AN APPRAISAL OF THE LEGALITY OF THE NOTIFICATION OF WITHDRAWAL BY SOME AFRICAN STATES FROM THE ROME STATUTE

Kamanu Ebele Gloria [1]

Abstract

Rome Statute of the International Criminal Court was established and adopted at a diplomatic Conference in Rome, Italy in 2002. The dissertation adopted the doctrinal method of research with primary sources of information drawn from ICC statute, while the secondary sources were drawn from journals, articles and internet sources. The Court was established to investigate and try individuals charged with the gravest crimes of concern to the international Community, these include impunity for genocide, war crimes, crimes against humanity and aggression. African states saw the Court as a great solution to the problems regarding international crimes so they embraced the idea and joined it in large numbers, that out of 124 member States, thirty-four were from Africa and Africa comprised thirty percent of the ICC's total membership. However, the attempts by the International Criminal Court to prosecute the sitting heads of State caused discontent and deterioration in the relationship between African Union and the court. African leaders accused the court of; selective justice, excessive focus on Africa and its heads of state while it ignored the atrocities committed by western States. The initial enthusiasm for International Criminal Court became riddled with controversies that in 2016, three African states parties; South Africa, Burundi, and Gambia submitted written notifications of withdrawal intention from Rome statute of International Criminal Court to the United Nations Secretary General pursuant to the Article 127(1) of the Rome Statute. The notifications of withdrawals were welcomed and supported by the African Union (AU) as part of its collective withdrawal strategy but it triggered criticisms from a number of African states like; Botswana, Burkina Faso, Cape Verde, Nigeria, Senegal, Tanzanian and Tunisia that reaffirmed their commitment to the court. However, in February 2017, following Yahja Jammeh's removal from power, the new Gambian president, Adama Barrow, revoked Gambia's notice of withdrawal. The South African government also revoked its own intention to withdraw in March 2017, after the constitutional court ruled that the notice was unconstitutional and invalid because it had not received parliamentary approval. However, the Burundi's withdrawal notification came into effect on 27th October,2017 and Burundi thereby became the first State that withdrawed from the Rome Statute. This dissertation therefore analyzed the reasons for the withdrawal notifications of the African States from the Rome statute of the international criminal court (ICC). It also discussed whether the African states withdrawal from the International Criminal Court was legal and if it was legal whether it was also legitimate taking into account that the offences under the Rome statute have attended the status of the Customary International Law and are regarded as Erga Omnes Obligation. It discussed the issues relating to the collective withdrawal of the African Union from the ICC, and finally, it also discussed the implications of the withdrawal. It concluded on the need for the state parties to abide by their obligations under the Statute in good faith. Drawing from the findings of this dissertation, it was recommended that the African states should strengthen their national /domestic Courts as complementary court to the ICC. They should also ratify and empower their proposed African court of justice and human and peoples' rights for its utmost functioning, in line with the structure of other regional courts of similar status.

[1] LLB(RSU) BL(ABUJA) 08036227557 kamanuebele@gmail.com

1.0 Introduction

International Criminal Courts (ICC) governed by the Rome Statute, is the first universal and permanent judicial body with personal jurisdiction to investigate and try individuals charged with the gravest crimes of concern to the international community, these include impunity for genocide, crimes against humanity, war crimes and crime of aggression.[2] The Rome statute of International Criminal Court was established and adopted at a diplomatic conference in Rome, Italy on 17th July 2002. African states saw the International Criminal Court (ICC) as a great solution to the problems regarding international crimes so they embraced the idea and joined it in large members[3] that out of 124 members countries that ratified the Rome Statute of the International Criminal Court, 34 was from African States (comprising 30% of the court membership). Senegal was the first to ratify the Rome Statute. Niger and the republic of Congo were part of the 10 instruments simultaneously deposited to make sixtieth ratification that brought the Rome Statute into force and Uganda referred the first case to the ICCs.[4]

The ICC and Africa have had a tumultuous relationship since its creation,[5] that the first five cases Central African Republic (CAR), the Democratic Republic of Congo (DRC), cote d'Ivoire and Mali relating to the civil war and other conflicts that have ranged in those countries[6] in compliance with Article 13 of the Rome Statute. The court has also indicted more than forty individuals, mostly from African countries.[7]

