

**A CRITICAL ANALYSIS OF THE LEGALITY AND LEGITMACY OF AFRICAN
STATES WITHDRAWING FROM THE INTERNATIONAL CRIMINAL COURT AND
THE AFRICAN COURT ON HUMAN AND PEOPLES RIGHTS**

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**BEING A RESEARCH DISSERTATION SUBMITTED TO THE SCHOOL OF LAW IN
PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE
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UNIVERSITY**

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DECLARATION

I, **CHITINDI MARVELLOUS**, do solemnly declare, that apart from reference to other peoples' work which has been duly acknowledged, this work is the product of my intellect and academic exercise and has not been presented to any university or other institution of higher learning and where in the world by anyone, either in part or as a whole for the purpose of the a certificate, diploma, LLB- Bachelor of Laws degree. I also certify that I prepared by myself specifically for the partial fulfillment for the award of the degree in law at Kampala International University, Uganda.

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APPROVAL

This is to certify that, this research entitled “A CRITICAL ANALYSIS OF THE LEGALITY AND LEGITMACY OF AFRICAN STATES WITHDRAWING FROM THE INTERNATIONAL CRIMINAL COURT AND THE AFRICAN COURT ON HUMAN AND PEOPLES RIGHTS” has been carefully supervised and approved to meet regulations governing dissertation writing of School of Law, in partial fulfillment of the award requirements for the award of Bachelor of Laws (LLB) Degree from School of Law of Kampala International University, Uganda.

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DEDICATION

I dedicate this dissertation to the lord almighty, my strong pillar that has seen me through out, the source of my inspiration, wisdom knowledge and understanding. My father NETO CHITINDI who has been a source of encouragement and inspiration to me throughout my life, for nurturing me always believing in me and supported me in my determination to find and realize my potential. The entire family for the love, care, support and guidance.

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LIST OF ACRONYMS

AC	African charter
ACHPR	African Court on Human and People's Rights'
AU	African Union
ICC	International Criminal Court
ICJ	International Court of Justice
NGO	Non-Governmental Organization
UNSG	United Nations Secretary General
VCLT	Vienna Convention on the Law Of Treaties
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant On Economic Social And Cultural Rights

LIST OF STATUTES

African Charter on Human and Peoples' Right, (Adopted in Nairobi June 27, 1981) (Entered into Force October 21, 1986).

American Convention on Human Rights Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969.

European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13.

Inter-American Convention to Prevent and Punish Torture, adopted the 9th of December 1985 in Cartagena de Indias (Colombia).

Interim Rules of Procedure of the African Commission.

Protocol to the African Charter on Human and Peoples' Right on the establishment of the African Court on Human and Peoples' Right of 9 June 1998 and entered into force on 25 January 2004, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III).

Rome Statute of the International Criminal Court.

Security Council resolution 9 (1946) of 15 October 1946.

Statute to the International Court of Justice.

The Charter of the United Nations signed on 26 June 1945, in San Francisco, at the end of the United Nations Conference on International Organization and came into force on 24 October 1945.

The Optional Protocol to the Vienna Convention on Consular Relations.

The Vienna Convention on the Law of Treaties (VCLT), adopted on May 22, 1969.

UN Human Rights Committee General Comment No. 26/1997 regarding the withdrawal by North Korea from the ICCPR.

United Nations Convention on the Law of the Sea.

TABLE OF CASES

Alex Thomas V. Tanzania app.No 005/2013

Al-Semussi Decision, Pre-trial Chamber I, 11 October 2013, ICC-01/11-01/11-466 Red.

Bayarri v. Argentina Judgment of October 30, 2008.

Compañía Naviera Vascongado v Steamship "Cristina", (1938) AC 485, 488 (H.L.).

Constitutional Court v. Peru Judgment of September 24, 1999.

Constitutional Rights Project v. Nigeria communication 60/91.

Democratic Republic of Congo Vs Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2003).

Faustin Uwintije v Rwanda, Appl.No 002/2014.

Gaddafi Decision, Pre-Trial Chamber I, 31 May 2013, ICC-01/11-01/11-344-Red.

In the matter of *Ingibire Victoire Umuhoza Vs Republic of Rwanda* Application No. 003/2014.

Ivcher-Bronstein v. Peru Judgment of September 24, 1999.

Katanga Judgment, Appeals Chamber, 25 September 2005, ICC-01/04-01/07-1497.

Kayumba Nyamwassa & others v Republic of Rwanda, Appl.No 016/2015.

Kennedy Gihana & others v Rwanda, Appl.No 017/2015.

Lohe issa Konate V. Bukina Faso. Appl No.004/2013

Krischna Achuthan for Aleke Banda and Amnesty International for Orton and Vera Chirva v. Malawi, communications 64/92.

Laurent Munyandikirwa v Rwanda, Appl.No 023/2015.

Ligue camerounaise des droits de l'Homme v. Cameroon, Communication 65/92.

Mtikila V. Tanzania. Appl.No. 011/2011

Portugal v. Panama Judgment of August 12, 2008.

Prosecutor V Uhuru Kenyatta Appeals Chamber, 30 August 2011, ICC-01/09-02/11-274.

Prosecutor v William Ruto, Appeals Chamber, 30 August 2011, ICC-01/09-01/11-307.

Prosecutor Vs Omar Al-Bashir.

Rutabingwa Chrysanthe v Rwanda, Appl.No 003/2013, Appl.No 022/2015.

S.S. "Lotus" (*France v Turkey*) 1927 P.C.I.J. (Ser. A) No. 10, at 20 (Jan 4).

Simone Gbagbo Decision, Pre-Trial Chamber 1, 11 December 2014, ICC-02/11-01/12-47-Red.

Sir Dawda K. Jawara v. Gambia, communications 147/95.

The Lotus, P.C.I.Y., 1927, Ser. A, No. zo.

Zongo V. Bukina Faso. Appl. No.013/2011

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CHAPTER ONE

GENERAL INTRODUCTION

1.0. INTRODUCTION

The International Criminal Court (ICC) was established in the year 2002 when the Rome Statute of the International Criminal Court (Rome Statute) came into force. The court was established to deal with the most grievous offences in international law namely; Genocide, war crimes, crimes against humanity and recently the crime of aggression.¹ At the establishment of the court a number of states become parties to the Rome Statute; majorly the African states.²

Today more than two-thirds of the members of the African Union (AU) are parties to the Rome Statute. The AU has played a critical role in the development of the ICC specifically by passing a number of resolutions to that effect. However, from 2008 the AU has become one of the big critics of the ICC when the court issued an arrest warrant for the President of Sudan; Omar Al-Bashir.³ This was followed by the prosecution of the Kenyan President Uhuru Kenyatta and his deputy William Ruto after the post-election violence of 2007-2008.⁴

In its general assembly of state, Uganda's President Yoweri Kaguta Museveni asked the member states of the AU to have a massive withdrawal from the Court on the grounds that the Hague based court has been driven by western agenda to prosecute only the African states and further not respecting the presidential immunity of the heads of state that they prosecute.

¹ Article 6, 7 & 8 of the Rome Statute of the International Court of Justice.

² 34 Signatories from Africa.

