of the UN Charter.

¹¹³ James Paul "Security Council Reform - Arguments about the Future of the United Nations System", UN Security Council - Global Policy Forum, (1995), P.1-5

¹¹⁴ R Omland Jv Cole, "Africa's Relationship with the International Criminal Court: More Political than Legal". Melbourne Journal of International Law, Vol (2013), PP.671-678.

¹¹⁵ Stefan Kirsch, "The Trial Proceedings before the ICC", International Criminal Law Review, Koninklijke Brill NV, Netherlands,(2006),PP.275-288

¹¹⁶ E Kayitana, "The Universal Jurisdiction of South African Criminal Courts and Immunities of foreign State Officials", Volume 18 No 7, PER / PELJ 2015(18)7, (2015), PP.2562-67.

¹¹⁷ In International Criminal Court (ICC or "the Court"), the Pre-Trial Chamber (PTC) will issue such an arrest warrant, upon an application by the Prosecutor.

¹¹⁸ See article 56 of the Statute.

¹¹⁹ Rome Statute, cited above at note 32, Article 58.1b.

investigations, court proceedings, trial and to prevent continued commission of the crime.¹²⁰ When the person appears before the Court, a hearing is held to confirm the charges and the Prosecutor should provide the Court with ‘sufficient evidence to establish substantial grounds to believe’ that the accused committed the crimes for which he or she is charged.¹²¹ Even where cases proceed to trial, the burden continues to lie with the Prosecutor to prove the guilt of the accused beyond reasonable doubt.¹²²

2.3.4. The ICC and State Immunity

Under Customary International Law senior state officials have immunity from legal proceedings.¹²³ But, one interpretation of Article 27 of the Rome Statute, which provides state immunity does not apply under the Statute, creates an exception to customary international law and allows heads of state and other senior state officials to be tried in this particular jurisdiction. Thus, as stated in the Rome Statute of the ICC Article 27 of paragraph 1 and 2 Statute shall apply equally to all persons without any distinction based on official capacity and shall in no case exempt a person from criminal responsibility under this Statute.¹²⁴ In this regard, Art.7of Charter of the International Military Tribunal at Nuremberg (1945) specified that ‘the official position of defendants, as responsible officials in government departments’ did not free them from responsibility or alleviate punishment.¹²⁵

¹²⁰ See article 56 and 57of the Rome Statute.

¹²¹ *ibid.*

¹²² See article 61 of the Rome Statute, see also Joanne Foakes et.al. “State Immunity: The United Nations Convention and its effect”, International Law Programme, ILP BP 05/01, (2005), P.1-18.

¹²³ See DapoAkande and Sangeeta Shah, “Immunities of State Officials, International Crimes, and Foreign Domestic Courts”, The European Journal of International Law Vol. 21 no. 4 EJIL (2011), PP.817-819: there are different types of immunity that international law accords to state officials: The first is the immunity that attaches to certain state officials as a result of their office or status (*immunity racione personae*) which are two types of immunity: those attaching to a limited group of senior officials, especially the Head of State, Head of Government, and diplomats, and the immunity of state officials on special mission abroad. Secondly, the immunity which attaches to acts performed by state officials in the exercise of their functions (*immunity racionemateriae*).

¹²⁴ Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544. In this regard, this Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person P.19.

¹²⁵ See article 7 of the Charter of International Military Tribunal at Nuremberg (1945).

Article 98 of the Rome Statute appears to conflict with Article 27, however, by providing that the ICC may not request cooperation or surrender from a state where that would require that state to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third state, unless the Court can first obtain the cooperation of that third state for the waiver of the immunity.¹²⁶ The ICC is dependent on cooperation from States, including non-states parties.¹²⁷ But there appears to be an acceptance that states parties, by virtue of becoming members of the Rome Statute, have waived the immunity of their own officials or have otherwise accepted that they do not have immunity.¹²⁸ Thus, for states parties, Article 98 does not apply, and there is no immunity before the Court.¹²⁹ But the difficulty arises in respect of states that are not parties to the Rome Statute, such as Sudan that Sudan is not a state party because the case was referred by a Security Council resolution, which are binding on all UN member states.¹³⁰

Jurisdictional immunities enjoyed by senior State officials are of no benefit before an International Criminal Court or tribunal with jurisdiction over serious international offences such as war crimes, crimes against humanity, and genocide thus may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction¹³¹

The question of immunities is central to the AU. With respect to that, in 2012 the AU Assembly asked the AU Commission to consider whether it would be possible to request an advisory opinion from the International Court of Justice (ICJ) on the question of immunity.¹³² But this initiative may not be successful, it is commendable that the AU has sought to resolve this matter through respected international law channels.¹³³

¹²⁶ See Article 98 of Cooperation with respect to waiver of immunity and consent to surrender which states that “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.”, P.63

¹²⁷ See Article 86 and Article 87(5) of the Statute; see also Zhu Wenq, on co-operation by states not party to the International Criminal Court, Volume 88 Number 861, (2006), PP.87-89.

¹²⁸ *Ibid*

¹²⁹ Rome Statute, cited above at note 32, Article 98.

¹³⁰ See, Zhu wenq., cited above at note 127.

¹³¹ See Article 27 (1) of the Rome Statute.

¹³² See the 2012 the AU Assembly decision.

¹³³ *ibid.*

2.4. Role of the ICC in Africa

Supporters of International Criminal Law (ICL) claim that establishing international criminal courts would discourage government officials and warlords from committing grave crimes against humanity achieve justice and facilitate peacemaking.¹³⁴ Africa has had a high number of human rights violations that a number of countries have continued to witness many incidents of gross human rights violations, including those crimes of genocide, war crimes and crimes against humanity.¹³⁵ As a result, to investigate and prosecute perpetrators, to end impunity, further to protect its people, and create a climate that is conducive to sustainable economic development and poverty alleviation, Africa most passionately argued for the establishment of the International Criminal Court.¹³⁶

Thus, the number of African States signing and ratifying the Rome Statute of ICC is a strong indication of Africa's commitment to the international criminal justice system set up to eradicate impunity.¹³⁷ With this back ground, primarily, the role of the ICC is to help states combat impunity and help foster a culture for the respect of the rule of law.¹³⁸ ICC cannot be and is not intended to replace domestic legal processes; is meant to complement them and raise accountability.¹³⁹

Therefore, ICC enjoys wide support among the general public in Kenya, but many senior officials view it with fear.¹⁴⁰ In Uganda, there was hope that the ICC would induce the perpetrators to seek a political settlement, although that has not yet happened¹⁴¹ and in the CAR, the government has

¹³⁴Chikeziri Sam Igw, cited above at note 40, PP. 294-295.

¹³⁵ Paul J. Magnarella, "Achieving Human Rights in Africa: The Challenge for the New Millennium", *African Studies Quarterly*, Volume 4, Issue 2, (2000), PP.18-27.

¹³⁶ Eric Blumenson, "National Amnesties and International Justice", Eric Blumenson rev. 11/2/05 ,PP.1-23.

¹³⁷Mogoeng, "Africa and the International Criminal Court (ICC)-Lessons learned and Synergies ahead", *Africa Legal Aid (AFLA)*, Johannesburg, South Africa, (2014).

¹³⁸United Nation Security Council, Security Council expresses deepest concern at continued civilian suffering during conflict, condemns all violations of Humanitarian Law threatening non-combatants, 5898th Meeting, SC/9340, (2008), available at: (<http://www.un.org/press/en/2008/sc9340.doc.htm>)last visited on April 15, 2017.

¹³⁹ Duncan McCargo, "Transitional Justice and Its Discontents", *Journal of Democracy*, Vol. 26, Number 2, (2015) , PP. 5-20

¹⁴⁰ ICC Forum, "Darfur debate -what should the ICC do about the Darfur", ICCforum.com/Darfur, (2010)

¹⁴¹See MakauMutua, "The International Criminal Court in Africa: challenges and opportunities", (September 2010), PP.1-10.

cooperated with the ICC's investigations.¹⁴² In Sudan, the ICC has been rejected particularly after it issued a warrant of arrest against President Omar al-Bashir.¹⁴³

In general, the most obvious benefits that the ICC can and will bring include a robust international law jurisprudence and helping end or limit the impunity for the worst of crimes.¹⁴⁴ In short, we need an ICC to achieve justice for all, end impunity, help end conflicts, remedy the deficiencies of ad hoc tribunals, and take over when national criminal justice institutions are unwilling or unable to act and to deter future war criminals.¹⁴⁵

2.5. Critics against the ICC

Here it is worth mentioning to highlight some of the critics against ICC. In dealing with this, the researcher picked few areas that clearly show the critics against the ICC. The first criticism is related to independence of the Court. Though the ICC's declare that the Court is an independent judicial institution, scholars in the area argue that it is far from being an independent, impartial, international court, it is inseparably tied to the United Nations Security Council.¹⁴⁶ In this regard, David Hoile presented in his book entitled "Justice Denied the Reality of the International Criminal Court", that the ICC is rapidly turning in to a Western court to try African crimes against humanity.¹⁴⁷ To begin with its statutory provision grants special "prosecutorial" rights, to refer or defer an ICC investigation or prosecution, to the Security Council, or more specifically to the five permanent members of the Security Council.¹⁴⁸ The ultimate power in this instance lies on the permanent members of the UNSC through the exercise of veto power.¹⁴⁹ The three permanent

¹⁴² Human Right Watch, "Kenya: Q&A on Recent Developments on the International Criminal Court", (April 8, 2013), PP.1-6, *available at*: (<https://www.hrw.org/news/2013/04/08/kenya-qa-recent-developments-international-criminal-court>), last visited on March 11, 2017.

¹⁴³ African Arguments Org., *The ICC, Sudan, and the Crisis of Human Rights*, (2009), (<http://africanarguments.org/2009/03/05/the-icc-sudan-and-the-crisis-of-human-rights/>), last visited on March 25, 2017.

¹⁴⁴ Jovana Davidovic, "The International Criminal Court & Africa: Is the ICC's alleged negative bias towards African countries undermining its legitimacy?", *University of Iowa, The Critique*, (2016).

¹⁴⁵ International Criminal Court, *Establishment of international criminal Court-overview*, *available at*: (<http://legal.un.org/icc/general/overview.htm>), last accessed April, 10/17.

¹⁴⁶ See Charles ChernorJalloh cited above at note 33, P.208-210

¹⁴⁷ See David Hoile, *Justice Denied the Reality of the International Criminal Court*, The Africa Research Centre, 26 York Street, LONDON W1U 6PZ, (2014).

¹⁴⁸ The Rome Statute. (1998) document A/CONF.183/9 art.13 (b) and 16.

¹⁴⁹ Justin MorrisNicholas J Wheeler, "The Security Council's Crisis of Legitimacy and the Use of Force", *International Politics Article Volume 44, Issue 2-3*, (March 2007), PP. 214-231.

members of the UNSC (USA, China and Russia) who are not members might refer a case of non-state party to the Statute when it is politically expedient for them to do so.¹⁵⁰ The case *de facto* impunity given to several serial abusers of human rights who happen to be friends of any of the permanent members can be the best example in this regard.¹⁵¹

On top of this, it is crucially vital mentioning the source of funding which shows for the absence of independence of the court in assessing the credibility and viability of the organization. The five dominant EU countries paid forty-four per cent of the ICC budget.¹⁵² There is as always a direct relationship between levels of payment and control. David Hoile¹⁵³ argues that the court is under control of European countries. The court is clearly tied financially with the European Union, which provides almost sixty percent of its funding, with most of it coming from Britain, France, Germany, Italy and Spain.¹⁵⁴ John Rosenthal in support of David's idea, the heart of the ICC's claim to political independence while accepting money from major funding states is a self-evident principle that the independence and hence impartiality of a Court is only as sure as the independence of its financing.¹⁵⁵

The other criticism goes with efficiency of the Court. The ICC Chief Prosecutor has declared that the Court is "proud to be economical"¹⁵⁶ others argue this is yet a misleading statement.¹⁵⁷ Though there is no clear and agreeable measure to evaluate the efficiency of the ICC, the most readily apparent one is expenditure per *indictée*.¹⁵⁸ Since issuing its first indictments in July 2005, the Office of the Prosecutor has initiated proceedings against 30 individuals. Excluding the budget for 2013, the Court has spent approximately €27.6 million per *indictée* that this number suggests that

¹⁵⁰ See David Hoile cited above at note 28, PP.25-26 and at note 38, PP.1-24

¹⁵¹ Kieran Kelly, The International Criminal Court will only hurt the Palestinian People, (2017), PP. 1-22, available at: (http://www.academia.edu/11712717/The_ICC_Will_Only_Hurt_Palestine) last visited April 22 2017.

¹⁵² L. Rush Atkinson, "Knights of the Court the State Coalition Behind the International Criminal Court", Journal of International Law and International Relations Vol. 7, (2011), PP. 66-103. ISSN: 1712-2988.

¹⁵³ David Hoile. cited above at note 29, P.3

¹⁵⁴ "The New EU: Definitely a Super state", The Brussels Journal, (2008), available at: (<http://www.brusselsjournal.com/node/2831>)

¹⁵⁵ John Rosenthal, A Lawless Global Court. How the International Criminal Court Undermines the U.N. System, Policy Review, Hoover Institution, (2004), available at: (<http://www.hoover.org/publications/policyreview/3439981.html>) last visited on April, 26, 2017

¹⁵⁶ The Economist, "Courting disaster? At its forthcoming review, the International Criminal Court has things to celebrate, things to improve & pitfalls to avoid", (2010), see also David Hoile, cited above at note 38, PP. 20-21.

¹⁵⁷ *ibid.*

¹⁵⁸ See the 12 November 2015, 19:45 Report of the Court on the development of performance indicators for the International Criminal Court.

the ICC has achieved less than its predecessor tribunals for the former Yugoslavia and Rwanda, which indicted 161 and 91 individuals, respectively, and spent far less per indictee.¹⁵⁹

The other point of criticism is the effectiveness of the Court which depends much on the cooperation of governments. Prosecuting international crimes in countries where conflict is ongoing, or against sitting heads of state, is delicate work which challenges not only accepted notions of state sovereignty but also the traditional territorial boundaries of criminal investigations.¹⁶⁰ At the same time, the ICC relies on state authorities to arrest suspects and transfer witnesses, evidence, and intelligence, and most governments have done little to help.¹⁶¹ Some have stepped up in relatively simple situations.¹⁶²

The other criticism is in relation to appointment of judges; the ICC is a unique court whose judges are appointed not because they are the best legal minds in the world, but because of dirty vote trading.¹⁶³ Vote-trading, campaigning and regional politicking invariably plays a great part in candidates' chance of being elected than considerations of individual merit.¹⁶⁴ According to the Human Rights Watch's reports and manual, "Unqualified judges...have been appointed to key positions because of highly politicized voting systems and a lack of transparency."¹⁶⁵ These are judges, with no legal expertise in the international law in some cases and no legal experience in one case, making critical rulings on very difficult issues of international criminal law.¹⁶⁶

The aforementioned critics, though not exhaustive plays pivotal role in the smooth and effective functioning of the Court. ICC's opposition from most African Union member states will be discussed in brief in chapter four of the thesis.

¹⁵⁹ *Ibid.*

¹⁶⁰ See Barbara Harlow. Daniel Kahozi and Lucas Lixinski. "Rapport Centre Human Rights Working Paper Series 6/2011", the United Nations Security Council Resolution 1973 (2011):Libya in the Dock, The University of Texas School of Law, PP.1-10.

¹⁶¹ Frederick K. Cox, "War Crimes Prosecution Watch", Public International Law and policy group, International Law Centre Vol. 8, Issue 15, (2013).

¹⁶² David Kaye, "Who's Afraid of the International Criminal Court? Finding the Prosecutor who can set it straight" Council on Foreign Relation, Foreign Affairs, Vol. 90, No. 3 (2011), PP.122.

¹⁶³ David Hoile, cited above at note 25 and PP.14-15

¹⁶⁴ Brian Z. Tamanaha, "On the Rule of Law: History, Politics, Theory?", Cambridge University Press The Edinburgh Building, Cambridge CB2 8RU, UK, (2004).

¹⁶⁵ See the Human Rights Watch's World Report 2004; see also Human Rights in the Administration of Justice: Independence and Impartiality of Judges, Prosecutors and Lawyers", A Manual on Human Rights for Judges, Prosecutors and Lawyers, Professional Training Series No. 9, UNITED NATIONS New York and Geneva, (2003).