However, African Union (AU) backlashed followed the referral and arrest warrant issued against Omar Al Bashir, the Sudanese President in 2005. The security council acting under chapter vii of the UN charter in pursuant to Article 13(b) of the Rome statute referred the situation in Darfur region of Sudan to ICC.[8] This ICC's exercise of jurisdiction on Omar Ali Bashir, raised important legal questions about the scope of immunity under Article 27(2) and 98(1) of the Rome statute and the states parties obligation to comply with requests of arrest and surrender issued by the court[9] resulted to African union statements of non-cooperation with ICC.[10] Thus, the security council became the central of the story of the AU and ICC collision course not only because it was the council that initiated the process that led to the issuing of the arrest warrants but also because the council holds the power to defer the proceedings against Omar Al Bashir under Article 16 of the Statute.[11] Behind the ICC- UNSC relationship is that between justice and peace, referrals promoting justice in the name of peace (presuming that the ICC can play role in maintaining international peace and security), and deferrals relying on the opposite presumption

[2] Rome statute of the international criminal Court, Art 6,7,8 and 8bis
[3] C. C. Jalloh, The relationship between Africa and the international criminal court lecture at the Raoul Wallen Berg. Institute https://rwi-lu.seaccessed on 20 may 2023
[4] P. Apiko and F. Aggad, The international criminal court, Africa and The African union: what way forward? <https://www.ecdpm.org/dp201.
[5] M.M. Mbengue and K. McClellan, The ICC and African: should latter remain engaged <http://archive- ouverte. unige. ch/ unige: 137394>
[6] M., Ssenyonjo, African failed withdrawal from Rome statute (international criminal review 17 (2017)749-802
[7] www.cfr.org; the role of the international criminal court< accessed 30 July 2024>
[8] D. Tladi, The African Union and the international criminal court: The battle for the soul of international lawhttp://academic.oup.com/ia/article/92/6/1319/2688348by university of Dundee
[9] https://justsecurity.org/why-the-iccs accessed 30 july 2023
[10] Assembly of the African union, thirteenth ordinary session 1-3 July 2009, Decision of the meeting of African states parties to the ICC.
[11]Tladi (n8)

that justice can hinder peace. In this context, the AU attempts to have it both ways, criticizing the UNSC's power to refer a situation to court (Libya and Sudan) as an intolerable political instrumentalization, while asking the same UNSC to defer cases before the ICC (Kenya, Libya and Sudan).[12]

Reacting to the indictments of the African head of states, the Africans accused the ICC of practicing selective justice and double standard to neocolonialism and racism.[13]

The African states under African Union called for a mass withdrawal from the International Criminal Court (ICC).[14]However, the "mass withdrawal strategy" is in reality a submission of a list of proposed changes to the international criminal Court. The AU Decision on the International Criminal Court also upheld the need for justice when international crimes are committed. Nevertheless, the search for justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace.

The African union (A.U) called upon the UN security council to apply Article 16 of the statutes and defer the process initiated by the ICC for a period of 12 months.[15] A similar request was also made in 2013 to defer the investigation and prosecution against Kenya's president Uhuru Kenyatta and his deputy William Ruto. Both efforts were unsuccessful.[16] Tensions further increased following the issuance of third arrest warrant against another African sitting president, late president Muammar Gaddafi of Libya, his son, and one official in his government.[17]

The deterioration in the relationship between Africa and international criminal court culminated that at the close of the 26th AU summit on 31st January 2016, a few days after ICC began its proceedings against President Laurent Gbagbo of cote d'Ivoire, the AU adopted Kenyatta's proposed resolution including the preparation of a roadmap for collective withdrawal from the ICC.[18] The reasons invoked for the withdrawal were well known. Why are Africa and Africans the main targets of the ICC when mass atrocities are committed elsewhere, and no credible effort is made by the ICC prosecutor to take action against the perpetrators.?[19]

In October,2016, African states parties namely Burundi, South Africa and Gambia submitted written notification of withdrawal from Rome statute United Nations secretary General pursuant to Article 127(1) of the Rome statute.[20]The withdrawal notifications of Burundi and Gambia were intended to ensure that state officials including sitting heads of state- president Nkurunziza of Burundi and president

[12] J. Okoth 'Africa, the United Nations Security Council and the International criminal court: the question of deferrals', in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum, eds, Africa and the International criminal Court (The Hague: T.M.C. Asser Press,2014) PP. 195-209.
[13] Mbengue and McClellan (n5)
[14] Assembly of the African union, Thirteenth Ordinary session, 1-3July 2009, 'Decision on the meeting of African states parties to the Rome Statute of the International criminal court (ICC)'.https://au.int> files > decisions> accessed 2nd August 2024.
[15] AU Sumit Decision on application by the international criminal court (ICC) Prosecutor for the indictment of the president of the republic of Sudan' Assembly/AU/ Dec 221(X11) February 2009
[16] Jalloh (n2)
[17] V. Arnould, A Court in crisis? The African and Beyond (Egmout publishers,2017)
[18] Mbengue and McClellan(n5)
[19] Niang (n2)
[20] Ssenyonjo (n6)

Yahya Jammeh of the Gambia escape possible criminal investigations and prosecutions before the ICC.[21] However, South Africa after being censored by its court for failing to execute an ICC arrest warrant against the Sudanese president as he visited its country decided that it could no longer be part of the Rome statute.[22]

On 27th October,2017 withdrawal of Burundi from the ICC came into effect and Burundi, thereby became the first state to withdraw its membership from the ICC.