³ *Prosecutor Vs Omar Al-Bashir*

⁴ *Prosecutor Vs Uhuru Muigai Kenyatta; Prosecutor Vs William Samoei Ruto.*

This was followed by the first letter of intention to withdraw from the court deposited by South Africa to the United Nations Secretary General (UNSG) on the 19th October, 2016.⁵ South Africa's withdrawal will have effect in October of 2018. South Africa was followed by Burundi which few days before that on the 12th of October, 2016 the Burundian parliament voted for the country to withdraw from the ICC. On the same date of the South Africa's letter of intention to withdraw, the Burundian president Pierre Nkurunziza signed a decree allowing for withdrawal of Burundi and on the 27th October 2016 Burundi notified the UNSG of its intention to withdraw.⁶

This research therefore discusses whether the African states withdrawal from the ICC is legal under the provision of the Rome Statute and if its legal whether it is legitimate taking into account the offences tried under the Rome Statute have obtain the status of Customary International Law and are regarded as *Erga Omnes* obligation.

The African Court of Human and Peoples' Right was established by the Protocol to the African Charter on Human and Peoples' Right on the establishment of the African Court on Human and Peoples' Right (African Courts' Protocol) which was adopted in Ouagadougou, Bukina Faso, on 9 June 1998 and entered into force on 25 January 2004.⁷ The court was created for sole purpose of complementing the protective mandate of the African Commission on Human and Peoples' Right.

The Court has never been faced by a question on withdrawal by the state members. The court was closely faced with a question of withdrawal in 2016 when Rwanda decided to withdraw its

⁵ See the text of the letter addressed to the UN Secretary General here: www.capetalk.co.za/articles/193225/southafrica-to-begin-exit-process-from-icc; Chan, S. and M. Simons. 2016. South Africa to withdraw from the International Criminal Court. *New York Times* 21 October 2016. October 2016: www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminalcourt.html?_r=0.

⁶ See Burundi's notification to the UNSG here: <https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf>.

⁷ Protocol to the African Charter on Human and Peoples' Right on the establishment of the African Court on Human and Peoples' Right of 9 June 1998 and entered into force on 25 January 2004.

declaration under Article 34(6) of the Court's protocol allowing individuals and Non-Governmental Organizations to bring matters directly to the court. The African Courts' protocol does not have a withdrawal clause in its provisions and to that effect the provision of Article 56 of the Vienna Convention on Law of Treatise which provide for the mode of withdrawal from a treaty which has no provision for withdrawal.⁸

This research will critically analyze whether it's legal to withdraw from the African court taking into consideration the lack of withdrawal clause and it being a court dealing with questions on matters of fundamental rights, and freedoms of individual. The research will further take a juxtaposition mode with other regional human rights courts on the question of legality of withdrawal from such a court.

1.1. BACKGROUND OF THE STUDY

The International Criminal Court had since its creation had a good relation with the African Unity. However, that relationship started to take a u-turn when the Hague based court decided to prosecute the President of Sudan Omar Al-Bashir; by issuing an arrest warrant on him. This was triggered further by the prosecution of the Kenyan President Uhuru Kenyatta and his deputy William Ruto. This triggered African states to start withdrawing from the ICC. South Africa became the first to submit its intention to withdraw from the court followed by Burundi.

The court was claimed to be moving western agenda by the African states since the court has only prosecuted African states since its establishment. The Rome Statute provides for a withdrawal procedure which states that want to withdraw from the court have to follow for the withdrawal to

⁸ Article 56 of the Vienna Convention on the Law of Treatise.

take effect. However, the question that arises is whether the rationale behind the withdrawal by the African States from the ICC is legitimate.

On the other hand the African Court on Human and Peoples' Right was faced with a question to determine in the *Ibingira Case* when Rwanda withdraw from the declaration it had made allowing individuals and non- governmental organization to bring matters directly to the court. This withdrawal happened just before the court had moved to determine the matter against Rwanda filed by Ibingira.

The court went on to determine that the withdrawal of Rwanda will not affect the cases that are already in existence before it. However, the court noted that withdrawal from a declaration is different from withdrawal from a treaty. The court pointed out that the determination would be different if the question before it would have been one where Rwanda has withdrawn from the Court's protocol.

The question that arises in this situation is what would have been the legal consequence if Rwanda had withdrawn from the court's protocol or any other state withdrawal from the African Court.

1.2. Statement of the Problem

The African states and the ICC have had issues since 2008 that has led to withdrawal by African states from the ICC. The Rome Statute provide for provision for withdrawal but the reason behind the withdrawal is a question that is to be determine as whether it is legitimate. Further the African Court which is establish by the African Courts' Protocol does not have a withdrawal clause and it being a court dealing with fundamental rights and freedoms of individual, a question arises whether a state can withdraw from the Court. This research, therefore interrogates the legality of withdrawal

from both the African Court and the ICC and also the legitimacy of the withdrawal from the two courts.

1.3. Research Questions

The following questions are to be addressed by this study;

1. What is the jurisdiction, composition and role of the ICC?
2. What is the procedure of withdrawal from the ICC?
3. What reason do African states have to withdraw from the ICC and are those reasons adequate?
4. What is the jurisdiction, composition and role of the African Court?
5. Can a state withdraw from the African Court?
6. What is the position of other regional courts in regard to withdrawal from those courts?
7. What role will the Malabo Protocol play when it comes into force?

1.4. Objectives of the Research

1.4.1. Main Objective

The primary objective of the study was to analyze the legality and legitimacy of withdrawal of African states from the International Criminal Court and the African Court on Human and Peoples' Right. However, there are also other specific objectives of the study.

1.4.2. Specific Objectives

The following are the specific objectives of the study;

1. To study the jurisdiction, composition and role of International Criminal Court and the African Court;
2. To determine the legality and legitimacy of the withdrawal of African States from the International Criminal Court and the African Court;

3. To juxtapose the withdrawal processes of the International Criminal Court and the African Court to the other international and regional courts;
4. To analyze the Malabo Protocol that is advocated to establish an African Court similar to the ICC and analysis of its difference and similarity to the African Court on Human and Peoples' Right.

1.5. Research Hypothesis

This study tests the following hypotheses;

1. That it is legal for a state to withdraw from the International Criminal Court and the African Court however, it is not legitimate;
2. That the nature of the matters handled by the International Criminal Court and the African Court are one that should not allow a state to withdraw from them;
3. That the Malabo Protocol is the best solution for the fight between the ICC and the AU.

1.6. Scope of the Study

The laws establishing the ICC and the African Court are very extensive in nature, it will be impossible for the researcher to dwell in all aspects of the ICC and the African Court and therefore, the research will focus on one of the areas of the two courts, which is the question of the legality and legitimacy of withdrawal by African states from the two courts. The African Continent will form the basis of the geographical scope of the study.

1.7. Significance of the Study

The finding of the research has a crucial significance both in theory and in practical in the interest of the development of international law and establishment of international courts and tribunals. The following is the significance of the study;

1. **To the Policy Makers:** The research will help the local or international policy makers to take initiative to develop and improve loopholes existing in treaty withdrawal processes.
2. **To Researchers:** The research findings may be an influence to further researchers and make them conduct a more comprehensive research on the subject matter.
3. **To Assembly of State:** The research may help the legislative body of the ICC to improve, formulate and amend the provisions with loopholes so as to fit the need of today.
4. **To Authors:** The study has highlighted the reasons of withdrawal by African states and whether the legality and legitimacy of the process is to be considered.

1.8. Research Methodology

The research will use the doctrinal method. The doctrinal method is the primary approach for data collection. The method shall involve the collection of relevant data that is most suitable for the research. The data will be collected from research materials such as textbooks, articles, treatises, dissertations, panel discussions reports, case laws and productive resources found on the internet.

1.9. Literature Review

The purpose of this literature review is to give a clear guidance on the legality and legitimacy of the withdrawal by African states from the International Criminal Court and African Court on Human and Peoples' Right. This shall be by critically analyzing different existing scholarly writings that provide the guidelines on the withdrawal from the International Criminal Court and the African Court on Human and Peoples' Right.