¹⁶⁶ David Hoile, cited above note 28, P.4

2.6. Conclusion

The ICC is the culmination of a decades-old movement to promote international criminal law. In 1948, when the Convention on the Prevention and Punishment of the Crime of Genocide was adopted, the United Nations General Assembly recognized the need for a permanent international court to deal with the kinds of atrocities which had just been perpetrated. However, while negotiations on the ICC Statute were underway at the United Nations, the world was witnessing the commission of heinous crimes in the territory of the former Yugoslavia and in Rwanda. In response to these atrocities, the United Nations Security Council established an ad hoc Criminal tribunal for each of these situations: for the Former Yugoslavia (ICTY) and then, in the wake of the genocide in Rwanda, the International Criminal Tribunal for Rwanda (ICTR). These events undoubtedly had a most significant impact on the decision to convene the conference which established the ICC in Rome in the summer of 1998.

In relation to this, Africa, as a continent, supported the idea of the ICC before its birth. This support was illustrated by Senegal which was the first country in the world to ratify the Rome Statute. African civil society also played a great role in the negotiation and establishment of the ICC and in encouraging African states to ratify the Rome Statute. After establishment and exercising its responsibility, ICC criticized in relation to its independence, efficiency, and appointment of judges of the Court.

Chapter Three

General overview of withdrawal and Exiting from ICC

3.1. Introduction

It is very crucial to explain the concept of acquisition of membership and the issues of withdrawal. This is because no organization can exist without members; members are the fundamentals of any organizations. In most organizations, only states may become members, we will usually refer to member states. Increasingly, however, international organizations may also have other international organizations as members.¹ Thus, any organization be it regional continental or international, has its own rules for the acquisition and exit of membership which are enclosed in the basic treaty, charter, etc. Therefore, this chapter basically devoted to see the concept of withdrawal and withdrawal from ICC. In this regard, it seeks to examine the general overview of withdrawal and the international law and it specifically examine the legal procedure of withdrawal from ICC.

3.2. General overview of withdrawal and the International Law

With regard to acquisition of membership, the original members of the organization are the States which conclude the basic treaty and they place down the circumstances for the admission of new members.² For instance, article 4(1) of the United Nation charter provides that membership in the United Nations is open to all peace loving states which accept the obligations contained in the Present Charter.³ It is also true for ICC that as per article 125(3) of the Rome Statute that the Statute shall be open to accession by all States and instruments of accession shall be deposited with the Secretary-General of the United Nations.⁴

When we see the issue of withdrawal, Article 42(2) of the 1969 Vienna Convention on the Law of Treaties (VCLT) provides that states can withdraw from a treaty only as a result of the

¹ VCLT, Vienna Convention on the law of treaties (with annex), Concluded at Vienna on 23 May 1969, 1980 United Nations-Treaty Series, Vol. 1155,1-18232, Article 5.

² Peter Fischer (2012) International organizations , Vienna/Bratislava, P. 31

³ See The United Nations Charter, (adopted 26 June 1945, San Francisco, entered in to force 24 October 1945), article 4(1).

⁴ See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, Article 125, and P.73.

application of the provisions of the treaty or of the present Convention.⁵ Part V of the convention, article 43-45 and 54-64, set out the various circumstances in which a treaty can be denounced, terminated or suspended.⁶

The Convention sets out a sequence of grounds for terminating or withdrawing from a treaty, including: ‘in conformity with the provisions of the treaty’, i.e. if the treaty explicitly provides for it (Article 54(a))⁷; ‘by consent of all the parties after consultation with the other contracting States’ (Article 54(b))⁸; following a ‘material breach’ by one of the parties (Article 60); ‘supervening impossibility of performance’ (Article 61); or ‘fundamental change in circumstances’ which ‘constituted an essential basis of the consent of the parties to be bound by the treaty’ (Article 62).⁹ Furthermore, as per Article 5 of the VCLT, it applies to treaties adopted within an international organization ‘without prejudice’ to the organization’s own rules.¹⁰

It is possible to list out the four ways that membership of international organizations may end. These are withdrawal by the member (constitutional provisions, withdrawal without constitutional provision and Partial withdrawal), expulsion from the organization, disappearance of the member or loss of essential qualifications and dissolution of the organization.¹¹ Withdrawal (voluntarily termination)¹² of membership of any international organizations may end by withdrawing from the organization. Instead, expulsion (non-voluntarily termination) is the compulsory cessation of membership.¹³ Many international organizations provide for

⁵ See VCLT Vol. 1155, cited above at note 1, P. 342.

⁶ See Part V of the VCLT: article 43-45 and 54-64, See also Anthony Aust, Modern treaty Law and practice, Cambridge University press, ((3rded. 2013), P. 245.

⁷ Article 54(a), P. 246.

⁸ Article 54(b): this can be done even if the treaty provides for a minimum period of notice and this article imposes one precondition applicable only to a multilateral treaty: before taking actions the parties must consult the contracting states, P.254.

⁹ Article 62 of VCLT, PP. 345-347.

¹⁰ See Article 5 of the VCLT, P. 334

¹¹ Henry G. Schermers and Niels M. Blokker, International institutional law: unity within diversity, (5th rev. ed.), (2011) by Koninklijke Brill NV, Leiden, the Netherlands, P.98.

¹² See VCLT, section 3, article 54.

¹³ See Henry G.Schermers and Niels M.Blokker, cited above at note 11.

expulsion of members which do not fulfill their obligations. Expulsion may be the final means of sanction in order to persuade a member to observe the rules of the organization.¹⁴

Thus, Article 6 of UN Charter contemplates expulsion under the same procedural prerequisites as admission (recommendation by the UNSC and two thirds majority in the GA) for “persistent violation of the principles of the Charter”.

Membership can also be terminated by disappearance of the member or dissolution of the organization. For illustrations like, the 1990 Germany Unification resulted disappearance of the German Democratic Republic and the dissolution of the Union of Soviet Socialist Republics, USSR resulted Russia becomes successor State.¹⁵

3.3. Withdrawal from ICC

The first fundamental question that should be asked for this analysis is what should be the treaty basis for states withdrawal from ICC. The International Criminal Court Statute which was adopted by 120 States on 17 July 1998, in Rome and entered into force on 1 July 2002¹⁶ lay down a procedure for withdrawal by a State Party from the Court. Article 127 of the Rome Statute is the treaty base and considered as the legal way to leave the ICC which is wide. Specifically, the legal process of exiting from Rome Statute of the International Criminal Court, explained in Part 13 of the final clauses of Article 127 (1). In this article it states that:

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

Besides, the Statute has also proposed Article 121 (6) of the Statute other ways to withdraw from Rome Statute of ICC.¹⁷ Article 121 of the Statute, which is specific than article 127 in relation to withdrawal, explained that if an amendment has been accepted by seven-eighths of States Parties

¹⁴ C. Wilfred Jenks, “Expulsion from the League of Nations”, in: 16 BYIL 155-157 (1935) and also see Ramses A.Wessel “You Can Check out Any Time You Like, But Can You Really Leave?” International organizations law review, Vol. 13, (2016), No.2.

¹⁵ *Id.*, PP. 32-33.

¹⁶ See the Rome Statute of ICC, see also G. Werle & J. Bung, The evolution of international criminal law: summary (historical evolution) International Criminal Justice, Humboldt-Universität zu Berlin, (2010), P.1.

¹⁷ Rome Statute cited above at note 4, Article 121 Amendments 6.

in accordance with paragraph 4, any State Party which has not accepted the amendment may withdraw from this Statute with immediate effect, notwithstanding article 127, paragraph 1, but subject to article 127, paragraph 2, by giving notice no later than one year after the entry into force of such amendment.¹⁸

As explained above, the two withdrawal articles in the Rome Statute address the issue of withdrawal for state parties from ICC, while Article 127 deals with withdrawal by a state party in a broader context, and Article 121 (6) deals with withdrawal in a narrow set of circumstances in relation to treaty amendments.¹⁹ The withdrawal question raised by African member states would fall on Article 127 of the Rome Statute, which is open ended in its execution.²⁰ For instance, African state parties of the Rome Statute Burundi, Gambia and South Africa had made an announcement of withdrawal from ICC and communicated their intention to withdraw from the ICC in accordance with article 127 of the Rome Statute.²¹ They made their announcements on 18 October 2016 Burundi, followed by South Africa's withdrawal on 25 October 2016 and the notice of withdrawal from The Gambia on 25 October 2016.²²

Other than the Statute clauses, there are treaty provisions that provide ways for withdrawal of states from an international organization. With regard to this, Article 42(2) of the 1969 Vienna Convention on the Law of Treaties provides that states can withdraw from a treaty only as a result of the application of the provisions of the treaty or of the present Convention.²³ In addition, it is possible to withdraw from organizations by agreement under provisions in international law as per Article 54(b) of the VCLT.²⁴

There are important elements that should be examined in the withdrawal articles of the Rome Statute. The first important element in exiting from ICC is notification of intention to withdraw which is the primary step for the member state that pursues to withdraw, after a decision to leave.

¹⁸Rome Statute, cited above at note 4, Article 127, paragraph 1& 2.

¹⁹*Id.*, Article 121 (6) and 127.

²⁰*Ibid*

²¹ Executive council Thirtieth ordinary session, 22-27 January 2017,(2017) Addis Ababa, Ethiopia, EX.CL/1006(XXX)Rev.1, P.6.

²²Valérie Arnould, "A Court in Crisis? The ICC in Africa and beyond", EGMONT Paper, (2017), PP.10-12.

²³See Article 42(2) of the 1969 VCLT, see also Anthony Aust, modern treaty law and practice, cited above at note 6, P.245.

²⁴See Article 54(b) of the VCLT.

Thus, it should be noted that, the first important element of article 127 of the Statute, is notification of intention to withdraw.²⁵ In this regard, for the official withdrawal of a member from the Court, a member state should give a one year written notice of declaring its intention for withdrawal to the Secretary-General of the United Nations.²⁶ There is no other requirement needed for withdrawal in case of ICC other than this and indicated in paragraph 2 of the same article.

Article 127(1) of the ICC Statute provides that one year following the provision of notification of withdrawal, a country would cease to be a State Party to the ICC Statute and be free of obligations under the treaty, subject to the limitations set out in Article 127(2). But, ICC Statute is not without an exception to the one-year notice period. While Article 121(6) provides for the possibility of immediate withdrawal, abandoning the one-year notification period requirement, in Article 127(1), it applies to circumstances where an amendment has been accepted by a certain proportion of member states, allowing states who have not consented to the amendment to denounce the ICC Statute.²⁷

Besides, time of notification is also another important element that must be considered. Thus, for notification of intention there is no specified time in Article 127 or 121 of Rome Statute that when it has to notify.²⁸

The other crucial issue of exiting procedure is form of notification of withdrawal. In this regard, Article 127 of Rome Statute specifies the type of form that the notification of intention to withdraw should take. It is clearly explained to be made in writing.²⁹ In relation to this, Article 67(1) of the VCLT requires a state that wants to invoke the Convention in order to withdraw from a treaty to notify the other parties in writing.³⁰

Thus, we can deduce from here, in withdrawal of member states, ICCs approval of the notification is not needed. This is because notice of withdrawal is unilateral and does not require

²⁵See Rome Statute, cited above at note 4, Article 127.

²⁶*Ibid.*

²⁷Rome Statute, cited above at note 4, Article 127(1).

²⁸*Id.*, Article 127 or 121 of the Rome Statute.

²⁹See article 127(1); see also Anthony Aust cited above at note 6, P.265: it state that the notification must indicate the measure to be taken and the reason for it.

³⁰See Article 67(1) of the VCLT.

the consent of the other Member States of the Rome Statutes of ICC. But, the process of withdrawal is carried out according to rules of the Rome Statute of ICC.

In relation to withdrawal, Article 68 of the VCLT explained that a notification of intention to withdraw from a treaty may be revoked at any time before it takes effect.³¹ But, this provision does not override any specific arrangements in a treaty. There is substantial disparity in treaties exit clauses over whether notification may be withdrawn.

Thus, a withdrawal evoked on the basis of Article 127 entails a waiting period of one year for the notification to take effect, unless a later date is specified. So, as per Article 127(1) of the ICC Statute, a state Party by addressing to the Secretary General of the United Nations with written notification, may withdraw from this Statute. Therefore, at the end of that year it stops to be a Member State of the Court except the notification stipulates a later date.

On the other hand, a withdrawal that is evoked on the basis of Article 121 paragraph 6 of the Statute, would have been initiated by a state which does not accept an amendment that has been adopted under Article 121 paragraph 4 of the Statute and may withdraw from the Statute at any time within one year after entry force of such amendment.³² This provision is an exception from the general right to withdraw, under Article 127(1), which takes effect only after one year of the notification. Withdrawals under Article 121(6) take effect immediately.³³ In the current situation faced by African member states, this clause is not likely to be considered as there is no amendment that is a point of contention by African Assembly of States Parties (ASPs).³⁴

Moreover, the other important issue in article 127 of paragraph 2 of the Rome Statute of ICC is, a state party demanding to withdraw from the Court, shall nevertheless observe the provisions of this Statute and shall remain liable for the discharge of its obligations under this Statute in that notification period as referred in paragraph 1 of this article.³⁵ Therefore, as per article 127 subsection (2) of the Statute, the obligations by state parties that began before the notification of

³¹ *Id.*, Article 68 of the VCLT.

³² See Article 121 paragraph 4 of the Rome Statute.

³³ *Id.*, Article 121(6) of the Rome Statute.

³⁴ EX.CL/952(XXVIII), Progress Report of the Commission on the Implementation of the Decisions of The Assembly of The African Union on The International Criminal Court, Executive Council, 28th Ordinary Session (2016), Addis Ababa, Ethiopia. See also African Union Draft 2 Withdrawal Strategy Document, P.5

³⁵ See paragraph 2 of article 127 Rome Statute.

withdrawal must be respected, even though a state party decides to withdraw and submits the notification of withdrawal. This includes matters that were introduced before the withdrawal became effective. The state would also be obligated to make payments on any accrued financial obligations.³⁶

Specifically, according to Article 127 of the Rome Statute, withdrawal takes effect one year after the date of receipt of the notification by the UNSG (unless a later date is specified). However, a state is not discharged from its obligations to pay all accrued financial arrears. Furthermore, any criminal investigations that have commenced prior to the withdrawal shall continue, and the country has an obligation to cooperate with the ICC on matters that were commenced before the date of withdrawal becomes effective.³⁷

The wording of Article 127 is framed to prevent cases where leaders under investigation use withdrawal from the ICC to avoid its jurisdiction. This means that before the effective date of withdrawal, Burundi, for example, will still be under the ICC's jurisdiction with regard to the current investigation. Now the ICC Prosecutor decided and opened a formal investigation into Burundi, though Burundi formally withdraws from the court this year. Burundi has a continuing obligation to cooperate with the ICC.³⁸

On top of this, paragraph 2 of article 127 also set out a state withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.³⁹ Furthermore, the duty to cooperate will not cease to apply even after withdrawal for cases that started before the withdrawal like the obligation to cooperate with the Court on cases that are under consideration by the Court relates to all cases instituted by the ICC, even after a withdrawal notification has been submitted.⁴⁰

³⁶*Ibid*

³⁷See article 127 of the Rome Statute.

³⁸*Ibid*

³⁹ See paragraph 2 of article 127 of the Rome Statute.

⁴⁰*Ibid*

In general, States Parties withdrawing from the ICC' must abide by the requirements not only by the one-year notification period, but also by the conditions for withdrawal indicated in Article 127(2) of the Rome Statute. Article 127(2) clarified the general principle that obligations on the State that exist at the time of withdrawal remain in force, and are unaffected except setting out three specific types of obligations. The first obligation is financial obligations, which may have been accrued will consist of regular assessments imposed upon States Parties by the Assembly of States Parties, in accordance with article 115(a) of the Statute. The second obligation is cooperation with the Court in connection with ongoing criminal investigations and proceedings; and the third obligation related to consideration by the Court of any matter which was already under consideration.⁴¹

Additionally, other vital matter in the withdrawal Articles (Article 127 and 121(6)) of the Rome Statute of ICC, the issue that is not clearly indicated is the legal procedure of the state which withdraws from the ICC would have to re-apply or can return through the normal application procedure.⁴²

3.4. Consequence of withdrawal

Withdrawal will be harmful to an international organization since the members of such an organization are more closely linked than is the case for other organizations. Withdrawal by one member state may have serious consequence for the entire organization. The transfer of sovereign powers to the organization by all members should not be rendered meaningless by the unilateral act of one member, neglecting the interest of the other and of the organization as a whole.⁴³ Withdrawal by a member from a universal organization, like ICC, can generally be regarded as disadvantageous from the perspective of the aim of universal membership. Withdrawal by a member from a closed organization will weaken the organization as a unit embracing a specific group, unless the state in question ceases to belong to the group.⁴⁴ Especially, withdrawal from organizations like ICC would not discourage government officials and

⁴¹See article 115(a) of the Statute; see also AU Draft withdrawal strategy, cited above at note 34, P.5-6.