This article discusses the relationship between African States and International criminal court. It discusses the reasons why three African states submit notifications of withdrawal from the Rome statute. It analyzes whether the withdrawal notification of the African states from the ICC is legal and also legitimate. Finally, it offers conclusion and recommendation.

2.0 The Legality of the Notifications of Withdrawal by Some African States from the Rome Statute

A state that signs and ratifies a convention charter, statute, international agreements and declaration is a member state to such and thereby bound by a treaty which it consents, accedes or exchange of instruments constituting a treaty or ratifies that convention or treaty.[23]

Then, what is Treaty?

Treaty is an agreement between states, whereby participating states consent to be legally bound by an agreement that regulates their relationship. Treaty is a binding formal agreement, contract, or a written instrument that establishes legal obligations between states and international Organizations.[24]

According to Black's Law Dictionary, treaty is an agreement formally signed, ratified or adhere to between two Nations or Sovereigns or an International agreement concluded between two or more states in a written form and governed by International Law.[25]

Treaty codifies norms of International Law and it is also governed by International Law. It sets out conditions and agreements which parties to it oblige to carry out.[26]

The Vienna Convention is an international agreement that regulates treaties between states, it is known as the 'treaty of treaties.' It reflects and codifies principles of Customary International Law.[27] For instance, the principle of good faith which was later codified by virtue of Article 26 of the Vienna Convention which provides that every treaty in force is binding to the parties to it and must be performed by them in good faith. This rule is termed *Pacta Sunt Servanda* (which means Agreement must be kept

[21] *Ibid*
[22] https://www.pgaction.org /ilhr/rome- statute/ south-africa.html <accessed on 30 July 2024>
[23] Vienna convention on the Law of treaties (adopted 23 May 1969 entered into force 1 January 1980) 153 Unit 33, Art II (hereafter refer as VCLT).
[24] Malcolm Shaw, Treaty: International Relations, Britannica. <https:www.britannica.com/topic/treaty>acessed13 August 2024.
[25] Bryan A. Garner Black's Law Dictionary (9th edition. Thomas Reuters business 2009) 1640.
[26] VCLT, 1969, Art 2(1).
[27] VCLT, 1969

in Latin).[28]This principle presupposes that parties who enter into a treaty must have intention to create a binding Legal agreement. In *Qatar v Bahrain*[29] where the ICJ held and affirmed that parties who enter into a treaty are legally bound by the provisions of that treaty and that non registration of a treaty does not actually affect the validity of an international agreement, what really matters is the intention to be legally bound. In addition, without the principle of good faith (which is explicitly stated in many agreements treaties would neither be binding nor enforceable.[30]The Vienna Convention on the Law of treaties is also widely recognized as the principle and most authoritative source of law governing the creation operation and termination or withdrawal[31] from treaties include the Rome statute of International Criminal Court[32] (ICC Statute).[33]

It is important to note that a state to a treaty shall be bound by it until it decides to withdraw from it. Where the treaty has a withdrawal clause, such state must meet the pre-requisite for withdrawal. The main purpose of withdrawal clause in treaties is to warrant the flexibility of states to terminate their supreme national interests that are in jeopardy.[34]

However, where a treaty does not have withdrawal clause, a state can withdraw or denounce from it through the consent of all parties after consultation with the other contracting states or in accordance with Article 56 of the VCLT which governs the withdrawal of states from treaties that do not contain an explicit denunciation clause.[35] This scheme is considered in Customary International Law and it is consolidated in paragraph 332 of the US Restatement (Third) of the foreign Relation Law which provides that;

1. The termination or denunciation of international agreement or the withdrawal of a party from an agreement may take place only:
    a) In conformity with the agreement or
    b) By consent of all parties.
2. An agreement that does not provide for the termination or denunciation or for the withdrawal of a party is not subject to such action unless the right to take such action is implied by the nature of the agreement or from other circumstances.[36]

Nevertheless, Rome Statute provides for a withdrawal clause by virtue of Article 127(1) which states:

A state party may by written notification addressed to the Secretary General of the United Nations, withdraw from this Statute. This withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

[28] *Ibid*, Art 26
[29] ICJ Repost 1994.
[30] *Ibid*
[31] L. R. Helfer, Termination Treaties in Duncan Hollis (edn Oxford University Press, 2012)634-635.
[32] Last amended January 2002) 17th July 1998.
[33] Y. Tyagi, The Denunciation of Human Rights Treaties, 79(1) *British Year Book of International Law* (2008) 86 @118.
[34] T. coppen, Good Faith and withdrawal from the non-proliferation Treaty <www.qil-qdi.org/goodfaith>.
[35] VCLT Art 56.
[36] K. Clarke and E. Kassaye, African state withdrawals from the Rome Statute of International Criminal Court: Legal Political Consideration (published by African Court Research Initiative (2016).