The author of this thesis shall establish that even though there is a legality of withdrawal from the International Criminal Court and the African Court, there is no legitimacy to the same. Taking into consideration that the Rome Statute of the International Criminal Court provides for a withdrawal

clause and the African charter as well as the protocol to the African Charter on the establishment of the court lacking the withdrawal clause.

Makweti Sishekanu⁹, analysis whether the withdrawal by African states from the ICC is a question of law or politics. He argues that the narrative by the African states that the ICC unfairly targets African leaders is the key premise for their withdrawal from the court and that by virtue of that then the withdrawals is more political rather than legal and to that effect they are not legitimate.

The article further stated that in determining the legitimacy of the narrative it is important to validate against court's statutes specifically its processes; admissibility of claims, and judicial decisions of case by case since inception of the Court's operations in 2005. Failure of which why then Makweti argues and agrees with Bensouda¹⁰ ICC Chief Prosecutor that incumbent presidents are against the ICC when decisions are against their interests.

The Author of the article further questions whether victims of those countries that have withdrawn from the ICC will get justice in determining the legitimacy of the withdrawal. He looks at the preamble to the Rome statute that provide; *recalling* the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes¹¹ while *emphasizing* the complementarity of the ICC with national criminal jurisdictions.¹²

He argues that in determining the legitimacy of the withdrawal then the proponents of withdrawal should demonstrate that their national criminal jurisdictions are adequate enough to do away with

⁹ In the Article "*ICC Membership Withdrawal: A legal or Political Question?*" Posted on 11th May 2017 Available at <<https://thebestofafrica.org/icc-membership-withdrawal-legal-political-question/>> Accessed on 22nd February, 2018.

¹⁰ Fatou Bensouda; Chief Prosecutor of the International Court of Justice.

¹¹ Paragraph 6 of the Preamble to the Rome Statute of the International Criminal Court.

¹² Paragraph 8 of the Preamble to the Rome Statute of the International Criminal Court.

the ICC and able to find state actors liable within the meaning of Genocide¹³ and that the same presumptive test should be applied for crimes against humanity,¹⁴ War Crimes and Crimes of Aggressions¹⁵. This paper is relevant to this dissertation but does not look at the withdrawal of the African states from the African Court on Human and Peoples' Right.

Michelle Nel¹⁶ and Vukile Ezrom Sibiyi,¹⁷ the primary focus of the article is the practicability of amnesty, domestic and local trials or an African regional court as viable alternatives to ICC jurisdiction and prosecution. The creation of the African Court of Justice and Human Rights (ACJHR), enabled by the Malabo Protocol which extends its jurisdiction to international and transnational crimes and the rationale for it coming into existence.

The article focuses on the historical background of the International Criminal Court providing the first initiative to create the Permanent International Criminal Court. This was later followed by the establishment of the two ad hoc international military tribunals, the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East, in the wake of the World War II atrocities. The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda were the two ad hoc tribunals that forced the creation of the International Criminal Court which the statute was adopted on 17 July 1998.

The Article further provides for the concerns that are raised by African states. Africa being the largest subscriber to the Rome Statute of the International Criminal Court. The article gives the

¹³ Article 6 of the Rome Statute of the International Criminal Court.

¹⁴ Article 7 of the Rome Statute of the International Criminal Court.

¹⁵ Article 8 of the Rome Statute of the International Criminal Court.

¹⁶ Dr Michelle Nel is a senior lecturer in criminal and military law at the Faculty of Military Science, Stellenbosch University. She is an admitted advocate to the High Court and has published a number of peer-reviewed articles on military law, international law and maritime security. In the Article co-authored Vukile Ezrom Sibiyi entitled "*Withdrawal from the International Criminal Court: Does Africa have an alternative?*"

¹⁷ Mr Vukile Ezrom Sibiyi is a lecturer in labour law and security law at the Faculty of Military Science, Stellenbosch University, as well as a guest lecturer in international law at the Senior Military Management Programme.

rationale of African states turning hostile on the ICC and basically is because of the act by the ICC to indict the President of Sudan Omar Al Bashir.¹⁸ This was followed by the charges against President Uhuru Kenyatta and his deputy William Ruto of Kenya. This has created wariness amongst African leaders regarding the agenda of the ICC and argued that Africa is being singled out. However the authors point out that this argument is futile since majority of the prosecutions are self-referral by the African states themselves.¹⁹

The article further stated that the move away from the ICC is not legitimate since it is due to political situation and weakness of the rule of law. To that effect the stay in ICC was ok as long as there is no political risk. A look at the rationale of the withdrawal by the African states on these grounds clearly indicate that the head of states seeking this withdrawal are looking for a license to kill, maim and oppress their people without consequences and there is no legitimacy to that.²⁰ Though the article is relevant in the topic at hand, the focus of this dissertation is on whether the African states have a legal base of withdrawing from the ICC and the African Court and whether the withdrawal is legitimate.

Tim Murithi,²¹ this article looked at the establishment of the ICC and the role played by the African states in the Rome Conference that established the Rome statute of the ICC. The Genocide in

¹⁸ African countries did not in fact oppose the prosecution of Al-Bashir by the ICC. Their concern related to the timing of issuing of the arrest warrants which coincided with regional peace building efforts (Murithi and Ngari 2011:9).

¹⁹ Uganda, The Democratic Republic of the Congo (DRC) and the Central African Republic are cases in point

²⁰ Desmond Tutu, prominent South African Nobel Peace Prize winner and human rights activist.

²¹ Dr Tim Murithi is the Head of the Justice and Reconciliation in Africa Programme at the Institute for Justice and Reconciliation, based in Cape Town, and Research Fellow at the African Gender Institute, University of Cape Town, South Africa. He has over 18 years of experience in the field of post-conflict peace-building, reconciliation and reconstruction across Africa. He has also held posts at the Institute for Security Studies (Addis Ababa); the Department of Peace Studies, University of Bradford, in the UK; the Centre for Conflict Resolution, University of Cape Town; and the United Nations Institute for Training and Research (UNITAR), in Geneva, Switzerland. He is the co-editor of *The African Union Peace and Security Council: A Five Year Appraisal* (2012) and author of *The Ethics of Peacebuilding* (Edinburgh University Press, 2009), and is currently co-authoring a book on justice and reconciliation in Africa. In the Article entitled, "The African Union and the International Criminal Court: An Embattled Relationship?" *The Institute for Justice and Reconciliation, Policy Brief Number 8* | March 2013.

Rwanda in 1994 had convinced majority of the African states on the need of having an international judicial body to deal with the most grievous crimes of international nature.

The article critically examined the ICC interventions and the African perception towards the court. The cases before the court have come as a result of combination of self-initiated by the then prosecutor, two by UN Security Council and by submission by African Governments.²²The author argues that it is critical to ask why all the cases prosecuted before the ICC are from Africa. By this one with a neutral position might understand that the ICC was created with the sole purpose of prosecuting the African states. However, he argues that one cannot also fail to conclude that there is existence of domestic and international political interests.

The article further stated that with the war going on all over the world it is unrealistic that the ICC only concentrates with Africa. The moral integrity of the ICC has therefore been put into question. The author explains that the rationale for AU's criticism stated with the case of the *Prosecutor v Omar Al-Bashir*, when the Trial Chamber I issued an arrest warrant against Al-Bashir for war crimes, The AU Peace and Security Council issued a communiqué, PSC/PR/Comm. (CLXXV), on 5 March 2009, lamenting against that decision of the ICC.²³What followed are state parties to the AU refusing to arrest Al-Bashir and not following the order of the court.