⁴² Rome Statute, cited above at note 34, Article 127 & 121.

⁴³ See Henry G. Schermers and Niels M. Blokker, cited above at note 11, P.99.

⁴⁴*Ibid*

warlords from committing grave crimes against humanity achieve justice and facilitate peacemaking.⁴⁵

3.5. Conclusion

The Rome Statute of the International Criminal Court lay down a procedure for withdrawal by a State Party from the Court as per Article 127 (1) of the Rome Statute. Besides, the Statute has also proposed Article 121 Amendments 6 of the Statute other ways to withdraw from Rome Statute of ICC which is specific than article 127 in relation to withdrawal. Article 127(1) of the ICC Statute provides that a member state should give a one year written notice of declaring its intention for withdrawal to the Secretary-General of the United Nations and a country would cease to be a State Party to the ICC Statute, while Article 121(6) provides for the possibility of immediate withdrawal. Moreover, Article 42(2) of the 1969 Vienna Convention on the Law of Treaties provides that, states can withdraw from a treaty only as a result of the application of the provisions of the treaty or of the present Convention. However, withdrawal has its own consequence; withdrawal by one member state may have serious consequence for the entire organization.

⁴⁵Chikeziri Sam Igw, “The ICC's favourite customer: Africa and international criminal law”, Institute of Foreign and Comparative Law, The Comparative and International Law Journal of Southern Africa , Vol. 41, No. 2 (July 2008), PP. 294-295.

Chapter Four

African Union and the International Criminal Court (ICC)

4.1. Introduction

This chapter examines the contention between the AU (referring to Africa) and the ICC. Primarily, it discusses about the organs of the AU and other voices speaking for Africa. It also tries to deal with the current relationship between Africa and ICC. Under this, it discusses what the current relationship between Africa and the ICC looks like including the discussion of the underlying reasons for their current contentious relationship. Following that, the chapter discusses Darfur conflict as a precursor triggering the contention of the two. Then, it considers issues like: the current state of play of AU and ICC relationship. It examines justifications raised by African countries to withdraw from ICC and the plausibility of the justifications. It also discusses the proposed mechanisms by AU to ease the contention. Besides, it also tries to see withdrawal from ICC and its impact on the Court. Finally, concluding observations of the chapter will be presented.

4.2. Who Speaks for Africa?

As already presented earlier, African States were strong supporter of the ICC initially.¹ Over the years, however, the relation between the Court and the AU has changed and is increasingly becoming severely tense. The AU has adopted a hostile position towards the Court and called its member states to implement a policy of noncooperation with the ICC², further threatening them regularly to withdraw from the Rome Statute in mass.³ As discussed under section 3.3 of this thesis, three African states have publicly declared their intention to withdraw from the ICC and

¹ See the Final Report: 2016 ICC Assembly of States Parties Side Event; See also EliseKeppler, “Managing Setbacks for the International Criminal Court in Africa”, Journal of African Law, School of Oriental and African Studies, (2011), PP. 5-6.

² Tim Murithi, “Africa’s relations with the ICC a need for re-orientation?”, Heinrich Boll Foundation-Africa, (2012), P.4.

³ See the 2013 and 2017AU Summit Assembly decisions, see also Jean-Baptistejeangènevilmèr, “The African Union and the International Criminal Court: counteracting the crisis”, The Royal Institute of International Affairs, Volume 92, Issue (6), (2016), PP.1319-1342.

the Court has repeatedly been criticized by African states as inefficient, neo-colonial institution of the Western powers.⁴ Even though, this argument is supported by the fact that nine of the ten situations under investigation by the ICC, with three others under preliminary investigations, involve African countries,⁵ as noted by the European Centre for Development Policy Management (ECDPM), “the gap is often caused by a neat difference in priorities where one gives more importance to peace processes, while the other gives more weight to obtaining international justice”.⁶

In this regard, there are arguments that peace must precede and take priority over the pursuit of justice and accountability; otherwise, justice risks undermining efforts to resolve conflict peacefully, on the other hand peace and justice must be pursued simultaneously with the reason that there is no peace without justice.

The tension between the AU and ICC is powered by the fact that, the ICC is accusing sitting heads of state and African states in their part argued that the accusations interfere with the ongoing peace processes to mediate conflict situations.⁷ African leaders also contended that there are legal mechanisms at national, regional and continental levels that can handle African cases and the ICC was meant to be a Court of last resort that investigate and prosecute international crimes only when domestic courts are unable or unwilling to do so.⁸

In addition, the UNSC has also been caught up in the ICC debate in Africa⁹ as it has been criticized for not referring international crimes that are occurring in other parts of the world to the ICC as in the case of Libya, Kenya and Sudan cases before the ICC were referred by the

⁴ C. Schwöbel-Patel, “The rule of law as a marketing tool: The International Criminal Court and the brand of global Justice”, University of Liverpool, School of Law and Social Justice, International Criminal Law research, PP. 4-9.

⁵ See EX.CL/1006(XXX) Rev.1 PP3-4, January 2017. The current situations before the Court under preliminary examinations are Afghanistan, Colombia Nigeria, Gabon, Guinea, Iraq/UK, Palestine, Registered Vessels of Comoros, Greece and Cambodia; and Ukraine. Situations under investigations are Democratic Republic of The Congo, Uganda, Central Africa Republic, Darfur(Sudan), Kenya, Libya, Cot’ivore, Mali, Central Africa Republic II, Georgia and Burundi.

⁶ See Brian Cooksey, “Tanzania and the East African Community a comparative political economy”, Discussion Paper, European Centre for Development Policy Management (E C D P M), No. 186, (May 2016), PP.1-30.

⁷ See Philomena Apiko & FatenAggad, “The International Criminal Court, Africa and the African Union: What way forward?”, Discussion Paper, European Centre For Development Policy Management, No. 201, (2016), PP.2-3.

⁸ See article 1 of the Rome Statute, the principle of Complementarity; see also Rachel Goodman & Nokukhanya Mncwabe, “International Criminal Justice in Africa: Neo-colonial agenda or strengthened accountability?” African Transitional Justice Research Network, ATJRN Brief, (2011), P.12-13.

⁹ UNSC, “Prevention should be Integral to all United Nations efforts, Secretary-General tells Security Council in first open debate on root causes of conflict”, United security council, 7561st Meeting , SC/12124 (2015).

UNSC.¹⁰ Furthermore, the failure by the UNSC to defer the cases before the ICC at the request of the AU, has led to the perception that the UNSC is not considering the request of African states.¹¹

As a result, the assembly of the AU has adopted various resolutions critical of the ICC and its practice.¹² It discouraged the prosecution of Heads of state by the ICC and to drive for the reform of the ICC, it also involved in talks with the UNSC and then on a strategy for withdrawing from the ICC.¹³ Regarding the strategy for withdrawing from the ICC, the AU Assembly started encouraging African states to withdraw from the ICC.¹⁴ Thus, in 2017 at the 28th AU Summit, the AU announced to its member states to pull out of the ICC.¹⁵ However, African states responded heterogeneously and not all countries are in favor of the withdrawal.

Following the release of the AU's "ICC withdrawal strategy", the following ASPs to ICC: Nigeria and Cape Verde entered official reservations to the decision adopted by the Heads of states.¹⁶ Liberia more specifically entered a reservation to the paragraph that adopts the strategy, and Malawi, Tanzania, Tunisia, and Zambia requested more time to study it.¹⁷ Further, these countries, together with others, among which most notably Botswana and Senegal, formed the

¹⁰ Hemi Mistry & Deborah Ruiz Verduzco, "The UN Security Council and the International Criminal Court", International Law meeting summary, with Parliamentarians for Global Action, Chatham house (16 March 2012), PP.2-3 ; See also Lawrence Moss, "The UN Security Council and the International Criminal Court towards a more principled relationship", International Policy Analysis, Friedrich-Ebert-Stiftung, (March 2012), PP.1-7.

¹¹ See EliseKeppler, cited above at note 1, P.5.

¹² See Philomena Apiko & FatenAggad cited above at note 7,P.3 ; see also "Perspectives: Political analysis and commentary from Africa, A fractious relationship", Africa and the International Criminal Court, Heinrich Böll Foundation-Africa, No.1.12,P.3, see also Jean-Baptiste JeangèneVilmer, cited above at note 3 PP. 1319-1342.

¹³ See the UN "Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General", Pursuant to Security Council Resolution 1564 of 18 September 2004 Geneva, (2005), PP.1-5.

¹⁴ See Assembly of the Union, 28 Ordinary Session 30 - 31 January 2017 Addis Ababa, Ethiopia, Assembly/AU/Dec.621 (XXVIII) Decision on the 2016 Annual Report of 943(XXX) adopted in Addis Ababa, Ethiopia, in January 2017 regarding their notification of withdrawal from the ICC, PP.1-2.

¹⁵ See the 2017 at the 28th AU Summit decision.

¹⁶ Allan Ngari, The AU's ICC strategy presents a new avenue for dialogue as much as it urges withdrawal, Institute of security studies (ISS), (2017), available at: ([14https://issafrica.org/iss-today/the-aus-other-icc-strategy](https://issafrica.org/iss-today/the-aus-other-icc-strategy)), last accessed April 27, 2017.

¹⁷ AALCO "International Criminal Court: recent developments and the legality, under international law, of the UNSC authority to refer cases and/or situations to the ICC under article 13 (b) of the Rome Statute and other issues", Asian-African legal consultative organization, for official use only, New Delhi, India, PP.5-8.

group of "ICC supporters", voicing their concerns against withdrawal and want to remain members of the Court.¹⁸

Conversely, another group of states actively promoted leaving the ICC, led by Kenya and Burundi.¹⁹ As raised in chapter three of this thesis, those countries: Burundi, South Africa and The Gambia communicated their intention to withdraw from ICC. The Open-ended Ministerial Committee also welcomed the decision of these African States Parties to submit their notification of withdrawal as pioneer implementers of the withdrawal strategy prior to its adoption and they recommended that the three member states should be supported by the AU including those that may intend to submit their notification of withdrawal.²⁰ Therefore, Burundi is the only African country that successfully carried out its withdrawal, whereas The Gambia and South Africa effectively initiated the process of withdrawal but later reversed it.

The government of Burundi appealed that the Court is not an international system of justice and its membership couldn't be justified as the preliminary investigation of Burundi constitutes a violation of complementarity with national courts and sovereignty.²¹ But, ICC denies the allegation, insisting it is pursuing justice for victims of war crimes in Africa due to the fact that, since April 2015 possible crimes against humanity were committed in Burundi. As a result, in 2016 the ICC's Office of the Prosecutor, Fatou Bensouda opened a preliminary examination on Burundi alleged violations of the rule of law and human rights in the country.²² Hence, the decision to withdraw from the Court was arguably a reaction to this fact.

Unlike Burundi, the withdrawal decision of South Africa was not voted upon by parliament that has legal implications on whether parliamentary approval was required before hand. South Africa announced that the provision of the Rome Statute as it relates to State Parties treaty obligations

¹⁸ See EliseKeppler, cited above at note1, P.2.

¹⁹Torque Mude, "Demystifying the International Criminal Court (ICC) Target Africa Political Rhetoric", Open Journal of Political Science, Scientific Research Publishing, (2017),PP. 178-188

²⁰ See Assembly of the Union twenty-eighth ordinary session 30 - 31 January 2017 Addis Ababa, ETHIOPIA: Assembly/AU/Draft/Dec.1(XXVIII)Rev.2, ,Assembly/AU/Draft/Decl. 1-2(XXVIII) Assembly/AU/Draft/Res.1-2(XXVIII) Assembly/AU/Draft/Motion(XXVIII)

²¹ See Solomon Goshu's, "ICC's biggest challenge in reversing African mass withdrawal," The Reporter English 20 May, 2017

²² See the Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, Office of the Prosecutor, Ikirundi, (25 April 2016), available at: (<https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016>); accessed June1, 2017.

were inconsistent with customary international law, which offers diplomatic immunity to sitting Heads of State and Government.²³ In this respect, in June 2015 Sudanese President Omar al-Bashir was in South Africa to attend the African Union summit and South Africa refused to arrest and not to cooperate with the ICC call for al-Bashir had immunity as the head of a member state while he was there knowing that the ICC had previously issued two warrants of arrest against him. But in February 2017, its withdrawal was stopped by the North Gauteng High Court by ruling declared that the request to withdraw from the Rome Statute was unconstitutional since the executive does not have the powers to withdraw from international treaties unilaterally and that approval must be sought in parliament.²⁴ Countries like Sierra Leone, Ivory Coast, Zambia, Nigeria, Malawi, Senegal and Botswana were also among the African states that countered the October 2016 withdrawal notifications by South Africa.²⁵

With respect to The Gambia, their justification for withdrawal is similar to the case of Burundi. They decided to withdraw from the ICC by claiming that, the ICC is racist, prosecuting and humiliating "people of color, especially Africans" while ignoring crimes allegedly committed by leaders in western countries.²⁶ They also claimed that there are many Western countries that have committed heinous war crimes against independent sovereign states and their citizens since the creation of ICC and not a single Western war criminal has been indicted.

However, The Gambia started reversing the process that was initiated to commend the withdrawal, after President Jammeh stepped down following election defeat.²⁷ Moreover, the newly elected president, Adama Barrow, acknowledged the importance of the existence of an institution like the ICC.

Kenya, one of the severest critics of the Court, proposed that it should be complimentary of domestic or regional judicial courts.²⁸ But Kenya played an indecisive role at the 26th AU Summit in 2016 by first intervening and suggesting African collective withdrawal, but then

²³ EX.CL/1006(XXX) Rev.1, P.6.

²⁴Jean-baptistejeangènevilmèr, cited above at note 3, PP. 1319-1342.

²⁵See the 2017 draft African states Withdrawal Strategy from ICC,

²⁶See the Amnesty International Report 2016/17, The State of the world Human Rights, (Feb 23, 2017).

²⁷ *ibid*

²⁸ See "Country reports on terrorism 2016", United States, Department of State Publication Bureau of Counterterrorism, (July 201), PP.34-37.

coming short of taking effective action, rather letting emerge the desire of the Kenyan government to push for changes at the ICC.²⁹

According to Allan Ngari, an expert on International Crime with the Institute for Security Studies in Pretoria, it remains up to individual states to decide whether they want to remain within the Rome Statute or leave it³⁰, even the countries that have said they will leave the Court and the Rome Statute have so far failed to take any concrete measures to do so like in case of Kenya and South Africa.³¹ In addition Ngari further explained there are processes to change the treaty from the inside, and this is what South Africa and other AU members are doing to amend the Rome Statute, for this, one must be a party to the Rome Statute.³²

Other voices like African Civil Society Organizations and International Organizations, working on human rights and international criminal justice are speaking for Africa. They recommend and urge that African state governments at the AU summit through decisions, press statements, and other actions to take account of Africa's role in calling for ICC involvement in its countries, to undertake of strong support for the ICC in Africa, strengthen domestic criminal justice systems to deal with international crimes, to the expansion of the jurisdiction of the African Court and to improve communications between the AU and the ICC.³³

Recently, several initiatives have been taken to encourage states to cooperate with the ICC. For instance, the foreign minister of Botswana urging states to work towards reforming the Court, as

²⁹ See Assembly/AU/Dec.590 (XXVI): Decision on the International Criminal Court - Doc. EX.CL/952(XXVIII).

³⁰ Allan Ngari, "Beyond the ICC: how international criminal justice can thrive in Africa", Institute for security Studies(ISS), (29 Apr 2016), PP.1-3 Benson Chinedu Olugbuo, "The Exercise of prosecutorial discretion during preliminary examinations at the International Criminal Court", Thesis presented for the degree of Doctor of Philosophy in the department of Public Law, Faculty of Law, University of Cape Town, (2016), PP.12-15.

³¹ See Allan Ngari cited above at note 30; See also Maddalena Procopio, "Reforms or withdrawal? The evolving Mosaic of Africa's ICC Strategies", ISPI, Commentary, (March 28, 2017), PP.1-3.

³² *Ibid* Ngari, see Sanji Mmasenono Monageng, "Positive Reinforcement: Advocating for International Criminal Justice in Africa", Southern Africa Litigation Centre, (2013), PP. 44-47.