This Article 127(1) which applies to withdrawals from the statute does not require state(s) to provide reason(s) for withdrawing. Thus, it implies that a state party to the Rome Statute may submit a withdrawal notification to the Secretary General of the United Nations at any time in accordance with Article 127, without giving any reason good or bad.[37]

However, for the withdrawal from Rome Statute to be effective, such state must fulfil certain withdrawal requirements.

First, the state must follow the provisions of the Vienna Convention in the Law of treaties, Article 42(2) states that termination of a treaty, its denunciation or withdrawal of a party may take place only as a result of the application of the provisions of the treaty.[38]

Second, the state must make a written notification of its intention to withdraw to the Secretary General of United Nations. However, this notification of withdrawal from Rome Statute must be consistent with the relevant domestic laws of such state as confirmed by the South African High Court which held that the South Africa's notification of withdrawal from Rome Statute without prior parliamentary approval, was unconstitutional, invalid and had to be revoked.[39]

Moreover, an attempt by a state to withdraw from the ICC without complying with the notice procedure and requirement set out in Article 127(1) of the statute will be viewed as a treaty breach for which the individual state will be accountable to even after the withdrawal is effective.[40]

The withdrawal shall have an effect one year after the date of receipt of the notification by the Secretary General of the UN except where the notification specifies another date for withdrawal, then the withdrawal shall have effect one year after from the date indicated in the notification.[41]

Finally, this article concludes that the withdrawal notifications of African States from Rome Statute have legal backing and cannot be faulted since Article 127(1) provides that a State has the discretion to withdraw from Rome Statute at any time it deems fits without any justifiable reason(s).

Much as the withdrawal notifications of African states from Rome statute may be legal as seen above. The crucial question is whether the said withdrawal is also legitimate. In determining this question, it would be crucial to take note of the principles of good faith and abuse of rights[42] as guaranteed under the Vienna Convention on the law of treaties. Any state that is entering into a treaty must do so in good faith: this principle is known as Pacta Sunt Servanda.[43]The requirement of good faith is one of the most fundamental principles of international law. Articles 26 and 31 of the Vienna Convention are declaratory of customary rules that all obligations deriving from treaties are to be interpreted and

[37] M. Ssenyonjo, African failed withdrawal from Rome statute (international criminal review 17 (2017)749-802
[38] VCLT Art 42(2).
[39] M.M. Mbengue and K. McClellan, The ICC and African should latter remain engaged <http://archive-Quvrte.unige.ch/unige:137394>
[40] Clarke and Kassaye (n14)
[41] Rome statute, Art 127(1)
[42] T. Meyer, Good Faith, withdrawal and the judicialization of international politics, 11th May, 2014.
[43] VCLT, Art 26.

implemented in good faith.[44]In the Nuclear Tests Cases,[45] In the Nuclear Tests Cases, the ICJ proclaimed that the principle of good faith is one of the basic principles governing the creation and performance of legal obligations. Moreover, international law rules such as pacta sunt servanda, abuse of rights, estoppel and acquiescence and negotiation of disputes are grounded to some extent, in good faith.[46] In treaty law, good faith has various manifestations from the time prior to signature and interpretation.

Good Faith refers to a sense of loyalty, rules of the law to the absence of dissimulation, deception, fraud and to the sincere belief that one acts in accordance with the law. Failure to act in good faith is known as bad faith.

It is very important to note that the principle of good faith does not generally limit a state from withdrawal from a treaty. The principle of good faith provides that a state party shall refrain from acts that would prevent the execution of a treaty.[47]However, where the object and purpose of a treaty is defeated by the withdrawal; then the principle of good faith will automatically come in to limit the process as it is not legitimate.

This principle of good faith will also limit a withdrawal from substantive and jurisdictional commitment that is not in good faith.[48] Rome statute of International Criminal Court is both a substantive and jurisdictional treaty which permits cases of genocide, crime against humanity, war crimes and crimes of aggression to be tried before ICC.[49] Where a state decides to withdraw from the jurisdictional commitment such as the Rome Statute in bad faith then such withdrawal shall not be legitimate and shall also be limited.