Further the article questions the motive of the then prosecutor Luis Moreno Ocampo who had initiated all the cases from Africa and whether he was not pursuing a pro western agenda. The Kenyan prosecution made it worse for the ICC prosecution as the issue was politicized and a move for withdrawal by African states from the ICC became more possible. The appointment of Fatou

²² Article 13 of the Rome Statute of the International Criminal Court.

²³ African Union Peace and Security Council. 2009. *Statement on the ICC arrest warrant against the President of the Republic of Sudan, Omar Al Bashir, PSC/PR/Comm.(CLXXV)*. 5 March, Addis Ababa, Ethiopia.

Bensouda²⁴ as the new prosecutor was to try and mend the narrative that the court was against African states however little effect seems to have been triggered by that selection.

The author argues that there is a legitimate reason for withdrawal by African states from the ICC as the clear indication of the court prosecuting Africans while the crimes within the jurisdiction of the Court are being committed everywhere. While the article is relevant to this research, the dissertation focuses on the question of legality and legitimacy of the African countries to withdraw from the ICC and the African Court.

International Justice Resource Centre,²⁵ this article focused on the withdrawal by Rwanda of its declaration under Article 34(6) of the Protocol to the African Court²⁶ allowing individual and Non-Governmental Organization with observer status to submit cases against it directly before the African Court on Human and Peoples' Right. The article provided an analysis of whether that withdrawal was valid and legitimate taking into consideration that neither the Protocol to the African Court nor the African Charter has a withdrawal clause. The decision for withdrawal came at a time when the court was to decide on a matter against Rwanda filed by the opposition politician Victoire Ibingira.²⁷

The author discusses the Ibingira case by then in establishing whether the withdrawal by Rwanda will in any way affect the case. The author differentiates the Protocol to the African Charter and the European Convention on Human Rights and the Inter-American Convention of Human Rights which the latter two have withdrawal clauses in them. Since the Protocol does not have a withdrawal clause the Vienna Convention on the Law of Treatise will be applicable.²⁸ It provides

²⁴ Former Attorney General and Minister of Justice of Gambia.

²⁵ In the article Posted on March 14, 2016 and Available at <http://www.ijrcenter.org/2016/03/14/rwanda-withdraws-access-to-african-court-for-individuals-and-ngos/> Accessed on 26th February, 2018.

²⁶ Article 34(6) of the Protocol to the African Charter on Human and Peoples' Right on the Establishment of the African Court of Human and Peoples' Right.

²⁷ In the matter of Ingibire Victoire Umuhoza Vs Republic of Rwanda Application No. 003/2014.

²⁸ Article 56 of the Vienna Convention on the Law of Treatise.

treaties that do not contain a denunciation clause are not subject to denunciation or withdrawal unless it is established that the parties intended to admit this possibility or the nature of the treaty implies a right of denunciation or withdrawal.

The author argues that since the withdrawal is not from the African Court on Human and Peoples' Right but just from the declaration then the withdrawal cannot affect the Ibingira case. Though the article is relevant however, it is not touching whether a withdrawal from the African Court is legal and legitimate.

Centre for Human Rights,²⁹The discussion started by establishing the legal background of the African Court on Human and Peoples' Right starting its operations into 2006. By 2016 which is Ten years the court has only handled four cases on merit.³⁰ The discussion went on to provide that Rwanda as a state has had six cases against it directly to the court.³¹

The discussion further provides that the withdrawal by Rwanda was made when the first case of the six cases was set to be determined by the court. The government of Rwanda sent a note verbale to the AU Commission and the African Court expressing its withdrawal from the declaration allowing individual and Non-Governmental Organization to bring matters directly to the Court.

²⁹ The Centre of Human Rights, Faculty of Law, University of Pretoria, held a panel discussion titled "*the legal and political consequences of Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court*."The panel discussion consisted of Professor Frans Viljoen, Director of the Centre for Human Rights; Professor Dire Tladi, Professor, Department of Public Law, Faculty of Law, University of Pretoria and a member of the International Law Commission; and Professor Michelo Hansungule, Professor, Centre for Human Rights; and legal counsel in two of the cases against Rwanda submitted to the Court. Available at <http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acc%20eptance-of-direct-individual-access-to-the-african-human-rights-court.html> Accessed on 26th February, 2018.

³⁰ Two against Tanzania (*Mtikila and Alex Thomas*) and two against Burkina Faso (*Zongo and Konate*).

³¹ Appl.No 003/2014, *Ingabire Victoire Umuhoza v Rwanda*; Appl.No 003/2013, *Rutabingwa Chrysanthe v Rwanda* (see also Appl.No 022/2015, *Rutabingwa Chrysanthe v Rwanda*; Appl.No 002/2014, *Faustin Uvintije v Rwanda*; Appl.No 016/2015, *Kayumba Nyamwassa & others v Republic of Rwanda*; Appl.No 017/2015, *Kennedy Gihana & others v Rwanda*; Appl.No 023/2015, *Laurent Munyandikirwa v Rwanda*).

The Panel went on to establish the applicable law for the withdrawal indicating that neither the Protocol establishing the African Court nor the African Charter provide for a withdrawal clause. To that effect making the Vienna Convention on Law of Treatise to be the applicable law for withdrawal when a treaty does not have a withdrawal clause. The panelist dealt with the question of the legality of the withdrawal by Rwanda. They concurred that the withdrawal clearly is valid since a unilateral acceptance can lead to a valid revocation.

The panelist indicated that withdrawal from the African Charter or the court would be difficult under International Human Rights standard which in this case is different since it's a withdrawal from a declaration. The discussion did not deal in detail on the withdrawal of the African Court though it is relevant to this dissertation.

1.10. Organization Layout

This research comprises five chapters. The first chapter provides provide the general introduction, background of the study, the statement of the problem, research questions, the objectives of the research, research hypothesis, the scope of the study, the significance of the study, research methodology, the literature review and finally the organization layout.

The second chapter dealt with historical background of the ICC and the African Court, composition of the Courts, jurisdiction of the courts and the role of the court in handling its matters.

The third chapter will focus of the process of the withdrawal from the ICC and the African Court. The legality of the withdrawal process and the legitimacy of the withdrawal by African states from the two courts and whether it's within the law.

The fourth chapter will dealt with juxtaposition of the African courts withdrawal process and the ICC with other international and regional human rights courts. The determination of whether the process requires an amendment or not.

The research will conclude by determining what are the findings and recommendations that should be applied by the African states to resolve the conflict with the ICC and whether the Malabo Protocol is the option for solution to the dispute.

CHAPTER TWO

HISTORICAL BACKGROUND OF THE ICC AND THE AFRICAN COURT

2.0. Historical Background of the International Criminal Court

After the end of World War II, there are a lot of atrocities that had been committed by the Nazi Government of Germany. The allied powers decided to punish them of the atrocities. This was made possible by the establishment of the International Military Tribunal sitting at Nuremberg and International Military Tribunal of the Far East sitting in Tokyo. However, these two tribunals were temporary for the specific crimes committed at that time and not of permanent nature. The nature of international crimes was later dealt with by the two ad hoc tribunals; the Ad hoc International Tribunal for International War Crimes in the former Yugoslavia and the Ad Hoc Tribunal for War Crimes for Rwanda. These two tribunals had been set up by the UN Security Council to deal with crimes of Genocide, war crimes and crimes against humanity. This brought the need to have a permanent court that would take over the time consuming mode of creating this tribunals and in 1994 the International Law Commission submitted the first draft Statute for the International Criminal Court to the UN General Assembly. An amendment to the draft was submitted in 1998 leading to setting up of a five week conference in Rome, Italy. On the last day the treaty was opened for signature and on 17 July 1998 the Statute was adopted and in entered into force in July 1 2002.