³³ Human Rights Watch, "Recommendations by African civil society groups and international organizations with a presence in Africa for the International Criminal Court's Assembly of States Parties 13th Session", (December 8-17, 2014); see also "Human Rights Watch Memorandum for the Twelfth Session of the International Criminal Court Assembly of States Parties", (November 2013), PP.6 See the African groups letter to AU, PP. 1-6, See also Max du Plessis, "The International Criminal Court and its work in Africa: Confronting the myths" ISS Paper 173,(2008), P.4.

opposed to leaving it.³⁴ In provisions to this, the Advocacy Director for Amnesty International in Africa urged other African states to follow the lead of Botswana rather than joining the drastic march away from justice.³⁵ Similarly, Human Rights Watch urged other African members to distance themselves from Burundi's withdrawal and affirm their support for the victims.³⁶ From these argument the researcher conclude that the court is still looked upon as a great administer of justice within some nations and withdrawing from it is a loss for the Court, the wider international community, and the victims of grave and inhumane crimes.

4.3. The current Relationship between the ICC and the AU

Regardless of earlier contributions and support, current changes in their relation in African states shows the ICC has confronted serious limitations in winning the interest of African leaders. Actually, the relationship between the ICC and Africa has become weak and rough. There is an growing trend of tension between Africa and the ICC in that changes Africa's state position towards the ICC from support to hostility and a strong dislike to the Court. Thus, here it is essential assessing the current state of play of AU and ICC relationship and the Darfur conflict which was a precursor issue triggering the contention between Africa and ICC which lead the African Union to ask its members to implement a policy of non-compliance and non-cooperation with the ICC.

4.3.1. Darfur Conflict as a Precursor Factor Triggering the Contention

ICC issued arrest warrant for Sudanese President Omar al-Bashir because of the conflict in Darfur in which over 200,000 people were killed and 2.3 million were displaced or otherwise affected by the conflict³⁷ when the Sudan Liberation Army attacked government forces³⁸ and the

³⁴ See, E. van Trigt, Africa and withdrawal from the ICC, peace palace library, (2016), available at: (<https://www.peacepalacelibrary.nl/2016/10/africa-and-icc-withdrawal/>,P.1-5), last accessed on April 3, 2017.

³⁵ Amnesty International, "Gambia: Withdrawal from ICC a drastic blow to countless victims globally", (Oct. 26, 2016), available (<https://www.amnesty.org/en/latest/news/2016/10/gambia-withdrawal-from-icc-a-drastic-blow-to-countless-victims-globally/>), last accessed May 5, 2017.

³⁶ Human Rights Watch, Burundi: ICC Withdrawal Major Loss to Victims (Oct. 27, 2016), available at: (<https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims>), last accessed May1, 2017.

³⁷ See Samar El-Masri, "The Legality of the International Criminal Court's Decision against Omar Al-Bashir of Sudan", International Journal: Canada's Journal of Global Policy Analysis, (June 1, 2011), P.3-6.

³⁸ Usman A. Tar, "Old Conflict, New Complex Emergency: An Analysis of Darfur Crisis, Nordic Journal of African Studies, Western Sudan University of Maiduguri, Nigeria 15(3): (2006), 406–427.

government responded with significant force and armed local “Arab” militias³⁹ to fight the African rebels.⁴⁰ As a result, the United Nations launch a Commission of Inquiry, this concluded that war crimes and crimes against humanity.⁴¹

Thus, ICC issued warrants for arrest and surrender of President Omar Hassan Ahmad Al Bashir of the Sudan for alleged war crimes and crimes against humanity allegedly committed in Darfur. The AU has issued a number of decisions calling on AU member States not to comply with the request by the ICC for the arrest and surrender of Al Bashir.⁴² In this respect, the AU has shifted its relationship with the ICC from that of cooperation to opposition and has become increasingly hostile towards the ICC.

The effects of the issuance of the Bashir arrest warrant continue to echo throughout the African leadership circles to date which challenged the notion of presidential immunity which previously formed the core of political discourse and viewed by many as unchallengeable norm within the customary international law category.⁴³ However, based on the evolvement of international criminal law, the argument has been made that the rules of customary international law on personal immunities of sitting heads of state do not bar the exercise of the jurisdiction of the ICC with respect to an incumbent head of state.⁴⁴

Succeeding this application, which was made on the basis of Article 58 of the Rome Statute, the PSC of the AU adopted a decision in relation to the ICC Prosecutor’s application for a warrant of arrest and the Council reiterated the African Union’s commitment to the fight against impunity

³⁹ Called *Janjaweed*

⁴⁰ Kurt Mills. (2012). “Bashir is Dividing Us”: Africa and the International Criminal Court, *Human Rights Quarterly* p. P.3.

⁴¹ Lawrence Moss, cited above at note 10, P.1.

⁴² Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Tribunal (ICC) Doc. Assembly/AU/13(XIII), 3 July 2009, Assembly/AU/Dec.245 (XIII) Rev.1 ,para. 10; Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/ Dec.270(XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV), 27 July 2010, Assembly/AU/Dec.296(XV), Paras 5-6; Decision on the Implementation of the Decisions on the International Criminal Court (ICC) Doc. EX.CL/639(XVIII), 30-31 January 2011, Assembly/AU/Dec.334(XVI), para. 5; Decision on the Implementation of the Assembly Decisions on the ICC - Doc. EX.CL/670(XIX), 30 June-1 July 2011, Assembly/AU/Dec.366(XVII), Para. 5.

⁴³ See the Decision on the Prosecution’s application for a warrant of arrest against Omar Hassan Ahmad Al Bashir, Public Redacted Version, No. ICC-02/05-01/09, (4 March 2009), available at: (www.icc-cpi.int/iccdocs/doc/doc639096.pdf), last accessed May 22, 2017.

⁴⁴ Paola Gaeta, “Does President Al Bashir enjoy immunity from arrest?”, *Oxford Journal of International Criminal Justice*, Oxford University Press, Volume 7, Issue 2,(2009), PP.315-332.

on the African continent and also condemned the gross violations of human rights in the Darfur region.⁴⁵ It, however, emphasized that the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace, thereby pointing to the “wrong timing” of the Prosecutor’s application for a Bashir arrest warrant.⁴⁶

In addition, the Council reaffirmed its statement of 11th July 2008, which highlighted the African Union’s concerns regarding the misuse of indictments against African leaders in conformity with decision Assembly/AU/Dec.199 (XI) on the abuse of the principle of universal jurisdiction.⁴⁷ Despite the concerns raised by the AU, the Pre-Trial Chamber of the ICC went ahead to issue the arrest warrant for President Omar Al-Bashir in March 2009⁴⁸, a move which was severely criticized by the AU, Jean Ping, the then AU Chairperson, was quoted to have stated as follows:

“The AU’s position is that we support the fight against impunity; we cannot let crime perpetrators go unpunished. But we say that peace and justice should not collide, that the need for justice should not override the need for peace.”⁴⁹

In general, the continental wide outrage boiled to the neck that it could be particularly in the wake of the ICC arrest warrant for Sudanese President Omar al-Bashir, although the public hostility masks deeper divisions among African countries.⁵⁰ Indeed, evidence of arguments among African states and between Africa and Western countries over the proper functioning and scope of the ICC is indicative of a number of paradoxes and conflicts which have emerged as

⁴⁵ See Article 58 of the Rome Statute, see also Peace and Security Council Communique arising out of its 142nd Meeting held on 21st July 2008 in Addis Ababa, Ethiopia PSC/MIN/Comm(CXLII).

⁴⁶ See the PSC of the AU decision adopted on the Bashir arrest warrant, see also Sharon Esther Nakandha, “Africa and the International Criminal Court: Mending Fences”, AvocatsSansFrontières (ASF), (July 2012), P.10.

⁴⁷ Assembly/AU/Dec.199 (XI) on the abuse of the principle of universal jurisdiction

⁴⁸ Avocats Sans Frontières, “Africa and the ICC: Mending Fences”, issue, (Aug 7, 2012), PP.1-16. See also Paul Andrew Gwaza, “African Union and International Criminal Court: The Trajectory to Peace and Security in Africa”, Government of Nigeria - Institute for Peace and Conflict Resolution, (August 19, 2014), PP.1-26.

⁴⁹ See an opinion by Mubarak M. Musa, the Deputy Head of Mission-Consulate General Uganda, “International Criminal Court has lost its impartiality” in the Daily Monitor Newspaper (22nd June 2010) in which he argued that the ICC’s selectivity against the Sudanese Government during the quest for peace and efforts of national reconciliation in Africa.

⁵⁰ AL Bashir is sought by the Court for the crime of numerous counts falling in the basic/core crimes category as war crimes, crimes against humanity and genocide and the specification are listed under the arrest warrant. See Human Rights watch, World Report, (2013), printed in the United States of America, PP.171-178 see also Kurt Mills cited above at note 40, P. 3-6.

Africa reorients its identities and interests to embrace international human rights norms while also asserting itself on the global stage.⁵¹

4.3.2. The current state of play of AU and ICC

Concern about the operations of the ICC has been expressed by the AU for several years. Hence, African states have come to be critical of the ICC. As a result, their relations are currently splitting. Earlier, in November 2009, the representative of South Africa were made proposals on behalf of the AU to amend the Charter, and to provide direction to the prosecutor on how he or she should choose his or her cases in the Assembly of States Parties of the ICC in The Hague.⁵² These suggestions were perceived by many as dangerously undermining core aspects of the ICC. As far back as 2010, the AU sought to have procedural changes made in the Rome Statute and in April 2016, the AU told its Economic, Social, and Cultural Council to evaluate the Council's relationship with the ICC, and on July 16, 2016, an AU advisory board stated that the ICC had focused its investigations on African leaders from its founding. The Council then recommended that African nations pull out of the ICC.⁵³

But the ICC and African Union good relation worsened following the ICC's accusation of two sitting African heads of state.⁵⁴ The earlier raised 2009 indictment of President Omar Al-Bashir of Sudan is often identified as the starting point for the deterioration of the AU-ICC relationship and the subsequent commencement of the trials against Uhuru Kenyatta and William Ruto, who were indicted prior to being elected President and Deputy President of Kenya, has only worsened this conflict.⁵⁵

⁵¹ *Ibid* PP.3-7;

⁵² See report of the Commission on the outcome and deliberations of the 8th Session of the Assembly of States Parties to the Rome Statute of the ICC held at The Hague, Netherlands from 16 to 26 November 2009, A.U. Exec. Council, 16th Ord. Sess., 29 Jan. 2010, Annex 2, A.U. Doc. EX.CL/568(XVI).

⁵³ *Ibid.* Matthew Santiago, AU Advisory Board Accuses ICC of bias against African Nations, Paper Chase (July 18, 2016).

⁵⁴ John MukumMbak, "International Justice: The International Criminal Court and Africa", the Brookings Institution, Africa Growth Initiative, (2014), PP.9-11; DaglousMakumbe, "African Response to the International Criminal Court Implications for International Legal Justice", Journal of Humanities and Social Science (IOSR-JHSS), Volume 20, Issue 8, Ver. IV (2015), P.1.Tim Murithi, "The African Union and the International Criminal Court: An embattled Relationship?", IJR Policy Brief, Number 8, (March 2013), PP.3-6.

⁵⁵ See Peter Beardsley (ed.), "War Crimes Prosecution Watch", Frederick K. Cox, International Law Center, Volume 9 - Issue 17,(November 17, 2014); Benedict Abrahamson Chigara & Chidebe Matthew Nwankwo, "To be or not to be? The African Union and its Member States Parties' Participation as High Contracting States

The ICC issued arrest warrants against Al Bashir in 2009 and 2010 as the major responsible person for the Darfur crisis and the AU opposition of the ICC's arrest warrant by claiming that the arrest warrant may lead to the deterioration of the peace process in Sudan and violates the international customary law such as immunity of heads of states.⁵⁶

As a result, the AU opposition to the ICC has been demonstrated in different ways. Primarily the AU Assembly decided that all its member States "shall not" cooperate with the ICC on the warrants of arrest issued against President Al Bashir pursuant to Article 23(2) of the AU Constitutive Act and Article 98 of the Rome Statute.⁵⁷ It also requested the AU Commission to consider seeking an advisory opinion from the ICJ regarding the immunities of State Officials under international law and to actively pursue the implementation of AU Assembly decisions on the African Court of Justice and Human Rights being empowered to try serious international crimes committed in Africa.⁵⁸ Even, the earlier supporters, Senegal and South Africa also put out a statement demanding that one of their fellow African heads of state be insulated from prosecution and that, if their demands were not met, they might not cooperate with the ICC in direct violation of their international legal commitments.⁵⁹

Parties to the Rome Statute of the International Criminal Court", (1998), Nordic Journal of Human Rights , Volume 33, Issue 3, (2015) .

⁵⁶Tegegne Edemealem Mekuriyaw, "The International Criminal Court-African Union Contestation on President Al Bashir Case", International Journal of Political Science and Development, Academic Research Journals , Vol.4(4), (April 2016), PP. 119-133, see also Human Rights Watch, Darfur: International Criminal Court's Decision on Bashir Arrest Warrant, February 3, 2010), available at:<https://www.hrw.org/news/2010/02/03/darfur-international-criminal-Courts-decision-bashir-arrest-warrant>), accessed on May7, 2017.

⁵⁷ See Article 23(2) of the AU Constitutive Act and Article 98 of the Rome Statute, See African Union Assembly Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC) Doc. EX.CL/710(XX), Assembly/AU/Dec.397 (XVIII), (29-30 January 2012), paras. 6-8. see also Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), adopted 3 July 2009, A.U. Assembly, 13th Ord. Sess., P.5, A.U. Doc. Assembly/AU/13(XIII). see International Criminal Court, "Al Bashir case: ICC Pre-Trial Chamber II schedules a hearing on South Africa's cooperation", (7 April 2017), ICC-CPI-20161208-PR1264, Press Release, P.1

⁵⁸ Decision on the Implementation of the Assembly Decisions on the International Criminal Court-Doc. EX.CL/670(XIX), Assembly/AU/Dec.366 (XVII), (30 June 1 July 2011), para. 8.

⁵⁹ The Conversation, "Al-Bashir's escape: why the African Union defies the ICC", Academic rigor, journalistic flair (June 15, 2015).

As a result, ICC had become unsuccessful to prosecute Al Bashir⁶⁰ because the enforcement of the ICC's decisions was mostly dependent on the states cooperation and no country was willing to arrest and surrender him to ICC.⁶¹

The withdrawal decisions of three ASPs from the ICC in 2016 is the other important point that reflects the current relation of ICC and Africa which have prompted worries that more countries may leave the Hague-based tribunal. Although the Gambia's new president, Adama Barrow, subsequently reversed his country's position⁶², these fears seemed well-founded when the Russian government announced its intent to withdraw its signature of the Rome⁶³.

As leaders in Chad, Kenya, Namibia and Uganda have lately openly toyed with the idea of exiting, there is also the possibility of further African withdrawals.⁶⁴ But, opposite to what many believe and what is being reported, 2016 saw a mitigating of the bombast of African mass withdrawal from the ICC, many African states unequivocally rejected calls for mass withdrawal and affirmed their support of the ICC.⁶⁵

At the 28th AU Summit in January 2017, though, AU Assembly adopted a mass 'withdrawal strategy, many African countries effectively contested and to the contrary.⁶⁶ Opponents of the withdrawal from the ICC are concerned that the risk of violations of human rights in African states would rise, since; the Court plays an important role in holding leaders accountable for their actions.

⁶⁰ See Tegegne Edemealem Mekuriyaw, cited above at note 56, PP.124-5.

⁶¹ Asad G. Kiyani, "Al-Bashir & the ICC: The Problem of Head of State Immunity", Chinese Journal of International Law, Volume 12 Issue 3, (2013): 467-508.

⁶² Manisuli Ssenyonjo, "State Withdrawal Notifications from the Rome Statute of the International Criminal Court: South Africa, Burundi and The Gambia", Criminal Law Forum, (June, 2017), PP.2-8. See also Kevin J. Vogel, "War Crimes Prosecution Watch", Frederick K. Cox International Law Centre, Volume 11 - Issue 2, (December 27, 2016).

⁶³ *Ibid.*, states like Botswana, Burkina Faso, Côte d'Ivoire, Democratic Republic of Congo, Ghana, Lesotho, Mali, Malawi, Nigeria, Senegal, Sierra Leone, Tanzania and Zambia.

⁶⁴ Laura Kokko, "Beyond the ICC exit crisis", European Union Institute for Security Studies (EUISS), (December 2016), P.1.

⁶⁵ *ibid.* states like Botswana, Burkina Faso, Côte d'Ivoire, Democratic Republic of Congo, Ghana, Lesotho, Mali, Malawi, Nigeria, Senegal, Sierra Leone, Tanzania and Zambia.

⁶⁶ See the 2017 AU Assembly decision.