First and foremost, looking at the reasons behind the withdrawal notifications of African states from Rome statute in order to determine whether such withdrawal is legitimate. Although, Gambia and Burundi did not state their reasons for their withdrawal notifications rather these may have appeared to be motivated by need to protect government officials from potential ICC investigations.[50] Burundi's withdrawal is specifically based on the inclusion of ICC investigation into crimes that recorded 1,200 murders, thousands of people that were illegally detained and tortured, and hundreds of people that disappeared since 2015 in Burundi.[51] However, South Africa was the only state to provide detailed reasons for its intended withdrawal from Rome Statute. These reasons include the loss of credibility of the ICC due to its relationship with the UNSC and its focus on Africa. The UNSC's refusal to consider Article16 deferral and conflicting International Law Obligation in respect of immunities.[52]

According to Ssenyonjo, one of the root causes for the withdrawal notifications of African states from Rome Statute is the perception that certain permanent states on the United Nations Security Council

[44] M. Virally, Good faith in Public International Law (1983) 77(1) *American Journal Of International Law*, 130-134
[45] (1974) ICJ Rep 253,268
[46] S. Reinhold, Good Faith in international law (2013) *UCL Journal Of Law And Jurisprudence* 40-63
[47] VCLT,1969 Art 18
[48] Meyer (n21).
[49] Art 5, Art 6, Art 7and Art 8.
[50] Mbengue and McClellan (n18).
[51] Situation in republic of Burundi (ICC -10/17)https://www.icc-cpi.int/burundi accessed 20th August,2024
[52] Mbengue and McClellan (n18)

who are not party to the ICC have used the referred power to target certain African States while insulating their allies from similar ICC Scrutiny. However, the referral practice of UNSC has also been characterized by double standards. The South African Government claimed that the ICC as a judicial body has lost its credibility because of its relationship with the United Nations political organs.[53] Ssenyonjo further stated that the questions on the credibility of ICC will persist so long as three of the five permanent members of security council (China, Russia and USA) are not state parties to the statute.[54] The moral integrity of the ICC was questioned by many African governments who believed that the ICC only focused on their continent, where the States are comparatively weaker than the diplomatic, economic and financial might of the United States, United Kingdom, Russia and China.[55]

Although the UNSC can refer situations that threaten international peace and security to the ICC. Some permanent members have shown the resolve to support moves by African States to prevent the UNSC from referring African situations to ICC. For instance, Russia and China, together with the non-permanent members such as Pakistan and Azerbaijan supported three African States (Morocco, Rwanda and Togo) in the UNSC's 2013 failed attempt to seek one-year deferral of the trial of Kenyan leaders who were accused of post-election crimes committed in 2007.[56] Furthermore, Ssenyonjo posited that none of the African non-permanent Security Council members voted against the UNSC referrals in Darfur and Libya: Gabon, Nigeria and South Africa voted in favour of the Libya referral while Benin Republic and Tanzania voted in favour of Darfur referral. He further argued that the five permanent members of UNSC would be unable to refer a situation to ICC without the concurrent role of other non-permanent members since a chapter vii decision requires a majority. He further stated that any investigations and proceedings that may arise from any situation referred by the UNSC to the ICC is not determined by the Security Council rather it is governed by the Rome Statute and the ICC Rules of Procedure and Evidence[57].

However, to put this point strength, the African states themselves should try as much as possible to reduce the court's disproportionate attention to their continent since their continent is the largest states party to the Rome Statute, they should wield significant influence on the ICC by referring non-African situations to the court and also by supporting UNSC's non-African referrals.[58]

Moreover, many African States have presented their criticisms of the ICC in over-simplified and factor ally misleading terms. They often describe the court as a neo-colonial institution, a tool of the west, or even as a race hunting institution. When there is little evidence that the ICC is any of these things. Such labels are levelled at the institution not because such trooped resonate with any constituencies but for political and historical reasons. Indeed, such critics makes little sense when the record shows that the

[53] Statement by the republic of South Africa on the Decision to withdraw from ICC<treaties.un.org/doc/ publication/ CN/2016/CN786.
[54] Ssenyonjo (n16)
[55] T. Murithi, The Africa Union and the International Criminal Court: An Embattled Relationship? 'The institute for justice and Reconciliation, policy Brief Number, 2013.
[56] Ssenyonjo (n16)
[57] *Ibid*
[58] J. Vilmer, The African Union and the International Criminal Court: counteracting crisis (The Royal institute of international Affairs, John Wiley &Sons Ltd,2016)