2.1. Historical Background of the International Criminal Court

After the entry into force of the African Charter in 1986. African states did not see the need of having a continent judicial body to deal with the interpretation and application of the fundamental rights and freedoms enshrined under the African Charter. However when the atrocities and human rights violation happened across Africa and against the African population especially the Genocide

in Rwanda and the international crimes in the Democratic Republic of Congo, Liberia, Côte d'Ivoire, Sierra Leone, Somalia and Darfur. There was a need to have a judicial body in Africa that would see the fight against impunity in Africa.

After a series of discussions and meetings with the first and second Government legal experts' meeting held respectively in Cape Town, South Africa (September, 1995) and Nouakchott, Mauritania (April 1997), and the third Government Legal Experts meeting held in Addis Ababa, Ethiopia (December, 1997). Finally the Protocol to the African Charter on the Establishment of the African Court was adopted on 9 June 1998 in Ouagadougou, Burkina Faso. However, it took another 5 years before the protocol entered into force on 25 January 2004.

The court officially started its operation in November 2006 having had the first judges of the Court sworn in on 2 July 2006. It took the court three more years until when it made its first decision on 15 December 2009.

2.2. JURISDICTION OF THE ICC AND THE AFRICAN COURT

2.2.1. The Jurisdiction of the International Criminal Court

The International Criminal Court was established by the Rome Statute to deal with the most grievous crimes of international nature; the crime of genocide, war crimes, and crimes against humanity and recently the crime of aggression.³² The jurisdiction of the International Criminal Court is divided into three (3); The Material Jurisdiction, Personal Jurisdiction and temporal Jurisdiction.

³² Article 5 of the Rome Statute. These provisions are further defined in detail in articles 6–8. In addition, article 9 provides for the preparation of Elements of Crimes to assist the Court in the interpretation and application of articles 6, 7 and 8. This was adopted on 9 September 2002 by the Assembly of States Parties, together with the Rules of Procedure and Evidence.

2.2.2 Material Jurisdiction

The Material jurisdiction of the court is limited to the crime of Genocide, war crimes and crimes against humanity and the crime of aggression.³³ However, jurisdiction cannot be exercised with regard to the crime of aggression until the Statute has been amended by its definition and the acceptance of conditions for jurisdiction and this happened in June 2010, the Kampala Review Conference of the Rome Statute in Kampala, Uganda. The amendment of the Rome Statute to include the crime of aggression was finally adopted by consensus.³⁴ The amendment was in respect of the definition and future framework of the courts exercising jurisdiction over the crime of aggression. The court will not have jurisdiction over the crime of aggression until 30 state parties have ratified the amendment and two thirds decide to activate that jurisdiction after 1st January 2017.³⁵

War crimes are limited only by the wording of the Statute of “grave breaches” of the Geneva Convention, serious violations of the laws and customs of international armed conflict and limited offences under non international armed conflict. Further the crime must be committed as part of a planned or policy of a large scale nature.³⁶

2.2.3 Temporal Jurisdiction.

The Court shall have jurisdiction over crimes that were committed after the entry into force of the Rome Statute in 1st July, 2002.³⁷ Where the state becomes a party to the Statute after 1st July, 2002,

³³ Ibid.

³⁴ Matthew Gillett, “The anatomy of an international crime: Aggression at the International Criminal Court,” *International Criminal Law Review*; Surendran Koran, “The International Criminal Court and the Crimes of Aggression: Beyond the Kampala Convention,” *Houston Journal of International Law*, Vol. 34, No. 2, 2012, p. 231.

³⁵ Coalition for the International Criminal Court. “The Crime of Aggression,” Delivering on the promise of a fair, effective and independent Court.

³⁶ Article 8(1) of the Rome Statute.

³⁷ Article 11 of the Rome Statute. Note, however, that a state may make a declaration under article 12(3) to permit the Court to exercise jurisdiction in the particular case as from 1 July 2002. Note also that under article 124, a state may, upon ratification, decide not to accept the jurisdiction of the ICC over war crimes with regard to its

then the court shall exercise jurisdiction only from the time the Statute came into force in respect of that state unless the state makes a declaration stating otherwise.

2.2.4. Personal Jurisdiction

The jurisdiction of the court is only invoked on nationals of states parties to the Rome Statute of the International Criminal Court³⁸ who have either directly committed the crimes or indirectly such as military commanders.³⁹ However, in certain circumstances the court may have jurisdiction even to nationals of states that have not consented to the jurisdiction of the court where the Security Council in exercising its powers under Chapter VII of the United Nations Charter refers any matter before the Court⁴⁰, or where the defendant's state of nationality gives consent for the court to exercise jurisdiction over its national⁴¹, or where any crimes within the subject matter of the court's jurisdiction has been committed in a state that is party to the Rome Statute or has consented to the court's jurisdiction.⁴²

2.3. Jurisdiction of the African Court on Human and Peoples' Right

The African Court is governed by the African Courts Protocol which provides for the jurisdiction of the Court to determine Human Rights contentious cases and give advisory opinion on matters of human rights.⁴³

nationals or to crimes committed on its territory for a period of seven years. In fact, only France and Colombia have taken advantage of this provision.

³⁸ Article 12(2) of the Rome Statute.

³⁹ Nuremberg Principle established by the International Military Tribunal at Nuremberg. 1950

⁴⁰ Article 13(b) of the Rome Statute.

⁴¹ WILLIAMA. SCHABAS, INTERNATIONAL CRIMINAL COURT, 2nd Ed. 7-8, Cambridge University Press 2004.

⁴² The principle of territorial character in criminal law is fundamental. The case of S.S. "Lotus" (*France v Turkey*) 1927 P.C.I.J. (Ser. A) No. 10, at 20 (Jan 4); *Compania Naviera Vascongado v Steamship "Cristina"*, (1938) AC 485, 488 (H.L.).

⁴³ Article 3(1) of the Protocol to the African Charter on Human and Peoples' Right on the Establishment of the African Court on Human and Peoples' Right, adopted on 9 June 1998, entered into force on 25 January, 2004.

2.3.1 African Court's Advisory Opinion Jurisdiction

The African Court has jurisdiction to give an opinion on any legal matter concerning the African Charter on Human and Peoples' Right or any other relevant Human Rights Instrument.⁴⁴ Only African Union member states, Organs of the African Union such as the Assembly of Head of States and Government and recognized organizations by the African Union such as regional economic community may request the court for an Advisory opinion.⁴⁵

The court may not exercise advisory jurisdiction on a question, if such a question is currently pending before the African Commission. The African Commission may also exercise the power of giving advisory as long as there is no conflict of jurisdiction between the Court and the Commission.⁴⁶

2.3.2 African Court's Contentious Jurisdiction

The African Court has Jurisdiction of determining cases brought to it regarding questions of interpretation and application of the African Charter, the Protocol and other Human Rights Instruments.⁴⁷ The court may also determine disputes between members states on questions relating to violations of rights provided for under the African Charter, the protocol or other international Human Rights Instruments.⁴⁸ They Court may further try to amicably reach an agreement between the parties to the dispute. However, the agreement must conform to the provisions of the African Charter.⁴⁹

⁴⁴ Supra note 12 Article 4.

⁴⁵ Ibid..

⁴⁶ Supra Note 13.