4.4. Justifications invoked by African countries to withdraw from ICC

There are different grievances that are presented as justifications pushing African countries to withdraw from ICC. The first one is related to considering ICC as a hegemonic tool of western powers and is an institution which is targeting or discriminating Africa.⁶⁷ With respect to this, the ICC, up to now has received more than 9,000 complaints about alleged crimes in more than 139 countries, yet its primary focus and all of the cases that the ICC is investigating and prosecuting have to do with crimes allegedly committed seems to be on Africa⁶⁸ in which the first justification raised pushing African countries to withdraw from ICC and which raised as an example of the selectivity of ICC.⁶⁹ As a result, some African leaders are currently complained that ICC has unfairly targeted Africans and described the Court as a “Court of Western countries” and it is objected for having a racist agenda, its selective prosecution, a faulty investigation process and a prosecutorial strategy.⁷⁰ African states argued it is a new form of imperialism that seeks to undermine people from poor African countries and other powerless countries in terms of economic development and politics.⁷¹ This argument was showed by the Rwandan president Kagami’s suggestions that the ICC is a "fraudulent institution" suggestive of "colonialism" and "imperialism" that is seeking to undermine and to control Africa.⁷²

Moreover, official statements by the representatives of AU contain serious charges that the ICC is targeting Africans and engaging in ‘race hunting’. During the AU summit, some leaders

⁶⁷ The chairperson of the AU Commission, Jean Ping, who reportedly expressed Africa’s disappointment with the ICC in noting that rather than pursuing justice around the world – including in cases such as Colombia, Sri Lanka and Iraq, the ICC was focusing only on Africa and was undermining rather than assisting African efforts to solve its problems.

⁶⁸ Rebecca Davis, “Analysis: Is the International Criminal Court biased against Africa?” South Africa, (19Jun 2015).

⁶⁹ Countries like Uganda, the Democratic Republic of Congo, the Central African Republic and Mali (all parties to the Statute) have referred situations occurring on their territories to the prosecutor. The United Nations Security Council has referred two situations to prosecutor: the situation in Darfur, Sudan and the situation in Libya-both non-States Parties. Two more situations (situation in Kenya and situation in Côte d’Ivoire) have been opened by the prosecutor for investigation upon the authorization of Pre-Trial Division. Max du Plessis, et al., “Africa and the International Criminal Court”, International Law, Vol.01, (2013), P.2.

⁷⁰ See Max du Plessis, “The International Criminal Court that Africa wants”, Monograph 172, Institute for Security Studies, (2010), PP.13-14.

⁷¹ W. Chadwick Austin & Michael Thieme, “Is the International Criminal Court Anti-African?” A Journal of Social Justice, Volume 28, (2016) - Issue 3, , PP. 342-350 see also S. Odero, “the Politics of International Criminal Justice: the ICC’s Arrest Warrant for Al Bashir and the African Union’s Neo-Colonial Conspirator Thesis”, unpublished, P. 156.

⁷² Lionel Nichols, “The International Criminal Court and the End of Impunity in Kenya”, Springer Series in Transitional Justice, Political Science, (Feb 2, 2015), PP -249-255.

expressed the view that, despite its name, the ICC has ceased to be ‘international’ and has become a ‘Western court targeting Africans’ and unfairly focused on Africa either out of a desire to avoid hostility with major powers or as a tool of western foreign policy. The then AU chairman and Ethiopian Prime Minister, Hailemariam Desalegn, at May, 2013 AU summit, in the closing press conference explained that, the ICC process conducted in Africa has a flaw and has degenerated to some kind of race-hunting.⁷³ Besides, Tedros Adhanom Ghebreyesus, the Ethiopian ex-foreign minister, said at an AU summit in 2013, "The Court has transformed itself into a political instrument targeting Africa and Africans", and Bashir has also declared the ICC as “a tool to terrorize countries that the West thinks are disobedient.”⁷⁴ Besides, Kenyatta also called the Court as the “toy of declining imperialist powers.”⁷⁵

Similarly, in 2009, President Boni Yayi of Benin explained that “we have the feeling that ICC is chasing Africa.”⁷⁶ This sentiment expressively captured by Professor Mahmood Mamdani, a Ugandan scholar at Columbia University arguing that the "ICC is rapidly turning into a Western Court to try African crimes against humanity” and to him, "the realization that the ICC has tended to focus only on African crimes, and mainly on crimes committed by adversaries of the United States, has introduced a note of sobriety into the African discussion" and fueled concerns about a "politicized justice" and even bigger questions about the relationship between law and politics.⁷⁷

The second justification is often expressed in terms of the Sudan referral and amounts to a criticism that the Court’s work is undermining peace efforts or conflict resolution processes, that, focus only on Africa is undermining rather than assisting African efforts to solve its problems. As a result, the AU has also referred the ICC as an obstacle to peace, and has eventually called

⁷³ See the statement of May, 2013 AU summit closing press conference.

⁷⁴ Adam Taylor cited above at note 63, P.3.

⁷⁵ Addressing fellow heads of state at the meeting of the African Union, ICC toy of declining Imperial powers, available at: (<http://www.capitalfm.co.ke/news/2013/10/icc-toy-of-declining-imperial-powers-uhuru/>), last accessed on March, 21, 2017.

⁷⁶ *ibid*

⁷⁷ See Charles ChernorJalloh, “Africa and the International Criminal Court: Collision Course or Cooperation?”, North Carolina Central Law Review ,Vol. 34,203, Florida International University College of Law, (2012), PP.209-210.

African ICC member States for non-cooperation with the Court.⁷⁸ It suspects the Court is politically influenced by its funding countries, mainly European, and is pushing for a review of the relationship between the ICC and African states.⁷⁹

The third complain is that the Security Council has ignored African's call for peace to be respected over justice.⁸⁰ Besides, the Council while entitled to send cases to the ICC has made itself guilty of a double-standard since it has done so in respect of Sudan but has not done so in relation to other countries.⁸¹ In this respect, the then Zimbabwean President Mugabe told the UN General Assembly that the ICC is turning a "blind eye" to crime of Western leaders like George Bush and Tony Blair in the Iraq war.⁸² Thus, the ICC has been accused of 'exclusively' targeting Africans, and being a mere tool for western countries.⁸³

Further, the former chairperson of the AU Commission, Jean Ping, also criticized that it is unfair that all those situations referred to the ICC so far were African and it seems that Africa has become a laboratory to test the new international law. Ping, also suggested to journalists, at the AU summit in 2009, that the Court is a 'neocolonial plaything' and that 'Africa has been a place to experiment with their ideas', and he also accused the ICC of ignoring crimes in other parts of the world, on Israel, Sri Lanka and Chechnya.⁸⁴ The perception of ICC bias against Africa and lack of consistency and fairness in the way the Court is implementing international criminal justice may not correspond with the true reality.⁸⁵

The fourth objection is explained as the Court has designed to proceed against a sitting head of state of a country that is not party to the Rome Statute. The objection fundamentally connected with articles 98 and 27 of the Rome Statute that talks about heads of state immunity under

⁷⁸ Mia Swart en Karin Krisch, "Justice irreconcilable differences? An analysis of the standoff between the African Union and the ICC", African Journal of International Criminal Justice, Eleven international publishing (2014), PP. 38-45.

⁷⁹ Abel S. Knottnerus, "The AU, the ICC, and the Prosecution of African Presidents from Part II - African States and the ICC", Universiteit van Tilburg, The Netherlands, Cambridge University Press, (2017), PP. 127-151

⁸⁰ Max du Plessis, "South Africa Reaffirms its Support for the ICC", ISS, (2009), P.1.

⁸¹ *Ibid.* For instance, Gaza.

⁸² Arnold Wehmhoerner, "Impunity for the powerful: The African Union (AU) and the International Criminal Court (ICC)", Foundations For European Progressive Studies (FEPS), Cape Town, (October 2013), PP.1-5.

⁸³ Alebachew Birhanu Enyew, Cited above at note 39, P.2.

⁸⁴ See Max du Plessis, Tiyanjana Maluwa and Annie O'Reill, "Africa and the International Criminal Court", Chatham House, International Law 2013/1, (July 2013), PP.1-6.

⁸⁵ Max du Plessis cited above at note 70, P.11.

customary international law.⁸⁶ This particularly associated with the case of Sudanese President. Here, the AU relied on article 98(2) of the ICC Statute in terms of which the ICC may not proceed with a request for surrender that would require a state to act inconsistently with its obligations under international law with respect to the sovereign immunity of, inter alia, heads of state.⁸⁷ However, it has been decided that under the rules of international law, sovereign immunity applies only to prosecutions in national courts and not to prosecutions in an international tribunal, and article 27(2) of the ICC Statute accordingly provides that sovereign immunity shall not bar the ICC from exercising jurisdiction over persons enjoying such immunity.⁸⁸ It is argued in this article that article 98(2) contradicts article 27(2): if a head of state does not enjoy immunity against prosecution in the ICC, there is no immunity to be waived by the national state.

These objections have been expressed in various ways by African governments including those that are party to the Rome Statute, as well as in decisions taken by the AU and statements by its leaders. The cumulative language of various AU Assembly decisions going back to 2009 suggests that the organization is becoming more stuck in its belief that the ICC process is selective, skewed, biased, and even condescending towards Africa and that international justice must be conducted in a transparent and fair manner, in order to avoid any perception of double standards, and in conformity with the principles of international law.

4.5. Plausibility of the justifications

Addressing how plausible the Argument made by the AU on the ICC is so crucial. Thus, any one that challenges to answer these questions shall first perch into the realities reflecting what specific roles and positions the Western powers have had since the inception of the Court system in its entirety: the big powers named in the discussion above, which have never become a party to the Rome Statute, are of course, not historically known to be colonizers in sense European

⁸⁶ See articles 98 and 27 of the Rome Statute; see also Jens Iverson, "Head of State Immunity is not the same as State Immunity: A Response to the African Union's Position on Article 98 of the ICC Statute", *EJIL Analysis*, *European Journal of International Law*, (2012), PP. 1-3.

⁸⁷ See article 98(2) of the Rome Statute, see also Johan D van der Vyver, "Prosecuting the President of Sudan: A dispute between the African Union and the International Criminal Court", (2001) 2 *AHRLJ* 683-698. See also Muna Kemal, "AU and ICC", Abstract, *Academia.edu*, (July 17, 1998), P.6.

⁸⁸ See article 27(2) of the ICC Statute.

powers once did it on Africans.⁸⁹ However colonization has embraced a new conceptual paradigm in the wake of the 21st century includes political and economic ideologies that the west uses to influence developing countries in the process of furthering their national interests.⁹⁰

The referral system enshrined under article 16 of the Rome Statute by the UNSC, the way how and from which countries the judges are appointed and the source and budget raising scheme of the Court are indications that the functioning of the Court is not independent. But the researcher believes that it is too early and profoundly unreasonable to conclude these drawbacks are simply and solely showing that the Court is a weapon to neo-colonize Africa. Besides, scholars argue that while there are justified concerns over the impact of the global Court in Africa, arguments about neo-colonialism exaggerate the strength of the ICC.⁹¹ Furthermore, these arguments also underestimate the ability of African Governments to manipulate international justice to their own ends.

On the other hand, the very issue that reminds one, i.e., the fact that Africa is still ways back to get fully recover from the hangover and shock that the colonial oppression left behind; what makes things even more complicated is that there is still the undue dictation on Africans by the western powers as how the former should design their major policy frameworks in an areas of politics, culture, economy and the social arena.⁹² Aid, loan and diplomatic ties are the new post-colonial era liberators highly relied on and utilized to shape the living style of Africa in a way it satisfies the westerners' interest.⁹³

But, it sounds prematurely unsupported to conclude the allegation that the ICC is a neo-colonial weapon to conquer Africa to a level of dependency to the west, indeed, if the latter has to survive at all. The reasons are, first, the role of the western powers in the ICC is not strong enough to

⁸⁹ Tim van Ham, "How Post-Colonial is the International Criminal Court?", A case study on the Kenyatta and Ruto Case, Radboud University,(2014) PP. 23-27.

⁹⁰*ibid.*

⁹¹ Un General Assembly, " Africa no longer prey to division by those bent on disrupting its progress, declares President of Ghana, as General Assembly continues debate ", GA/11428, Sixty-eighth General Assembly , 12th, 13th & 14th Meetings, (26 September 2013); The International Criminal Court in a politically divided world, Report, Gaborone, Botswana, 21-22 October 2011, available at: (www.afla.nl/.../4321_156199_e1Z3_Report-Botswana_Conference_21-10-2011..doc), accessed Nov,2017.

⁹²Abdel Ghaffar Mohamed Ahmad, "Sudan Peace Agreements: Current Challenges and Future Prospects", Sudan Working Paper SWP (2010), PP.1-2.

⁹³ElandersGotab, "African voices African visions",The Nordic Africa Institute, Sweden, Stockholm(2001), PP.10-19.

extend undue influence on Africa and secondly, Africa is more powerful than it was during the colonial era. Thus, it would simply go immature to conclude that Africa might be a wounded prey for the powerful states, for to be a wounded prey is as good as to be dead.

The shifting of political power from the global north to the global south is another reality that strips the former off their morale capacity if such devilish interest is behind their gate door.⁹⁴ To make things further uncomfortable to the westerns is that there emerges new front of political and economic polarity headed by nations as China, India, Brazil, and South Africa together with many others, seemingly with no interest to back up the Westerns position, if they have any at all.⁹⁵

The western powers even do not have the gut to pursue such hidden interest knowing the fact that the way leading out of the ICC is unfenced and the very moment they manipulate ICC to their own national end, would certainly undermine the historical purpose that the Court is founded for, i.e., fighting impunity in case of the commission of major crimes.

It is pertinent to point out that thirty three of the fifty five member states of the African Union are party to the Rome Statute, this statistic certainly puts a lot of strain on the argument that the values represented by the ICC of intolerance against impunity. And the consequent indictment of Bashir is being imposed on African states by Western states.⁹⁶ True, there are some instances where the AU has claimed that it does not support impunity and wants to see a continent free of such inactions. However, leaders of the Africa need to show their determination in action rather than simply reciting words for their political consumption. If they truly want to see a continent free of impunity, it's time to take concrete action, like to look inward and reaffirm their commitment to international criminal justice by either providing domestic options for prosecution of international crimes or by ratifying the Protocol establishing the international criminal chamber of the ACHPR and making a true dialogue that commit themselves to work with ICC.

⁹⁴Stefano Trevisan, "The Interplay of Law and Politics within the ICC Procedures: The Kenya and Libya admissibility cases and the potentialities of the Complementarity Principle", International Law Research Seminar, Université Libre de Bruxelles, (2015), P.2-4.

⁹⁵*ibid*

⁹⁶Valérie Arnould, "A Court in Crisis? The ICC in Africa and beyond", EGMONT Paper, (2017), PP.9-12. See W. Chadwick Austin & Michael Thieme cited above at note 95.

The other most important issue is, all the cases investigated and prosecuted by the Court against any of the Africans was/is not stuffed by political aspirations or is not fabricated. They were all committed in violation of basic human and humanitarian laws and principles that the Court is expected to involve in and address. Besides, the top on list of African leaders agitating withdrawal from ICC have severe record on human rights violation and war crimes against humanity. The mere fact that there has been no one or not as many and sufficient suspects from the other corner of the globe as Africans do for balancing the number of cases would not be of any good to conclude Africans were subjected to the ICC's partiality in its effort to render justice, which is, of course a selective one. There are also efforts of ICC towards outside Africa Georgia that facing such an investigation. Besides, in addition to the eighth African countries, ICC is carrying out preliminary investigation of international crime in Iraq, Honduras, Palestine and Ukraine.⁹⁷ These efforts shows to answer the claim of Africa bias against the Court.

The other scenario is fifty percent of the cases brought before the court was lodged through states referral.⁹⁸ Otilia Maunganidze, from the Institute for Security Studies, argued that the ICC only deals with a case that has been referred to it and the majority of cases before the ICC were referred by the states themselves.⁹⁹ This is clearly indicating the fact that, at one point Africa was contented with the working of the Court. It was only later on that Africa began to conceive and develop animosity towards ICC. Thus, the characterization of the ICC as unfairly targeting Africans is not supported by the facts, while all situations under ICC investigation to date are in Africa; the majority of these came about as a result of voluntary referrals by the governments of states where the crimes were committed.

Further, the current prosecutor of the ICC, Bensouda, claims that the Court has not targeted Africans, instead simply sought justice for victims of crimes against humanity, including African

⁹⁷ Abraham Joseph, "Why did South Africa, Burundi and Gambia Decide to Leave the International Criminal Court?", Ansal School of Law, Ansal University, (2016).