ICC has legitimated more African Government than it has undermined.[59]Some AU member States like Botswana, Nigeria, Ghana, Cote d'Ivoire and Mali maintained their support and cooperation with the ICC. For example, Cote d'Ivoire cooperated in the arrest warrants and surrendered Laurent Gbagbo and Charles Ble Goude to the ICC. Niger handed over Ahmad Al Faqi Al Mahdi who was accused of the war crime in Mali to the ICC. Gabon requested the ICC prosecutor to open an investigation into Gabon for International Crimes which occurred since May 2016. This shows that some African States still consider the ICC as a relevant judicial body.[60] Moreover, the argument that Africa is being single out by ICC, however loses traction if one considers the fact that a number of the prosecutions and investigation before the court was due to self-referral by African states.[61]The first five African situations (Central African Republic (CAR), Cote d'Ivoire, Mali, Uganda and Democratic Republic of Congo (DRC)) were self-referrals to ICC by African states.[62] The Union of Comoros and Gabon have also referred situations on their territories to the ICC. Ssenyonjo concluded that the self-referral of African situations to the ICC by the African States cannot be blamed on the ICC.[63]

Although the ICC's Afro-centrism is a reality that should not be denied:[64]

Defense has been put up to explain this lopsided feature in the target of Africa countries as against other parts of the world such Europe and Asia as mere fact of coincidence and not necessarily a conscious effort at selective victimization or stigmatization of African leaders. For instance, events that occurred before the coming into force of the Rome statute do not fall within the court's jurisdiction and many atrocities in Europe and Asia fall across this category. The jurisdiction of the ICC is restricted to crimes committed after July 2002. For the vast majority cases where we would like to see accountability of mass atrocities; Syria, North Korea, Burma and so on, the ICC simply does not have jurisdiction. And this is a structural problem relevant to the jurisdiction reach of the court and not one of choice for the ICC. Moreover, the ICC's policy is to base its decisions on which cases to pursue on the gravity of the situations under consideration. All African situations before the ICC are precisely distinguished by their scale owing to the numbers of victims (2-5 million in Darfur, 2 million in DRC, 1.3 million in Uganda).[65] Additionally, majority of situations that occur elsewhere in the world even though warranting an intervention of the international community going by the immense suffering they have imposed on humanity do not fall under war crimes, crimes against humanity and genocide.

Moreover, the case for victimization of African leaders by the court is unfounded because judicial systems within the African municipal entities are weak and have not provided avenue for the victims of injustice. Thus, Article 17(1)(a) of the statute provides that the court can only investigate atrocities if the state in question is not doing so itself or refuses to do so genuinely, and this must be applied evenly

[59] M. Kersten, The Africa-ICC Relationship: more and less than meets the eye (part 1). Justice in Conflict- posted 17th July, 2015.
[60] A. Apiko and aggad, The international criminal court, Africa and The African Union: What way forward?<https://www.ecdpm.org/201
[61] Nel and Sibiya, Withdrawal from the International Criminal Court: Does African have Alternative? (2017)
[62] Ssenyonjo (n16)
[63] Ssenyonjo (n16)
[64] Vilmer (n37)
[65] *Ibid.*

and fairly.[66] Some African States also lack the will to act and have shown severally their unwillingness to investigate and prosecute perpetrators of international crimes. Africa also lacks an operational regional jurisdiction like the European Court of Human Rights (ECHR) and Inter-American Court of Human Rights (IAHR).

Furthermore, African continent being the largest member states parties to the Rome Statute is most statistically exposed to the investigations and proceedings of the ICC.[67] However, the ICC does not have problems in its relationships with a significant number of African states. But as with the court's relationship with all political actors, the problems are complex and fundamentally political.[68] And there is not a single situation in Africa where the ICC has intervened in which the court should not have opened an official investigation. Each and every one warranted an ICC intervention.

Kersten concludes that the institution isn't against African but is in fact a court for Africa; that dozens of African States joined the court: that they (ICC) have numerous preliminary examinations outside of Africa.[69]The prosecutor conducted preliminary examination in Afghanistan, Colombia, Palestine, Ukraine on British military intervention in Iraq on registered vessels of Greece and Cambodia and it also has opened an investigation regarding a situation in Georgia.[70] Thus, the allegation that the ICC has preoccupied itself with Africa and failed to investigate equally severe conflicts elsewhere are neither here or there. On one part, there is a pending warrant of arrest hanging on the head of President Vladmir Putin of Russia yet to executed.

Another major reason given by the South African government for the withdrawal of African States from the Rome statute is the conflict between International legal obligation with Rome Statute regarding the rights to immunity. The ICC has power under Article 89 of the statute to request a state party to arrest a suspect but this power is limited by the virtue of Article 98 which states that the court must not place a request for surrender or assistance from a state party in a situation where it is required to act inconsistently with its international legal obligations regarding immunities. [71] The ICC issued arrest requests to seven state parties that were visited by Al Bashir but none of those requests were complied with. The principal justification given by such state parties was that the arrest of Al Bashir would have constituted a violation of his immunity ratione personae under customary international law.[72] However, the ICC aims to uphold human rights for serious crimes as contained in its jurisdiction has abolished immunity under Article 27 of the statute and this applied to state officials who are parties to the Rome Statute and not to non-state party who is third State and such a treaty does not create rights or obligation to the third State.[73]