⁴⁷ Supra note 12.

⁴⁸ A Guide to the African Human Rights System, *celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986-2016*, Pretoria University Law Press, Pg 44.

⁴⁹ This means the agreement cannot infringe on a right provided by the Charter.

The court may also exercise jurisdiction in a situation of interpretation or reviewing of its judgment. A party may ask the court to interpret its judgment and the court may invite the other party to make comments on the case. Further a party may seek review of a judgment when new evidence emerges that was not within the knowledge of the party at the time of making of the decision.⁵⁰

The Court can also exercise jurisdiction only against states that are party to the African Courts Protocol.⁵¹ Lastly, whenever a question of jurisdiction arises before the court. The court shall determine its own jurisdiction.⁵²

2.4. ADMISSIBILITY OF CASES BEFORE THE ICC AND THE AFRICAN COURT

2.4.1 Admissibility of the Cases before the International Criminal Court.

The Rome Statute of the International Criminal Court provides for circumstances under which a case shall be inadmissible before the court.⁵³ The purpose of such is to determine whether a case brought by the Prosecutor is admissible due to jurisdictional conflict.⁵⁴ The Appeals Chamber has endorsed a two-step test for determining admissibility before the ICC.⁵⁵ The Appeals Chamber of the ICC in *Simone Gbagbo* Decision provided for a matter to be admissible before the court there must be an existence of an investigation or prosecution and the state must be unwilling or unable to investigate or prosecute.⁵⁶

⁵⁰ International Federation for Human Rights, *Practical Guide The African Court on Human and Peoples' Right towards the African Court of Justice and Human Rights*, April, 2010, Pg 53.

⁵¹ *Zongo and Others Vs Bukina Faso*, 28 March, 2014.

⁵² Article 3(2) of the Protocol to the African Charter on Human and Peoples' Right on the Establishment of the African Court on Human and Peoples' Right, adopted on 9 June 1998, entered into force on 25 January, 2004.

⁵³ Article 17(1) of the Rome Statute of the International Criminal Court.

⁵⁴ Appeals Chamber, 30 August 2011, ICC-01/09-01/11-307 (*Prosecutor v William Ruto*) at Para 44; Appeals Chamber, 30 August 2011, ICC-01/09-02/11-274 (*Prosecutor V Uhuru Kenyatta*) at Para 43.

⁵⁵ Appeals Chamber, 25 September 2005, ICC-01/04-01/07-1497 (*Katanga Judgment*) at Para78; Appeals Chamber, 30 August 2011, ICC-01/09-01/11-307 (*Prosecutor v William Ruto*) at Para 41; Appeals Chamber, 30 August 2011, ICC-01/09-02/11-274 (*Prosecutor V Uhuru Kenyatta*) at Para 40; Pre Trial Chamber 1, 11 December 2014, ICC-02/11-01/12-47-Red (*Simone Gbagbo Decision*) at Para 49.

⁵⁶ *Ibid.*

2.4.2 Existence of an Investigation or Prosecution.

For a matter to be admissible before the ICC there must be no ongoing or past investigation by the state in existence. Article 17(1) (b) of the Rome Statute provide for the term decision not to prosecute. The Appeals Chamber explained it not to include where judicial proceedings are withdrawn for reason of surrender of a suspect to the ICC.⁵⁷

To determine an ongoing investigation steps such as interviewing of witnesses or suspects, carrying out forensics analysis and collecting of documentary evidence must be conducted.⁵⁸

Where the state has failed to conduct an investigation or prosecution then the matter becomes admissible before the ICC.

2.4.3 State Unwillingness or Unable.

The criteria of establishing unwillingness is provided for under Article 17(2) of the Rome Statute. The Investigation or prosecution being conducted must be one that is genuine.⁵⁹ The investigations or prosecutions must be conducted in a manner clearly showing independence and impartial and a manner that justice shall be served.⁶⁰

The criteria for inability is provided under Article 17(3) of the Rome Statute where the national judicial system unavailable. In the *Gaddafi* case the Pre-Trial Chamber held that the situation in Libya had rendered the national judicial system unavailable therefore the matter was admissible before the ICC.⁶¹

The same position was held in *Al-Semussi* case where the Pre-trial Chamber I, held that lack of an effective witness protection programme and difficulties of authorities to exercise control over

⁵⁷ *Katanga* Judgment Supra Note 24.

⁵⁸ *Ruto and Kenyatta* Judgment, Supra Note 24; Article 17(1) (a) of the Rome Statute.

⁵⁹ *Simone Gbagbo* Decision, Supra Note 24.

⁶⁰ Pre-trial Chamber I, 11 October 2013, ICC-01/11-01/11-466 Red (*Al-Semussi Decision*) at Para 26.

⁶¹ Pre Trial Chamber I, 31 May 2013, ICC-01/11-01/11-344-Red (*Gaddafi Decision*) at Para 58.

certain detention facilities amounted to inhumanity by the state of Libya therefore, the matter was admissible before the court.⁶²

2.5. Admissibility of Cases before the African Court of Human and Peoples' Right

The African Court Protocol⁶³ refers to the African Charter to provide that for cases to be admitted before the Court.⁶⁴ There are certain criteria that must be met.

First the case must be compatible with the Constitutive Act of the African Union and The African Charter.⁶⁵ An application which does not prima facie provide violations of the African Charter or the AU Constitutive Act shall not be admissible before the court.

Secondly the Case must be written in a language that is not disparaging or insulting to the state members, its institutions or the African Union.⁶⁶ The application should state the facts without insulting anyone. Political rhetoric and vulgar language will render a communication inadmissible, irrespective of the seriousness of the complaint. This was reiterated by the African Commission in the case of *Ligue camerounaise des droits de l'Homme v. Cameroon*.⁶⁷

Thirdly, the case should not be based purely on news disseminated through mass media without verification.⁶⁸ The applicant must be able to investigate and ascertain the truth of the facts before requesting for the Court's intervention as it was stated in the case of *Sir Dawda K. Jawara v. Gambia*.⁶⁹

⁶² Supra note 29.

⁶³ Article 6 of the Protocol to the African Charter on Human and Peoples' Right on the establishment of the African Court on Human and Peoples' Right.

⁶⁴ Article 56 of the African Charter on Human and Peoples' Right.

⁶⁵ Communication 57/91 and 1/88, where failure to prove a *prima facie* violation renders the communication inadmissible; an allegation in a general manner is not enough, Communication 63/92.

⁶⁶ *Ligue camerounaise des droits de l'Homme v. Cameroon*, Communication 65/92 where the communication was declared inadmissible for using words such as 'regime of tortures' and 'a government of barbarism'.

⁶⁷ *ibid*

⁶⁸ *Sir Dawda K. Jawara v. Gambia*, communications 147/95 and 149/96, the government alleged that the communication should be declared inadmissible because it was based exclusively on news disseminated through the mass media. The Commission however declared the communication admissible.

⁶⁹ *ibid*

Fourthly, all domestic remedies have been exhausted unless in this process is unduly prolonged.⁷⁰

The matter must have been taken before the national courts to the highest court of the land. This is to give the national authorities to deal and be aware of the human rights violations before they are brought in an international forum. However, where the remedies are unavailable, insufficient or are duly prolonged then an applicant needs not to exhaust the local remedies.

Further the matter must be brought within a reasonable time after exhaustion of local remedies.

The matter must also be one that is already being handled by another international body.