⁹⁸ International Criminal Court, Situations under investigation, The Hague, The Netherlands, available at: (<https://www.icc-cpi.int/pages/situations.aspx>), last accessed April 10, 2017.

⁹⁹ Otilia Anna Maunganidze, "ICC Prosecutor's policy on case selection: timely, but is it enough? ",Institute for Security Studies (ISS), (28 Sep 2016); Mali, DRC, CAR, Uganda referred themselves. Two other situations were referred by the UN Security Council. That is not the ICC's prerogative to do that, it only relates to non-states parties, Sudan and Libya, see African Court Research Initiative, "African states withdrawals from Rome Statutes for the ICC Legal-political consideration", (2016), P.1.

victims.¹⁰⁰ In her argument, all of the victims in our cases in Africa are African victims, and they are the ones who are suffering these crimes, as a result the Court is protecting Africans rather than targeting them. In addition, CICC also claimed that the ICC is not unfairly focusing on Africa, rather fighting against impunity all over the world;¹⁰¹ thus ICC has targeted impunity, not African individual leaders.

Besides, Jeffrey Smith, an Africa specialist at Robert F. Kennedy Center for Justice and Human Rights, argued that, at first glance, the criticism that the Court has focused too much on African states is a fair one, but it fails to acknowledge that independent tribunals in the former Yugoslavia and Cambodia, to take two recent examples, have thus far led to a natural reduction in the ICC's scope.¹⁰²

In addition, an international human rights lawyer, Angela Mudukuti, wrote in the *New Internationalist* last December; presented that far from serving a neo-colonial agenda, the ICC is in fact a safeguard against neo-colonialism: “Africa’s former colonial powers would want nothing more than to see impunity tear the continent to shreds, and the ICC can assist in preventing this”.¹⁰³

Therefore, the criticism of neocolonialism, or even racism, is unjustified. Because, there are substantial legal and factual reasons for the Court’s present focus, i.e., all current investigations, with the exception of the Kenyan situation, were referred to the ICC by the states concerned or by the UN Security Council with the consent of the ICC’s African state parties that were members of the Council. But, the researcher believe that there has been uneven application of international criminal justice an intense focus on Africa and ICC may not prosecute leaders of powerful States, or even those States they protect. However, the risk of this argument is that it covers African dictators and their followers who seek reasons to delay or resist being held responsible under universally applicable standards of justice. African leaders weaken

¹⁰⁰See the argument of Jeffrey Smith, an Africa specialist at Robert F. Kennedy Center for Justice and Human Rights on ‘Why so many African leaders hate the International Criminal Court?’ in *Washingtonpost.com* 15 June 2015.

¹⁰¹Brendon J. Cannon, “The International Criminal Court and Africa: Contextualizing the anti-ICC narrative”, *African Journal of International Criminal Justice* 2016 (2) 1-2, (January 2017), PP.7-9.

¹⁰²*Ibid* Jeffrey Smith cited above at note 100, P. 1.

¹⁰³See Angela Mudukuti , “Is the International Criminal Court racist?”, *New Internationalist Magazine*, (December, 2014), P.1.

accountability by presenting the ICC as a new form of imperialism that should not be supported and regardless of the selectivity and partiality, no one dares to argue that all indicted individuals before the ICC are in clean hands.

In relation to this, Nobel Peace Laureate Archbishop, Emeritus Tutu, accuses in an article for the Cape Times: “African leaders behind the move to extract the continent from the jurisdiction of the ICC are effectively seeking a license to kill, damage and oppress their people without consequences”.¹⁰⁴

Netsanet Belay, Africa Director, Research and Advocacy of Amnesty International, in his part suggest that, although, the scenarios could seem unwelcoming for the ICC, there are reasons to be hopeful. But, we should not soften the legitimate questions that African member states have about the ICC like the role of the UN Security Council (UNSC) and the politicized nature of referrals is also a very important question that should be addressed, not by the ICC but by the UNSC itself and the legitimate reform proposals with respect to the Rome Statue system that sets out the ICC’s rules and procedures.¹⁰⁵

4.6. Proposed Mechanisms by African Leaders to ease the Contention

As a result of the contention between AU and ICC, in 2013 AU Summit some AU member states called on all signatory African states to withdraw their membership of the Rome Statute.¹⁰⁶ In this summit the Assembly also decided that no charges shall be commenced or continued before any international Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.¹⁰⁷ These initiatives pushed both attempts to lobby reform of the ICC through the proposal of amendments of the

¹⁰⁴ Archbishop Emeritus Desmond Tutu , “ War tribunal not a 'witch hunt' targeting Africa: Tutu, Times, South Africa, (11 October 2013) , <https://www.timeslive.co.za/news/south-africa/2013/10/11/war-tribunal-not-a-witch-hunt-targeting-africa-tutu/> ; See Arnold Wehmhoerner, “Impunity for the powerful: The African Union (AU) and the International Criminal Court (ICC)”, FEPS Correspondent for Southern Africa Cape Town, (October 2013).

¹⁰⁵ See Netsanet Belay, “Impunity vs Immunity: Africa and the ICC”, Amnesty International, Research and Advocacy at Amnesty International (24 June 2015); see also Stephen Arthur Lamony, “Africa and the International Criminal Court”, Coalition for the International Criminal Court, (14 April 2009).

¹⁰⁶ See the 2013 AU Summit Assembly decision, see also Philomena Apiko & Faten Aggad, “The International Criminal Court, Africa and the African Union: What way forward?”, Discussion Paper, ECDPM-European Centre For Development Policy Management, No. 201, November 2016, p.21

¹⁰⁷ Ext/Assembly/AU/Dec.1, para. 10

Rome Statute, and the prioritization of the expansion of the ACHPR's mandate to try international crimes.

As a result, AU proposed reforms so as to ease the contention with ICC included: amendments to Article 27(Irrelevance of official capacity), Preambular part of Rome Statute to allow for complementarity of regional judicial institutions, Article 16 on the deferral of cases, Article 70-offences against administration of justice, and the reduction of the powers of the Prosecutor.¹⁰⁸

Therefore, in order to develop strategies to implement the various decisions of the Assembly relating to the ICC, the Open-Ended Ministerial Committee of Foreign Affairs on the International Criminal Court (here after "The Open Ended Ministerial Committee"¹⁰⁹), was established pursuant to Decision Assembly/AU/Dec. 586 (XXV) in June 2015.¹¹⁰ At the January 2016 Summit, in accordance with the decision Assembly/AU/Dec.590 (XXVI), it requested the committee to develop a comprehensive strategy including collective withdrawal from the ICC.¹¹¹

Hence, the committee identified the relevant issues and formulates the draft African Union strategy document with multiple approaches including the option of a collective withdrawal from the Rome Statute for the ICC and submitted to an extraordinary session of the Executive Council. In the 28th AU Summit in Addis Ababa, heads of states and government adopted a decision on this strategy document for withdrawing from the ICC to follow if reform demands are not met.¹¹² Some of the strategies outlined in this AU's "withdrawal strategy" and resounding

¹⁰⁸ See the Rome Statute of article 27, 16 and 70; see also Report of the 4th meeting of the Open Ended Committee of Ministers of Foreign Affairs on the International Criminal Court, Para. 18

¹⁰⁹The composition /the members of Open Ended Committee of Ministers of Foreign Affairs on The International Criminal Court ("The Open Ended Ministerial Committee") is at April 2016, are as follows: Algeria, Angola, Burundi, Chad, and Congo. Cote d'Ivoire, Djibouti, Egypt Eretria, Ethiopia, Equatorial Guinea, Kenya, Libya, Madagascar, Mali, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Sudan, Sudan Somalia, South Africa, Tanzania, Uganda, Zambia and Zimbabwe.

¹¹⁰ Assembly Decision /AU/Dec. 586 (XXV) adopted by the Assembly, Twenty Fifth Ordinary Session held in Johannesburg, South Africa in June 2015; see also paragraph 5 of the draft withdrawal strategy doc.

¹¹¹ Decision Assembly/AU/Dec.590 (XXVI), adopted by the Assembly adopted in January 2016., see also Executive Council Twenty-Ninth Ordinary Session 10 – 15 July 2016, Kigali, Rwanda, Progress Report of the Commission on the Implementation of the Decisions of the Assembly of the African Union on the International Criminal Court, EX.CL/987(XXIX).

¹¹² Assembly of The Union Twenty-Sixth Ordinary Session 30 - 31 January 2016 Addis Ababa, Ethiopia, Decisions, Declarations and Resolution, Assembly/AU/Dec.588-604(XXVI), Assembly/AU/Decl.1-2(XXVI) Assembly/AU/Res.1(XXVI), Assembly/AU/Dec.590 (XXVI), Assembly/AU/Dec.616 (XXVII)] decision.

the repetition of African solution for African problems, proposes two broad approaches: Legal and institutional strategies, and Political strategies.¹¹³

4.6.1. The legal and institutional strategies

At this juncture, it is important to look in detail the legal and institutional strategies adopted in a decision by Heads of state and government in the 28th AU Summit to follow.

4.6.1.1. Amendments to the Rome Statute

With the reason to address a situation where the UNSC is unable to decide on a deferral request, such be transferred to the UNGA for a decision, Article 16 of the Statute was decided to propose for an amendment.¹¹⁴ The refusal of the UNSC to address or respond to the deferral request of the AU was evidenced in the case against the Sudan President. Thus, with respect to article 16 of the Statute¹¹⁵, the proposed amendments include “*A State with jurisdiction over a situation before the Court may request the UNSC to defer the matter before the Court.*” and “*Where the UN Security Council fails to decide on the request by the State concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377 (V) of the UN General Assembly.*”¹¹⁶

The other proposed amendment is Article 63 of the Statute i.e., trial in the presence of the accused. The proposed amendment was:¹¹⁷

Notwithstanding article 63(1), an accused may be excused from continuous presence in the Court after the Chamber satisfies itself that exceptional circumstances exists, alternative measures have been put in place and: considered, including but, not

¹¹³ See the 28th African Union Summit heads of state and government adopted decision in Addis Ababa.

¹¹⁴ See Article 16 of the Rome Statute. See also the draft withdrawal strategy. P. 8

¹¹⁵ See Rome Statute of the International Criminal Court and Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court, Rome, 15 June - 17 July 1998, Official Record, Volume I, United Nations, New York, (2002) Article 16: P. 11,” No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under the Chapter VII of the Charter of the United Nations, has requested the Court to that effect, that request may be renewed by the Council under the same conditions.”

¹¹⁶ Refers to article 16 of the Statute.

¹¹⁷ See Article 63 of the Statute and the African Union decision cited at note 110, P.9-10.

limited to changes to the trial schedule or temporary adjournment or attendance through the use of communications technology or through representation of counsel; (2) Any such absence shall be considered on a case-by- case basis and be limited to that which is strictly necessary; (3) The Trial Chamber shall only grant the request if it determines that such exceptional circumstances exist and if the rights of the accused are fully ensured in his or her absence, in particular through representation by counsel and that the accused has explicitly waived his right to be present at the trial.

Here the amendment is intended to address the problem that under the Rome Statute, article 63(2) foresees a trial in absence of the accused in exceptional circumstances and the Rome Statute does not define the term exceptional circumstances and neither are there case laws to guide the Court on the same.¹¹⁸ Besides, it also offers other cautions in granting such trials in circumstances where other reasonable alternatives have provided to be insufficient and for a firmly mandatory duration.

In addition to this, even if it is pending, Article 27 of the Statute, irrelevance of official capacity, amended as: *“Heads of State, their deputies and anybody acting or is entitled to act as such may be exempt from prosecution during their current term of office. Such an exemption may be renewed by the Court under the same conditions.”*¹¹⁹ In this regard, trial should not be started until the Head of State or Government or anyone involved to act as such, has left office in harmony with domestic and customary international law though being a Head of state or Government such will not excused them from criminal liability.

Furthermore, an amendment presented to the Rome Statute is Article 70 of offences against administration of justice. This article should be amended to include offences by the Court Officials as *“The Court shall have jurisdiction over the following offences against its administration of justice when committed intentionally by any person”*, so that it's clear that either party to the proceedings can approach the Court when 2 such offences are committed.¹²⁰

¹¹⁸ See Rome Statute, article 63(2).

¹¹⁹ See Article 27 of the Statute, see also the draft withdrawal strategy.

¹²⁰ See Article 70 of the Rome Statute and see also the draft withdrawal strategy, P.8.

The other important proposed amendment is article 112 of implementation of Independent Oversight Mechanism (IOM). Thus, in order to enhance its efficiency and economy, The IOM is operationalized and empowered to carry inspection, evaluation and investigation of all the organs of the Court. Therefore the Assembly of States Parties proposed to establish such subsidiary bodies as per Article 112(4).¹²¹

In general, these proposed amendments to the Rome Statute have been submitted to the Working Group on Amendments by African State Parties, some of which were submitted on behalf of the African Union based on decisions of the Assembly and others by individual African States Parties.

4.6.1.2. Reform of the UNSC

The power vested in the UNSC is controversial as it confers power to countries to refer cases to the prosecutor that have not submitted to the jurisdiction of the Rome Statute themselves as stated under Article 13 (2) of the Rome Statute.¹²² The problem is further difficult when the referral is made for a sitting Head of State like the case in 2005 under Resolution 1593 the UNSC referred the situation in Darfur to the Prosecutor of the ICC.¹²³

The referral of Al-Bashir was rejected by the government Sudan and through successive AU Assembly decisions, a deferral of the case also requested by the AU.¹²⁴ South African has prompted the amendment for the United Nations General Assembly to entertain the request of deferral if the UNSC does not respond to a deferral request within six months of being notified of it, as per Resolution 377 (V), Para.1 of 1950.¹²⁵ This amendment was resulted because the continuous refusal of the UNSC to defer the case involving President Al-Bashir of Sudan and the

¹²¹See article 112 and Article 112(4) of the Rome Statute, see also Assembly of States Parties, Report of the Working Group on Amendments, Thirteenth session, New York, 8-17 International Criminal Court ICC-ASP/13/, (31December 2014); See also the African Union, Withdrawal Strategy document-restricted circulation, Version 12.01.2017, P.12.

¹²² Article 13 (2) of The Rome Statute states that, “The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”

¹²³See Resolution 1593 the UNSC; see also Asad G. Kiyani cited above at note 61, PP. 467-508;

¹²⁴Assembly/AU /Dec.221 (XII), Para.3; see also Assembly/AU/Dec.270 (XIV) Para. 10

¹²⁵ See Resolution377 (V), Para.1 of 1950

request asks for a reshaping of how the referral system works and calls for the UN system to play a role in addressing a structurally unequal problem.¹²⁶

4.6.1.3. Ratification for Judicial Alternatives for Africans

At the 23rd Ordinary Session of the African Union in Malabo, in June 2014, the AU adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (“The Protocol on Amendments”).¹²⁷ This protocol expands the jurisdiction of the Court to encompass international and transnational crimes including genocide, crimes against humanity and war crimes, and the crime of aggression.¹²⁸ Member states should exert effort to ratify and domesticate the Protocol in order to enhance principle of complementarity and to reduce the deference to the ICC, which furthers the word of African solution to African problems.¹²⁹ The expansion of the jurisdiction of the Court as outlined in the Malabo Protocol allows the crimes listed in Rome Statute to be prosecuted with in the African continent.

However, three years after the protocol was adopted, no country has ratified the Malabo Protocol and no new signatures were added or instruments of ratifications were received.¹³⁰ Only the following member states have signed the Malabo Protocol: Kenya, Benin, Chad, Congo, Ghana, Guinea-Bissau, Guinea, Sierra Leone, Sao Tome & Principe.¹³¹ During the meeting of the Open-ended Ministerial Committee, the Ministers deplored the low level of signature and ratification of the Malabo Protocol and underscored the need for Foreign Ministers to sign the Malabo Protocol during the AU Summit in January 2017. As a result, the Commission is planning a number of activities in 2017 as part of its treaty promotion activities to give serious attention to enhance the pace of signature and ratification of the Malabo Protocol and the Government of the

¹²⁶*ibid*

¹²⁷For this reason, this protocol is occasionally referred to in the literature as the “Malabo Protocol”, See Article 11 of the Protocol.

¹²⁸ See article 5 of the Rome Statute ; see also Manuel J. Ventura and Amelia J. Bleeker (2015); Universal Jurisdiction, African Perceptions of the International Criminal Court and the New AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, P. 1-6

¹²⁹ See Rebecca Bowman, “Lubanga, the DRC and the African Court: Lessons learned from the first International Criminal Court case”, AHRLJ Volume 7 No 2, (2007), PP.412-445.