[66] Rome Statute, Art 17(1)(a)
[67] Vilmer (n37)
[68] Kersten (n38).
[69] *Ibid.*
[70] *Ibid*
[71] K. Kawai, Who enforces an arrest warrant of the international criminal court? <https: // academic. Oup.com/jicj/article/ 19/3/543/6413694 by University of Dundee> accessed 2024.
[72] *Ibid*
[73] Ssenyonjo (n16)

Nevertheless, a recent experience has shown that this immunity has been also lifted in most international instruments dealing with the prosecution of genocide, war crimes or crimes against humanity which may indicate the formation of the ICJ which stated that:

> It has been unable to deduce that there exists under customary international law any form of exception to the rule according immunity from Criminal Jurisdiction and unavoidability to incumbent ministers for foreign affairs where they are suspected of having committed war crimes against humanity[74].

The ICJ stated that the jurisdictions are often raised for the removal of the protection of immunity are first, that the international crimes including crimes against humanity, genocide and war crimes cannot be categorized as sovereignty. Second, the prohibition against crimes against humanity and war crimes have attained JUS cogen status, and states have an obligatio erga omnes to ensure that such perpetrators do not enjoy immunity[75] (as in the case of Pinochet or prosecution before International Courts and tribunals that exempt serious crimes from immunity (e.g. Charles Taylor case before special court of Sierra Leone).[76] Moreover, the pillar of Customary Law Avenue is International Court of Justice (ICJ)'s dictum in the arrest warrant case said that

> under Customary International Law that those who otherwise enjoy immunity rations personae may be subject to criminal proceeding before certain International Criminal Court.[77]

A state practice in Africa Nations as evidence for instance, (in the constitutions of South Africa. Kenya, Uganda, Senegal, Mauritius and Burkina Faso, there is no immunity) is consistent with ICJ finding in the Arrest warrant case.[78] However, this was settled in 2014, the pre-Trial chamber in Malawi and Chad decisions, the chamber correctly noted that Article 27(2) should in principle be confined to those state parties who have accepted it. Therefore, the chamber accepted that when the exercise of jurisdiction by the court entails the prosecution of a head of state of non-state party, the question of personal immunities might validly arise. The solution provided for in the statute to resolve such a conflict is found in Article 98(1) of the statute. Accordingly, in a case dealing with a Head of State who is not a party to the Rome statute, who is wanted by ICC and where there is no relevant security council referral or binding treaty removing immunity, immunity can be consider or give effect to in the light of the position under Customary International Law.

However, according to the chamber, the security council 'implicitly waived the immunities granted to Omar Al Bashir by virtue of SC Resolution 1593 (2005) for the purpose of the proceedings before the court. It follows that under Customary International Law, a Head of State does not possess immunity in

[74] Democratic Republic of Congo v Belgium (2000) ICJ Reports 3,53.
[75] E. Okurut and H. Chodry, The contentious relationship between Africa and ICC (2018) 10 (3) *Journal of law and conflict Resolution*
[76] M. Cacciatori, kings are criminals: Lessons from ICC prosecutions of African presidents ((2018) 12 (3) International Journal of Transitional Justice, 386-406.
[77] Kawai (n50)
[78] Clarke and Kassaye (n14)

cases where that immunity has been waived or removed either implicitly or explicitly by the Security Council or treaty such as the Genocide Convention to which a state is a party. Furthermore, Article VI also obliges state parties to the Genocide Convention which accepted the jurisdiction of the ICC to cooperate with it, this implies that all states parties to the Genocide Convention including both Sudan and South Africa as parties to the Genocide Convention should have arrested President Al Bashir who was given official notification in July 2010 by the competent authority of an allegation that he has committed the crime of genocide and surrender him to the ICC when he was present in their territory[79]. These acts of the Sudan and South Africa were against the principle of good faith which provides that state party shall refrain from acts that would prevent the execution of a treaty.

Finally, this article concludes that withdrawal notifications have legal backing and cannot be faulted since by the virtue of Article 127 (1) of the statute, a state has the discretion to withdraw from the Rome statute at any time it deems fit without any justifiable reason(s). However, the withdrawal of African states from the ICC is not legitimate since it is due to political reasons and weakness of the rule of law. A look at the reasons for the withdrawal by some African states, clearly indicate that some African leaders behind the move are looking for license to kill, maim and oppress their people without consequences and thereby avoid the ICCs responsibility for International Crimes and many of Africa's grievances against the ICC seems more political than legal. [80]To that extent the object and purpose of Rome statute is defeated by their withdrawal then the principle of good faith will automatically come in to limit the process as it is not legitimate. To this end makes the process of withdrawal by African states illegitimate as it basically violates the principle of *Pacta Sunt Servanda*.