2.6. THE SEIZURE OF THE ICC AND AFRICAN COURT.

2.6.1 The Seizure of the International Criminal Court.

The Court may be seized in any of the three modes. First is through a referral to the Prosecutor by the Security Council acting under Chapter VII of the Charter, which is will be binding and it is irrelevant whether a state is a party to the Rome Statute or not.⁷¹ This was seen with referral of the situation in Darfur, Sudan, which was referred to the Prosecutor on 31 March 2005 by the Security Council in resolution 1593. After a preliminary examination of the situation, an investigation was opened on 1 June 2005 and after a twenty-month investigation into crimes allegedly committed in Darfur since 1 July 2002, the Prosecutor presented evidence to the judges and a summons to two named Sudanese individuals, one being a government minister and the other a military officer, to appear was issued with regard to charges alleging the commission of war crimes and crimes against

⁷⁰ Article 56(5) of the African Charter on Human and Peoples' Right; See communications 43/90 and 45/90 where non exhaustion of local remedies rendered communication inadmissible; but *Emgba Mekongo Louis v. Cameroon*, communication 59/91 where communication was declared admissible where appeal has been pending before the courts for twelve years. This was considered to be unduly prolonged. Communication can also be declared admissible without the exhaustion of local remedy if the remedy is at the discretion of the executive or if the jurisdiction of the ordinary courts have been ousted by a decree or through the establishment of a special tribunal, see in this regard communications: *Constitutional Rights Project v. Nigeria* communication 60/91, *Krischna Achuthan for Aleke Banda and Amnesty International for Orton and Vera Chirva v. Malawi*, communications 64/92, 68/92 and 78/92.

⁷¹ Article 13(b) of the Rome Statute.

humanity.⁷² Warrants of arrest were issued on 27 April 2007 against the two individuals by Pre-Trial Chamber I.⁷³

Secondly, the ICC may be seized where a matter has been referred to the prosecutor by one or more of the state parties to the Rome Statute.⁷⁴ Uganda referred the situation in regard to the Lord Resistance Army to the Prosecutor;⁷⁵ the Democratic Republic of the Congo in April 2004 referred to the Prosecutor the situation of crimes committed in its territory;⁷⁶ and the Central African Republic in December 2004 referred the situation in its country during the armed conflict of 2002–3 to the Prosecutor.⁷⁷

Thirdly, the Prosecutor can by himself or herself initiate an investigation.⁷⁸ Where the Prosecutor is convinced after receiving information that the information is serious and reasonable for an investigation to be conducted then the prosecutor shall ask for authorization from the Pre-Trial Chamber to proceed and conduct the investigation. When the Pre-Trial Chamber, after examining the request and the supporting material, considers that there is a reasonable basis to proceed with

⁷² Available at www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf.

⁷³ ICC-02/05-01/07-2 01-05-2007 1/16 CB PT and ICC-02/05-01/07-3 01-05-2007 1/17 CB PT; Schabas, *International Criminal Court*, pp. 47 ff. The Prosecutor applied for a warrant of arrest against the President of Sudan on 14 July 2008 alleging genocide, war crimes and crimes against humanity, ICC-OTP-20080714-PR341-ENG.

⁷⁴ Articles 13(a) and 14 of the Rome Statute.

⁷⁵ In July 2004, an investigation was opened by the Prosecutor, and on 8 July 2005, warrants of arrest for crimes against humanity and war crimes against five senior commanders of the Lord's Resistance Army were issued under seal by Pre-Trial Chamber II. These warrants were made public on 13 October 2005: see www.icc-cpi.int/library/cases/ICC_20051410-056-1_English.pdf and Schabas, *International Criminal Court*, pp. 36 ff.

⁷⁶ ICC-OTP-20040419-50-En. An investigation was opened in June 2004, the first such investigation by the Prosecutor: see ICC-OTP-20040623-59-En. An arrest warrant was issued in early 2006 against Thomas Lubanga Dyilo, who was charged on various counts concerning the recruitment and use of child soldiers: see *ICC Newsletter*, No. 10, November 2006. However, a stay on proceedings was ordered and the accused released due to fair trial considerations. An appeal is pending, ICC-01/04-01/06, 2 July 2008. An arrest warrant was issued against Germain Katanga on 2 July 2007 and he was transferred to the custody of the Court in October that year: see www.icc-cpi.int/library/cases/DRC-18-10-07_En.pdf. An arrest warrant was issued against Mathieu Ngudjolo Chui on 7 July 2007 and he was transferred to the custody of the Court in February 2008: see www.icccpi.int/press_release_details&id=329.html. Both the latter individuals are also charged with regard to the situation in the Congo. See also Schabas, *International Criminal Court*, pp. 42 ff.

⁷⁷ An investigation was opened by the Prosecutor in May 2007: see www.icccpi.int/library/press/press_releases/ICC-OTP-BN-20070522-220_A_EN.pdf and Schabas, *International Criminal Court*, pp. 51–2.

⁷⁸ Articles 13(c) of the Rome Statute.

an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation.⁷⁹

2.6.2. The Seizure of the African Court on Human and Peoples' Right.

The African Court may be seized either directly or indirectly in accordance with the African Court Protocol.⁸⁰ The African Court Protocol grants certain entities and individuals to have access to the court. Any entity or individual whom is not provided for under the Protocol may not bring a matter to the court unless the party uses any of the entities granted access to the court.

2.6.3. Direct Access to the Court.

In conformity with Article 5(1) of the African Court Protocol direct access to the Court has been granted to the Commission, the State Parties and African Intergovernmental Organizations.⁸¹ The African Commission shall bring matters to the court if it has come to its attention that there are massive violations of human rights on a member state to the African Charter and the Protocol.⁸² State Parties may submit cases to the Court in any of the circumstances. First, where the state party had lodged a complaint to the Commission.⁸³ The State must have considered that another State Party has violated the provisions of the Charter.⁸⁴ Secondly, State Party against which the complaint has been lodged at the Commission.⁸⁵ the State party must wait for the Commission's decision then they can use the court to appeal the decision of the Commission if it feels aggrieved

⁷⁹ Article 15 of the Rome Statute; the refusal of the Pre-Trial Chamber to authorize the investigation will not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation; he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

⁸⁰ Article 5 of the Protocol to the African Charter on Human and Peoples' Right on the Establishment of the African Court on Human and Peoples' Right, adopted on 9 June 1998, entered into force on 25 January, 2004.

⁸¹ Supra note 39 Article 5(1)

⁸² Article 119.4 of the Interim Rules of Procedure of the African Commission.

⁸³ Supra note 39, Article 5(1) (b).

⁸⁴ *Democratic Republic of Congo Vs Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003).

⁸⁵ Supra note 39, Article 5(1) (c).

with the decision.⁸⁶ Thirdly, State Party whose citizen is a victim of human rights violation.⁸⁷ This may be done either the state party directly submits a matter to the court against another state party that have violated the rights of its citizen or the state party may along with an NGO or Individual submit the matter directly to the Court.⁸⁸

African intergovernmental Organization may also directly access the Court.⁸⁹ This is a unique feature of the African Court compared to other regional human rights Courts. The organizations that can bring matters under this category are the African Union and the Regional Economic Communities.⁹⁰

The African Court Protocol gives Non- Governmental Organization with observer status before the African Commission and Individuals direct access to the Court only where the state concerned has made a declaration under Article 34(6) of the African Court Protocol.⁹¹ Article 34(6) of the African Court Protocol allows states at the time of ratification of the African Court Protocol to make a declaration permitting NGO and Individuals to bring matters directly to the Court.⁹² Where a state has not made such declaration then an NGO or individual cannot bring matters directly before the court.⁹³

⁸⁶ Article 33 (c) and 119.5 of the Interim Rules of Procedure of the African Commission;

⁸⁷ Supra note 39, Article 5(1) (d).