¹³⁰ See “the 21September 2017 minute and conclusion of the Fifth Meeting of the Open Ended Committee of Ministers of foreign Affairs on the International Criminal Court”, P.5;Amnesty International, see also “Malabo Protocol: Legal and Institutional implications Of the merged and expanded African Court Snapshots”, (2017), P. 14

¹³¹ *Ibid*; Executive Council, EX.CL/1006(XXX) Rev.1,Thirtieth Ordinary Session 22 - 27 January 2017 Addis Ababa, Ethiopia, Paragraph 41, P.10; See also Assembly/AU/ decision.1(XXVIII)Rev.1,PP.1-2.

Republic of Kenya reiterated its financial support for the operationalization on the African Court of Justice and Human and Peoples' Rights. On 21 September 2017, in its 5th Meeting at the AU permanent Observer Mission to the United Nation in New York, USA, the Open-ended Committee of Ministers of Foreign affairs on ICC were made the following comments and observations: There was need to look in to the reasons why Member states were neither signing nor ratifying the Protocol; the need for Special Technical Committee(STC)on justice and legal affairs to consider the reasons for the poor ratification; and considering the possibility of adopting revisions or amendments to the Protocol taking in to account the concerns of Member States.¹³²

The Ministers were of the view that establishment of the African Court with criminal jurisdiction is the strongest solution to mitigating the involvement of the ICC on the continent based on the principle of complementarity.¹³³ But, it may lead doubts on the possibility of having an African court with criminal jurisdiction, as countries lack the will to ratify this Protocol extending the jurisdiction of the African Court on Human and Peoples Rights to cover criminal matters.

The heads of International Center for Transitional Justice (ICTJ) offices in Uganda, Kenya and Coted'ivoire, in their part argued that the AU has adopted the Malabo Protocol to establish a court that might replace the ICC in some way and the Protocol needs 15 ratifications to come into force but after three years it still has none.¹³⁴ Therefore, the researcher believes that it cannot be relied on exclusively to deliver justice to victims of mass crimes on the continent any time soon. Besides, if the mass withdrawal takes effect some African states will not have an existing court to deal with international crimes unless countries have ratified the Malabo Protocol.

The Malabo Protocol also grants immunity to sitting heads of state that is contrary to the ICC's jurisdiction. The adoption of Protocol on Amendments undoubtedly comes of the heel of the AU

¹³²Executive Council Twenty-Sixth Ordinary Session, 23 – 27 January 2015 Addis Ababa, Ethiopia, Annual Report of the Chairperson on the Activities of the African Union Commission covering the period January to December 2014, EX.CL/866(XXVI), P.12.

¹³³*ibid*, Paragraph 42, P.10.

¹³⁴Sarah Kasande, Chris Gitari and Mohamed Suma, "AU Strategy for Collective Withdrawal from the ICC; non starter", Pambazuka News, Heads of ICTJ offices in Uganda, Kenya and Côte d'Ivoire ;See also Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,' AU Doc. No. STC/Legal/Min. 7(1) Rev.1 (14 May 2014) ('Malabo Protocol'); The AU Assembly adopted the Malabo Protocol on 30 June 2014 at its 23rd Ordinary Session.

decision on the ICC, and the cases brought against Kenyatta, Ruto and the Sudanese President Omar al- Bashir.¹³⁵ Therefore, in this regard, the 2014 African Court Protocol: attack against the ICC most. Mainly, Article 46A b is of the Protocol Amendments, however, states that “no charges shall be commenced or continue before the court against any serving African Union Head of State or government, or anybody acting or entitled to act in such a capacity, or other senior State officials base on their functions, during the tenure of office.”¹³⁶ It is perhaps the most expressive explanation of what is really at the heart of criticisms of the ICC: the protection of the powerful. However, even if the protocol was ratified, due to the immunity clause for sitting heads of state and other high-ranking government officials in the protocol, it may lead to question whether the Court would be a true mechanism to make accountable people responsible of violations of the crimes listed in Rome Statute in the continent. Thus, this may undermine the Court’s capability to serve as a deterrent to perpetration of international crimes.

The decision of the AU on the ICC and the adoption of the Protocols on the Amendment found contrary to principles of international law, mainly because heads of state and governments officials are not entitled to immunity with regards to genocide, war crimes and crimes against humanity. AU uses the principle of complementarity as a basis for its decision to extend the jurisdiction of the African Court of Human and People’s Rights to cover the crimes that currently fall under the jurisdiction of the ICC.¹³⁷ There may be some merit in the idea of an African Court if it has the financial muscle and political will to perform credibly, but nothing points to either being the case at the moment.

¹³⁵ See the 2014 African Court Protocol ; see also Nelago Ndapandula N. Amad, “Is the African Union’s decision on the ICC and the adoption of Article 46A B is of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights unlawful under international law?” , University of Cape Town, 2014, PP.6-16

¹³⁶ *Ibid* the 2014 African Court Protocol ; See AU Doc. No. Assembly/AU/Dec.529 (XXIII). See also D. Tladi, ‘The Immunity Provision in the AU Amendment Protocol: Separating the (Doctrinal) Wheat from the (Normative) Chaff’ (2015) 13(1) Journal of International Criminal Justice 3-17. Art. 46A b is of the Protocol reads, in full: ‘No charges shall be commenced or continued before the [African] Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

¹³⁷ See the 2014 African Court Protocol; see also Kelly Lekkerkerker, “The African Quest for an inter-African Jurisdiction: Looking beyond the International Criminal Court versus Africa Debate” Leiden university, Master’s Thesis, (2017), PP.23-26.

In relation to other options for accessibility justice, scholars¹³⁸ argued that one option could be to focus on Hybrid Courts. The AU has been instrumental in establishing hybrid courts, for example the Extraordinary African Chambers in Senegal, which successfully prosecuted and sentenced Hissene Habré for crimes committed whilst he was president of Chad.¹³⁹ The AU is also in charge of establishing a Hybrid Court of South Sudan, which will try perpetrators of international crimes.¹⁴⁰ The Hybrid Court “currently represents the most viable option for ensuring accountability for crimes committed during the conflict, as well as for deterring further abuses”.¹⁴¹ However, hybrid courts are not immediately activated and in the case of the Extraordinary African Chambers, the case of Hissene Habré took 25 years before it was brought to trial.¹⁴²

4.6.2. The AU Political strategy

The AU Political approach, on the other hand, includes the continued use of the Open-Ended Committee of Ministers of Foreign Affairs to involve with various stakeholders in the international criminal justice system. Specifically, the Assembly of States Parties to the Rome Statute, the UNSC, the permanent five members of the UNSC, Russia and China, the President of the ASP, the African Group of States Parties based in New York and The Hague, and the Prosecutor of the ICC should engage with stakeholders relevant to the ICC processes as already addressed above.¹⁴³ In this strategy, there are issues to be addressed for each key stakeholder. Next let us see some of them.

4.6.2.1. United Nations Security Council

¹³⁸ Like Philomena Apiko, (a Ugandan national and Junior Policy Officer ECDPM) Luckystar Miyandazi (a Kenyan national and Policy Officer at the ECDPM) and Faten Aggad-Clerx (an Algerian national and Head of the Africa s Change Dynamics Programme at the ECDPM)

¹³⁹ Anne Bodley & Sousena Kebede Tefera, “Uploaded the extraordinary role of the Extraordinary African Chambers Convened to try former Chadian leader Hissène Habré By”, Friclw Tody, Issue 3 (2013) ABA section of International Law, PP.1-3

¹⁴⁰ See the document “towards “silencing the guns by the year 2020”: a call for clear and tangible measures for addressing impunity for conflict-related violations in Africa”, Amnesty International, Index: AFR 01/6628/2017, (June 2017) ; see also Mark Kersten, The Hybrid Court for South Sudan? Looking for a Way Forward (Part 1), Justice in Conflict, (2017), available at(<https://justiceinconflict.org/2017/02/23/the-hybrid-court-for-south-sudan-looking-for-a-way-forward-part-1/>), accessed Sep. 2, 2017.

¹⁴¹ *ibid*

¹⁴² Human Rights Watch, The Case of Hissène Habré before the Extraordinary African Chambers in Senegal: Questions and Answers, (2016), available at (<https://www.hrw.org/news/2016/05/03/qa-case-hissene-habre-extraordinary-african-chambers-senegal>), accessed on Oct.2017.

¹⁴³ See African Union draft 2 withdrawal strategy document, cited above 121, P.8

The UNSC as key stakeholder for achieving an outcome of withdrawal of the referral of the situation in the Sudan by the UNSC the issues to be addressed includes the following:¹⁴⁴ the first issue is suspension/deferral or withdrawal of proceedings against President Omar Al- Bashir of the Sudan, and highlight the referral of a sitting Head of State whose country is not Party to the Rome Statute and the unresolved international discourse as it relates to immunities.¹⁴⁵

The other issues to be addressed by UNSC is, in future, no referral of a situation on the continent should be made without deference to Assembly of the Union; and Non- inclusion of execution of ICC arrest warrants in UN mandated Peacekeeping missions.¹⁴⁶ Besides the need to acknowledge and respond to issues from continental and regional mechanisms and the need to take into cognizance the interrelatedness of peace and justice and the importance of sequencing is the other issue to be addressed by UNSC.¹⁴⁷

4.6.2.2. Assembly of State Parties

The need to take in to cognizance the interrelatedness of peace and justice and the importance of sequencing, reduction of the power of the prosecutor, and non-inclusion of execution of ICC arrest warrants in the UN mandated peace keeping missions are the issues to be addressed by Assembly of State Parties.¹⁴⁸ In addition, all pending proposed amendments to the Rome statute and rules of procedure and evidence (RPE) is the issues to be tackled by the Assembly.

4.6.2.3. P-5 in the UNSC

To obtain assurances that the none of the P-5 will veto a resolution to support the AU request for deferral of proceedings against the president of Sudan, the P-5 in the UNSC address firstly the issue of the need to acknowledge respond to the issues from continental and regional mechanisms and to get their support as members of the P-5 but also in order to get additional support from the members of the UNSC.¹⁴⁹ Secondly the issue to influence the P-5 and the

¹⁴⁴ *Ibid* P.7

¹⁴⁵ See Abel S. Knottnerus, cited above at note 79, PP.152-184

¹⁴⁶ See, the draft withdrawal strategy”, cited above at note 121, PP.11-12.

¹⁴⁷ *ibid*

¹⁴⁸ Fatou Bensouda, Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005), Twenty-first Report, International Criminal Court, New York (2015), PP.2-7.

¹⁴⁹ See United Nation, “International Criminal Court’s Chief Prosecutor, Briefing Security Council, Criticizes Failure to Address Sudan’s ‘Persistent Failure’ on Darfur”, SC/12393, Security Council 7710th meeting (2016).

UNSC as a whole in support of AU/African positions is given to China and Russia Separate from P-5.¹⁵⁰

However, the above stated Legal and institutional and Political strategies would require the continued engagement of African States Parties (ASP) within the Rome Statute system. It would otherwise be impossible, for example, to enhance African representation in the ICC, or engage with the African Groups in New York and The Hague to propose amendments to the Rome Statute outside of the ASP.¹⁵¹

Allan Ngari, commented that, the strategy pronounces itself on the need for African states to strengthen national criminal justice systems.¹⁵² This reflects the strongest statement by the AU on international criminal justice, as it relates to Africa. Within the principle of complementarity espoused in the Rome Statute, the ICC remains a court of last resort and it remains the responsibility of national legal systems to investigate, prosecute and try international crimes. African states have been unable to effectively conduct the investigations and prosecutions needed to bring to justice those alleged to have committed international crimes against African citizens.¹⁵³ A strong recognition that the continent needs national laws, legal capacity and judicial mechanisms in place will only support the fight against impunity for international crimes, and help to provide access to justice for victims. This would be a true demonstration of repeated mantra, African solutions to African problems.

4.6.3. Collective/Mass states withdrawal as an option

4.6.3.1. The concept collective withdrawal

As stated above, in the 28th African Union (AU) Summit in Addis Ababa, heads of state and government adopted a decision on a strategy document for withdrawing from the ICC

¹⁵⁰Peter Ferdinand, “The positions of Russia and China at the UN Security Council in the light of recent crises”, Briefing Paper, Directorate-General for External Policies of the Union, European Union, (2013), PP.6-17.

¹⁵¹Franck Kuwonu, ICC: Beyond the threats of withdrawal: African countries in dilemma over whether to leave or support the International Criminal Court, Africa Renewal: May - July 2017, available at: (<http://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats>), last accessed August 17, 2017.

¹⁵²See Allan Ngari, cited above note 16. See UN Chronicle the magazine of UN, Vol. XLIX No. 4, (December 2012) explaining the role of the ICC in ending Impunity and establishing the rule of law.

¹⁵³ DailyMaverick, “The AU’s (other) ICC strategy”, ISS Today, (14 Feb. 2017), available at: <https://www.dailymaverick.co.za/article/2017-02-14-iss-today-the-aus-other-icc-strategy/>, last accessed April 27, 2017

collectively. Thus, collective withdrawal is an option adopted by African heads of state and government that urges member states to collectively withdraw from ICC. It is a concept that has not yet been recognized by international law. Collective withdrawal explained as:

“a smaller number of treaty parties may indicate an attempt to shift from an old equilibrium that benefits some states and disadvantages others to a new equilibrium with different distributional consequences.”¹⁵⁴ States can sometimes group together to challenge international legal rules they perceive as unfair and oburgate international institutions that enforce those rules.”¹⁵⁵

The collectiveness of the action has the potential to radically reconfigure existing forms of international cooperation. It makes clear that if member states chose to withdraw, they should do so according to their domestic mechanisms. And even where states have banded together to propose different legal alternatives to the dominant regimes, they have done so unilaterally by invoking the notice procedures established in the various treaties they were disapproving.¹⁵⁶

4.6.3.2. Legality of collective withdrawal

Regarding the legality of collective withdrawal, first, it is non-binding and legally nothing has changed; it is also more of a political theater, not a practical decision. Secondly, its focus is on AU states considering how to implement collective withdrawal rather than actually doing it. Thirdly, each state would have to withdraw individually under the rules they signed up to when they voluntarily joined the court.¹⁵⁷ Collective withdrawal may not have a place in the Statute. Thus, collective withdrawal from the treaty is not a legal option. Most important of all, the resolution shows very clearly that the states of the African Union do not have a common position on ICC withdrawal. They did not unanimously endorse the decision, and some countries have

¹⁵⁴ R. Helfer, ‘Terminating Treaties’ in Duncan Hollis, ed., the Oxford Guide to Treaties (Oxford University Press, 2012), 634 at 635.

¹⁵⁵ See Draft 2, 2017 AU withdrawal strategy document P.6; see also C.N,786.2016 treaties-XVIII.10, “Declaratory statement by the republic of South Africa on the decision to withdraw from ICC; see also <http://www.aljazeera.com/news/2016/10/> Gambia withdrawal International Criminal Court; see also Kamari Clarke & Earmias Kahssaye, “African state withdrawal from the Rome Statute legal and political consideration for ICC”, Africa Court research initiative, (2016), P.34.

¹⁵⁶ *ibid*

¹⁵⁷ Sarah Kasande, et al., [AU Strategy for Collective Withdrawal from the ICC a Non- Starter](https://www.ictj.org/news/au-withdrawal-icc-non-starter), ICTJ, 2/16/2017 (<https://www.ictj.org/news/au-withdrawal-icc-non-starter>), last accessed 12 Nov, 2017.

issued reservations against the strategy. States including Cape Verde, Malawi, Nigeria, and Senegal) and others have strongly supported the ICC.¹⁵⁸

Though, collective withdrawal may not have a place in the Statute but if Africans negotiate alone, outside the Statute system decide concomitantly to withdraw collectively and write letters of withdrawal (convincing one another, providing incentives to one another, and so on), it might happen in fact. International laws do not also prohibit this kind of withdrawal.

Each state is sovereign, as a result, each state has to make its own decision to leave the Court and separately notify the UN of its withdrawal from the Rome Statute and this would hinder any plans for widespread withdrawal.¹⁵⁹ A state's withdrawal from the Court will not enter into force until one year after it notifies the UN Secretary-General as explained in chapter 3 of this thesis. Therefore, if crimes against humanity, war crimes or genocide committed between when the ICC began its jurisdiction over that state up until a year after notification of the UN, they would remain under the Court's jurisdiction. Additionally, if states withdraw from the ICC, the UN Security Council can refer the state to the Court, or a state can accept the Court's jurisdiction on an ad hoc basis and refer itself.