Moreover, the right of withdrawal is also based on the doctrine of sovereignty states[81] which provides that a state has a right to enter into treaties and withdrawal whenever it wants as long as it has legal backing. However, the principle of abuse of rights dictates that much as states under International Law have rights. These rights seem to be abused and in such a situation then the right must be limited.[82] In the Lotus case[83] the permanent of International Justice held that the domestic jurisdiction allowing the discretion of states to do what they feel is a question that the courts can only intervene when the discretion is being abused. Some African Head of States decision of withdrawal is a right at their discretion. However, where the right is abused the withdrawal much as it is legal, will be illegitimate.

3.0 Conclusion

Rome statute of the ICC was put in place to fight impunity of international crimes of genocide, war crimes, crimes of humanity and crimes of aggression. Its preamble recognizes that these most serious crimes of concern to the international community must not go unpunished. So, the International Criminal Court guarantees the effective prosecution of such want in acts both at the national level and through international cooperation. This principle is predicated on the affirmation that states parties, are by their international obligation enjoined as a duty to exercise their criminal jurisdiction over persons

[79] Ssenyonjo (n16)
[80] R. J. Cole, Africa's relationship with the international criminal court: more political than legal (Melbourne journal of international law vol.14.2013)676
[81] Deborah Russo, reply to/ followup/unilaternal withdrawal from Treaties with the principle of good of faith? On June 9, 2014 {http://www.qil-qdi/procedural-obligations-and-good-faith-the-case-of-human-rights-treaties} accessed August 2024.
[82] G.D.S. Taylor, the content of the Rule Against Abuse of Rights in International Law @ pg1.
[83] The Lotus, P.C.I.Y, 1927, ser,A, No. 20.

responsibility for international crimes. It is therefore wrong that the Africa Union called their members which were parties to the ICC not to cooperate with the Court. And it is also illegitimate for the African States parties to the ICC to withdraw from the Court since the nature of the crimes within its jurisdiction are one of an ergon crimes obligation and are retarded as peremptory norms. Any State withdrawal from Court undermines the global movement towards greater accountability to put an end to impunity for the perpetrators of the most serious crimes and a ruled-based international order.[84] The decision of African states to withdraw from the ICC constituted a threat to the realization of the hope offered by it to the most vulnerable in their region and also rise question about the concept of protection and actual enforcement of human rights Moreso for African union constitutive Act.

Finally, AU and African States party to the ICC should support and encourage the ICC for dealing with the offenses which they cannot do by themselves. Moreover, withdrawal from the Rome statute without credible alternative mechanism (national or regional judicial systems) in place to investigate and prosecute international crimes without any distinction based on official capacity will shield heads of states that commit crimes from accountability. And thereby violations of human rights, and there can be no state or region peace and stability without observance of human rights.

4.0 Recommendations

In view of all the above, the following recommendations are proffered:

1. Rome Statute of the international Criminal Court through the Assembly of the state parties should reframe the statute in a way that there will be restriction on the right of withdrawal of their member states.
2. Africa should also develop political will and resources to empower their regional court by ratification of the protocol and the subsequent operationalization of the African court of Justice, Human and People's rights for the promotion and protection of human rights in their region, thereby echoing the motion of Africa solution for Africa problems.
3. United Nations General Assembly should encourage its members to maximize political will for ratification, accession and implementation of the statute in order to achieve the desire universality of the court; using means such as international agreements and other multilateral bodies and support for dissemination of the ICC principles and rules. Knowing that he refusal by some countries to place themselves under the jurisdiction of the Rome statute means that the ICC will fall short of being a genuinely international court and will undermine the principle of international justice.
4. ICC should have intermediary institutional structures in every continent. This establishment will increase the co-operation of the ICC with every member state parties. This will enable the ICC to conduct party of its work out of The Hague. This will also facilitate the work of ICC's prosecutor, judges, lawyer from every and each continent. It will save cost and reduce the risks for the security of the victims and witness.
5. The ICC prosecutor and NGOs should collaborate government officials to enhance the domestic judicial capacity of states that are unable to investigate and prosecute crimes themselves. They

[84] Ssenyonjo (n16) Pg 799.

should arrest such state and their civil society to implement legal reforms, capacity building and infrastructures investment.

6. The African States should also actively engage with each other in actively pursuing appropriate reforms within the assembly of the state parties, with views to make the ICC more effective in advancing its objectives of international justice rather than withdrawing from the Rome statute of International Criminal Court.
7. Finally, the Assembly of State Parties (ASP) of the Rome statute should consider and approve the proposed amendment of Article 16 which was sponsored by South Africa.