As discussed earlier in chapter three of this thesis, Aust states that withdrawal may take place only as a result of the application of the relevant treaty provisions;¹⁶⁰ in this case, articles 127 and 121(6) of the Statute. Further, a party may also withdraw, at any time, upon the consent of all the parties after consultation.¹⁶¹ However, regardless of its effectiveness in law, one should also be aware that the "collective withdrawal," is viewed by the AU as a mechanism to change what it perceives are power inequalities attendant to the court. Arguably, collective action by

¹⁵⁸ See also Sosteness Materu, A Strained Relationship: Reflections on the African Union's Stand Towards the International Criminal Court from the Kenyan Experience, International criminal justice book series (ICJS volume 1), Sept. 2014, PP.211-228

¹⁵⁹ Taylor A. Ackerman, "Dwindling Momentum for Collective Withdrawal", American NGO Coalition for The International Criminal Court, Advocating for full US support of the ICC , AMICC Blog, Monday, February 06, 2017

¹⁶⁰ Anthony Aust, *Modern Treaty Law and Practice* 245 (3d ed. 2013) (noting that Article 5 of the Vienna Convention also states that it shall apply to constituent instruments of international organizations).

¹⁶¹ Francis Tom Temprosa & Clyde Alton, "Withdrawals from the Rome Statute: Continuing the saga of institutional legitimacy" Michigan Refugee Guidelines, MJIL, Volume 37:4, April 11, 2017, see also VCLT, art. 54(b), opened for signature May 23, 1969, 1155 U.N.T.S. 331.

states can challenge international legal rules that are “unfair and objugate international institutions that enforce those rules.”¹⁶²

4.6.4. Possible Impact/Implication of withdrawal

Clearly, African states withdrawal from ICC has the following possible impacts. In the first place, possibly the most far reaching consequential impact on the ICC's future in Africa will be that countries that have signed but not ratified the Rome Statute,¹⁶³ may not ratify it or may even decide to "un-sign" the Statute and this would place these African countries in the same category who also signed but did not ratify the Treaty.¹⁶⁴ Furthermore, countries like Equatorial Guinea, Ethiopia, Libya, Mauritania, Rwanda, Somalia, South Sudan and Togo are likely to strengthen their determination also not to sign the Rome Statute and the continued politicization of the ICC's judicial role is the other far-reaching negative implication.¹⁶⁵ Furthermore, States withdrawal affects the courts reputation in the eyes of other African nations. In this regard, it is possible to argue that this will perhaps lead to the major weakening of the Court, particularly because of the country's powerful stance in the region.

The impact of withdrawal even has effect that have been done individually, like the case of South Africa, Gambia and Burundi. These withdrawals have several potential effects both on the regional as well as the international scene. Regarding general potential effects of these exits first they have eroded some of the intended effects of the ICC's actions against suspected criminals on the African continent. For instance, President Al-Bashir of Sudan had formerly been increasingly isolated on the regional and international scene owing to an ICC arrest warrant. However, since this act of withdrawal, Al-Bashir has come out to endorse Burundi's withdrawal and urged the mass withdrawal of African states from the ICC. Secondly, aside from the fact that this exit is a sign of continued dissatisfaction with the Court from the general masses, it is also an indicator of the difficulties and possible hostility that the Court will face with investigations and prosecutions. Even if latter reversed, South Africa's decision to leave the ICC may of course have significant international implications, including the fundamental weakening

¹⁶² See African Union decision cited at note 110, P. 9.

¹⁶³ States like Algeria, Angola, Cameroon, Egypt, Eritrea, Guinea Bissau, Mozambique, Sao Tome and Principe, the Republic of Sudan, and Zimbabwe.

¹⁶⁴ as the USA and Israel

¹⁶⁵ See also Francis Tom Temprosa & Clyde Alton, cited above at note 161.

of the ICC, in addition to the damaging implications for the South African domestic legal system. This is particularly so given South Africa's powerful position in the region, and its previously leading role in supporting the Court.¹⁶⁶ This decision will have significant implications for the legal landscape in South Africa, and likely also for the position of other African States in the ICC. It may lead to accelerated ratification by AU Member States of the expansion of the African Court of Justice and Human Rights' jurisdiction to include international crimes which could in turn accelerate further withdrawals from the ICC by AU Member States. The President of the Assembly of State Parties (ASP) to the Rome Statute, Mr. Sidiki Kaba described South Africa's withdrawal as a "disturbing signal" and he stated that "withdrawal would open the way to other African States withdrawing from the Rome Statute, thus weakening the only permanent international criminal court".¹⁶⁷ The mass withdrawal of the Rome Statute by African states leaves most of them with little to no discretion on whether to prosecute *jus cogens* crimes envisaged in the courts jurisdiction due to the absence of the complementarity principle, the principle on which the ICC is based.¹⁶⁸

In relation to the African withdrawal of the ICC, it may have the effect of leading to a potentially large scale institution of prosecutions against many African leaders within the time of their notification to no longer be bound to the Statute, which has already been witnessed and seems to be the main source of discontent by the African Union. Furthermore that even where the State is effectively no longer a party to the Statute such does not prevent the ICC from exercising jurisdiction over someone especially considering where such a prosecution or requirement of arrest has been made a resolution by the UNSC in terms of Article 25 of the UN Charter, a resolution that binds all members of the United Nations.¹⁶⁹

However, the central legal implication of withdrawing from the treaty arises from an analysis of Article 12(3) of the Statute which defines the Court's jurisdiction and states that such a

¹⁶⁶Hannah Woolaver , "International and Domestic Implications of South Africa's Withdrawal from the ICC", European Journal of International Law, EJIL Analysis, EJIL (2016), PP.1-4.

¹⁶⁷See Press Release ,The President of the Assembly of State Parties (ASP) to the Rome Statute, Mr. Sidiki Kaba, regrets withdrawal of any State Party from the Rome Statute and reaffirms the Court's fight against impunity (Oct. 22, 2016).

¹⁶⁸ See Rui Lopes, 'Omar Dis-Appear': Legal Effects of Africa's Withdrawal from the ICC", Jacaranda global, Anti-Fraud & Corruption Law in Africa, (2015), PP. 1-3.

¹⁶⁹See Article 25 of the UN Charter

jurisdiction is limited to the crimes of genocide, aggression, war crimes and crimes against humanity that all these crimes have attained the status of '*juscogens*'¹⁷⁰ which impose '*erga omnes*'¹⁷¹ obligations upon states. The implication of a state withdrawing from the Rome Statue is that such a state is left vulnerable to breaching their obligations *ergaomnes* in terms of these crimes, and withdrawing from the ICC seems to be more detrimental than beneficial to these African states considering the possible breaches of their obligations *ergaomnes*.¹⁷²

Generally, a withdrawal by the AU member states from the ICC will significantly undermine the goals that the Court aims to achieve. The ICC may find it difficult to continue with its mandate to investigate and, where warranted, try individuals charged with the gravest crimes of concern to the international community, including genocide, war crimes and crimes against humanity, if African state parties to the Court decide to depart.

To be certain, the researcher believes mass withdrawal from the ICC will hurt Africans more than the ICC because with the highest incidence of systemic and human rights violations globally, Africa, more than any other continent, needs the ICC. But till this time in general, the African states collective withdrawal is not effective and practical and its effect on the court is not observed. However, the Court is increasingly coming under threat. In fact, out of 123 states that are parties to the Rome Statute 33 of which are African states thereby making African the largest regional groupings of states parties. Thus, if these group of states move out of the Statute, its impact for ICC is disastrous, that an international court without the support of the African Members is almost meaningless and none.

4.7. Conclusion

Over the years, the relationship between African states and ICC is severely tense and AU has adopted a hostile position towards the Court and further called for its member states to implement a policy of non-cooperation with the ICC. This is mainly due to the assumption that the ICC is being criticized for having a racist agenda, its selective prosecution, a faulty

¹⁷⁰See article 12(3) of the Statute, a set of commanding international law standards which no state may deviate or depart from.

¹⁷¹*ergaomnes* the term is Latin meaning 'towards all' and thus such obligations that arise from *jus cogens* standards are owed to the international community as a whole.

¹⁷²See Rui Lopes cited above at note 168, P.3.

investigation process and a prosecutorial strategy, as well as indictments of sitting African heads of state.

Thus, in the 28th African Union Summit in Addis Ababa, Heads of state and government adopted a decision on a strategy document for withdrawing from the ICC composed of legal and institutional strategies and the AU Political strategy. Even though a decision on a strategy document for withdrawing from the ICC that urges member states to collectively withdraw from ICC was adopted, so far, it is not applied. Besides, this withdrawal strategy' is not binding on the 55 African member states, i.e. individual states can act independently of it, disregarding the AU's collective stand. Further, it is more of a recommendation than an actual decision to withdraw from the ICC. In general, though the relationship between Africa and the ICC still remains controversial for some of the reasons listed above, withdrawing from the Court is a loss for the victims of grave crimes and even for the Court itself.

Chapter Five

Conclusions and Recommendations

5.1. Conclusions

The contribution of Africa to the realization of ICC was so crucial. The negotiation and adoption of the Rome Statute remains one of most important achievements of the past century in the fight against impunity in which thirty-four state parties are Africans that represents the biggest regional bloc so far. The then high level of acceptance of the Court in Africa reflects the belief of African states in the principles and potentials of the Rome Statute in which that Africa should be proud of. It was believed that the Court would play a positive role in political, social and economic transformation by strengthening the rule of law and respect for the fundamental rights and freedoms of the African people. Indeed, at the early phase of the relationship between African states and the Court most of the African cases before the Court were submitted by African states themselves reaffirming this belief.

However, despite the then cooperation and achievements, most African leaders now a day started to point out their fingers against the Court and it is increasingly coming under threat. They started to perceive as the Court targeted the continent only, exercising selective prosecution, having a racist agenda, a neo-colonial weapon, a faulty investigation process and a prosecutorial strategy, as well as indictments of sitting African Heads of State. Thus, AU further called for its member states to implement a policy of noncooperation with the ICC.

Thus, in 2017, in the 28th AU Summit in Addis Ababa, heads of state and government adopted a decision on a strategy document for withdrawing from the ICC to follow if reform demands are not met, outlining a legal and institutional strategies and Political strategy. Its legal and institutional strategies include amendments to the Rome Statute, reform of the UNSC, enhancement of African representation at the ICC, strengthening national criminal justice systems and the ratification of the Protocol on the Amendments on the Statute of the African Court of Justice and Human Rights relating to an international crimes jurisdiction. On the other hand, the Political strategy that encompasses the continued use of the Open-Ended Committee of

Ministers of Foreign Affairs to engage with various stakeholders in the international criminal justice system.

Even though the Assembly of AU adopted this collective withdrawal strategy from ICC, so far, it is not applied and its effect on the Court is not observed. Treaty withdrawal from the ICC Statute is governed by Article 127. Attempts to withdraw from the ICC Statute that do not comply with the notice procedures and ongoing cooperation requirements set out in Article 127 will be viewed as a treaty breach. On the other hand, if African states sit, negotiate, decide on withdrawing in mass and since the Statute may not allow them to withdraw in a single paper, they could do it individually but doing it the same day and all African states having agreed to deposit a letter of withdrawal each on the first of this month of this year at the UNs, African states could do it in fact. International laws do not prohibit this kind of withdrawal and in this regard no need of customary rule to emerge.

As stated above, African Union as a political umbrella of the continent and member countries in their private capacity, continue to push for the Court to withdraw its mandate in Africa to national and regional justice mechanisms. This position has its bearings in the principle of complementarity which gives states the primary jurisdiction to try grave crimes and play an active role in the fight against impunity.

The ICC's failure in prosecuting leaders of powerful states and cases from other continent than Africa, but this issue must be addressed in and of itself and should not be used to curtail the accountability of others. It is not plausible to say ICC's prosecutorial actions are not being taken in other parts of the world, where equally serious crimes are being committed, should not end letting African leaders free from the same crime. In addition to this, the African contexts exclusively have allowed the ICC to become operative and put into practice its legal framework. The African situations i.e. the prevalence of international crimes, inability of most domestic courts to try such crime, allowed the ICC to react.

Considering all the situations under ICC's investigation to date are in Africa, the majority of the cases came as a result of voluntary referrals by the states where the crimes were committed (Democratic Republic of Congo, northern Uganda and Central African Republic). Two other

situations were referred to the ICC by the UN Security Council (Darfur and Libya). The prosecutor has acted on his own initiative to open an investigation in only two situations (Kenya and Côte d'Ivoire). The claims of most African leaders in this regard should not be escalated for two cases of ICC inferring in the 15 years period. Their disappointment with the ICC policy decisions that target Africa should not lead African leaders to detest the Court to completely sever their relations with the Court, as the Court is a necessity for Africa and the world.

Though the ICC has not gone into other areas of conflict in which it has jurisdiction such as Afghanistan, Syria, Colombia, Iraq and Sri Lanka there is now an investigation of the case in Georgia. The UNSC's unwillingness to send similarly situations in respect of Israel, Chechnya and Syria to the Court while sending African situations of non-States Parties to the ICC also exacerbated the confrontation between ICC and Africa. In the coming years the ICC will undoubtedly also deal with non-African situations.

More attention to the reasoning underlying the AU call for non-cooperation with the ICC could be valuable in promoting a more accurate portrayal of African views on the ICC. First, such attention would underscore that much of the AU's expressed concern vis-à-vis the ICC relates to Security Council inaction, and not the Court itself. Secondly, it could help to show that the Security Council has not in fact ignored the AU's deferral request, although it has not formally granted or rejected it.

The relationship between Africa and the ICC still remains controversial for some of the reasons listed above, which are not justifiable. Hence, it is important for all stakeholders in the justice process to look at the fight against impunity as their main objective and withdrawing from the court is a loss for the victims of grave crimes and for the wider international community. It could leave a potentially disastrous legal gap, with negative impact on the ability of victims to get redress for serious human-rights violations. Mass withdrawal from the ICC will hurt Africans more than the ICC because with the highest incidence of systemic and human rights violations globally, Africa, more than any other continent, needs the ICC. This is because the establishment of the Court meant a global commitment to protect victims, when national judicial mechanisms lacked the capacity, willingness or jurisdiction to prosecute those responsible for the most serious crimes.

5.2. Recommendations

The tension in the relationship between ICC and the African Union is deep and calls for a realistic approach. Unless resolved immediately it presents serious challenges for the AU as well as the Court. As the Court is a necessity for Africa and the world, the disappointment of African leaders with the ICC policy decisions that target Africa should not lead them neither to detest the Court nor to completely sever relations with the Court. The researcher recommends the following points necessary to ease the strain between ICC and Africa.

- Strengthen domestic criminal justice systems to deal with international crimes: Putting their mistrust with the ICC aside, each AU member state must be committed to develop its domestic trial capacity to effectively investigate and prosecute international crimes committed within its borders in internationally accepted standards, especially to the parameters of ICC in the exercise of its complementarity jurisdiction. In their effort to capacitate domestic tribunals of member state, the AU, the ICC and the international civil societies working in the area, where necessary, must provide technical assistances to ensure the principle of complementarity.
- An open dialogue and discussion between all stakeholders, especially African State Parties and the Court: In this regard, there must be mechanism to restore the trust in the ICC among Africans though it is a huge task. Because it is relevant to explore why the very countries that were yesterday at the forefront in the fight against impunity are today no longer interested. This can be done through an open and a frank dialogue and discussion between all stakeholders, especially African State Parties and the Court, to identify and address the legitimate concerns of all stakeholders and on how to make the Court a better institution. The Court also needs to explain its investigatory and prosecutorial strategies how the Court operates which could serve as a forum through which Africa can allay its fears of the Court.
- Extending genuine impartiality in the fight against impunity to the rest of the World: In this regard the ICC should go forward to unveil the misperception that it is little known outside Africa and commands little respect or attention in other conflict regions of the world. It helps to maintain a practical role in the fight against impunity so as to keep its credibility among African state leaders and the victim communities.

- Immediate ratification and implementation of the Protocol to expand the jurisdiction of the African Court: Member states should work hard in prompting the implementation of the amendment Protocol of the Statute of the African Court of Justice and Human Rights. The effective implementation of the protocol plays pivotal role in the administration of justice that investigation, prosecution and trials be held in the communities where the crimes are committed. This also allows each African country to retain a significant level of sovereignty on criminal jurisdiction, so as to ensure complementarity.
- Genuine effort of UNSC in referring all international crimes to the ICC: The UNSC acknowledging its important role in the universality of the court has to exercise the power given by Rome Statute in referring and deferring cases on the basis of international peace and security. As it does in referring the case of the two African countries (Sudan and Libya), non-parties to the Rome Statute, should open its eyes to refer the existing serious cases of gross human right violations committed like Syria, Gaza and Yemen. This in effect relieves the burden of ICC in the rectifying misperceptions-targeting a single continent.

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