⁸⁸ Supra note 19, Pg 73.

⁸⁹ Supra note 39, Article 5(1) (e).

⁹⁰ The Regional Economic Communities include the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of Central African States (ECCAS), the Southern African Development Community (SADC), the Intergovernmental Authority on Development (IGAD), the Arab Maghreb Union (UMA), the Community of Sahel-Saharan States (CEN-SAD) and the East African Community (EAC).

⁹¹ Article 5(3) of the Protocol to the African Charter on Human and Peoples' Right on the Establishment of the African Court on Human and Peoples' Right, adopted on 9 June 1998, entered into force on 25 January, 2004.

⁹² Supra Note 50, Article 34(6).

⁹³ Rwanda withdrew its declaration of Article 34(6) in 2016 and therefore NGO's and Individuals in Rwanda cannot bring matters directly to the court.

2.6.4. Indirect Access to the African Court.

Where state parties have not made a declaration under Article 34(6) of the African Court's Protocol the individuals and NGO's can only bring matters to the court indirectly through the African Commission. The commission shall receive the communication from either the individual or NGO and then refer the matter to the court when it is satisfied that there are massive human rights violation in a member state to the African Court Protocol.

The commission may also decide to refer a matter to the court after it has received the communication where the commission went on to determine the matter on its merits and found the state party to have violated human rights and the state fails to comply with the commission's findings.

CHAPTER THREE

LEGALITY OF WITHDRAWAL PROCESS OF THE ICC AND THE AFRICAN COURT

3.0. Legality of Withdrawal Process of the International Criminal Court.

A state is bound by a treaty when that state consent, accedes, acceptance, exchange of instruments constituting a treaty, approves or ratifies that convention or treaty.⁹⁴ The state shall be bound by that treaty until the state decide to withdraw from that treaty where the treaty has a withdrawal clause⁹⁵ or where the treaty does not have a withdrawal clause if the criteria under the Vienna Convention on the Law of treatise have been met.⁹⁶

A state that has ratified the Rome Statute of the International Criminal Court shall be bound by it. However, the Statute provides for a clause where a state can withdraw from the 'Statute.'⁹⁷ The provision of Article 127 of the Rome Statute gives parties to the Statute to withdraw from the Statute at any time they deem fit. The provision does not provide for reasons a state should have for a withdrawal to be effective. This is a lacuna in the law on withdrawal that should have been cured by the drafters of the Statute. Since there is lack of such provision on the reasons a state can withdraw then a state party can do so irrespective of the reason it has. This is the reason that the question of legality of withdrawal is clear within the ambit of the Rome Statute and it is legal for a state to withdraw from the Statute.

However, for a withdrawal from the Rome Statute to be effective certain preconditions must be met. First a state party to the Rome Statute must make a written notification to the Secretary

⁹⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 1 January 1980) 1155 UNTS331, art 11 [hereinafter 'VCLT'].

⁹⁵ Supra, Art. 54; Stephen P. Mulligan, Legislative Attorney, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, May 4, 2018.

⁹⁶ Supra note 1, Art. 56; Laurence R. Helfer, *Exiting Treaties*, *Helperbook*, *Virginia Law Review* 10/26/2005 at 1589.

⁹⁷ Rome Statute of the International Criminal Court, Art. 127.

General of the United Nations of its withdrawal. This notification shall indicate the state's party withdrawal from the Rome Statute. The withdrawal shall have an effect one year after the date of receipt of the notification to the Secretary General of the United Nations. Where the notification specifies another date for withdrawal, then the withdrawal shall have effect one year after from that date indicated in the notification.⁹⁸

During this one year period the state shall still be bound by the provision of the Rome Statute and even a case can be lodged against any citizen of the state. The jurisdiction of the court shall not be ousted at this time where the withdrawal has not taken effect. The obligations of the state will still exist under the Statute at this period such as financial obligation.⁹⁹

After the lapse of the one year period the state's obligations under the Statute shall cease. However, any obligation that was in existence before the withdrawal including financial obligation that accrued to it before the withdrawal. The withdrawal shall also not affect any previous cooperation with the court in connection with criminal proceedings or investigations which the state had a duty to cooperate or proceedings commenced prior to the date on which the withdrawal became effective.¹⁰⁰ The cases against any citizen of a state party pending before the court shall not be affected by the withdrawal of such a state from the Rome Statute.¹⁰¹ However, any matter brought

⁹⁸ Supra Note 4, Art 127(1).

⁹⁹ Supra Note 4, Art 127(2); Sheena McKenzie, *Russia Quits International Criminal Court*, CNN (Nov. 17, 2016, 3:25 AM), Available at <http://www.cnn.com/2016/11/16/world/russia-quits-international-criminal-court/> Accessed on 30/05/2018.

¹⁰⁰ See Burundi's notification to the UNSG here: <https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf>.

¹⁰¹ Ndungu Wainaina, *Why Withdrawal From The Rome Statute (ICC) Will Not Be Easy*, Available at <https://www.kenya-today.com/facing-justice/withdrwal-rome-statute-icc-will-easy>

Accessed on 30/05/2018.

before the court after the withdrawal has taken effect shall be a nullity and the court cannot exercise jurisdiction over such matter save where the Security Council in exercising its powers under Chapter VII of the United Nations Charter refers any matter to the prosecutor against such a state¹⁰² or where any national of such a state commits the crimes in the court jurisdiction in another state that is a party to the Rome Statute and has not withdrawn from it.¹⁰³

Therefore, the withdrawal process from the Rome Statute has legal backing and cannot be faulted since state have the discretion of withdrawing from it at any time they deem fit without justifiable reason.

3.1. Legality of Withdrawal Process from the African Court on Human and Peoples' Right.

The African Court which is governed by the African Court Protocol has only jurisdiction to handle matters brought to it against a state party.¹⁰⁴ Whether a state party can withdraw from the court's jurisdiction is not provided for under the African Court Protocol.¹⁰⁵ Since the Protocol does not have a withdrawal clause, then the Provisions of the Vienna Convention on the Law of Treatise will be invoked.¹⁰⁶ Article 56 of the Vienna Convention on the Law of Treatise provides where a treaty does not have a withdrawal clause then that treaty is not subject to with draw except it can

¹⁰² Supra Note 4, Art. 13(b).

¹⁰³ Willama. Schabas, *International Criminal Court*, 2nd Ed. 7-8, Cambridge University Press 2004.

¹⁰⁴ A Guide to the African Human Rights System, *celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986-2016*, Pretoria University Law Press, Pg 44.

¹⁰⁵ The Centre of Human Rights, Faculty of Law, University of Pretoria, held a panel discussion titled "*the legal and political consequences of Rwanda's withdrawal of its acceptance of direct individual access to the African Human Rights Court.*" The panel discussion consisted of Professor Frans Viljoen, Director of the Centre for Human Rights; Professor Dire Tladi, Professor, Department of Public Law, Faculty of Law, University of Pretoria and a member of the International Law Commission; and Professor Michelo Hansungule, Professor, Centre for Human Rights; and legal counsel in two of the cases against Rwanda submitted to the Court. Available at <http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acc%20eptance-of-direct-individual-access-to-the-african-human-rights-court.html> Accessed on 26th February, 2018.

¹⁰⁶ VCLT Supra, Art. 56.

be proved the parties intended to admit the possibility of withdrawal or a right of withdrawal be implied by the nature of the treaty.¹⁰⁷

To determine whether the parties in the African Court Protocol intended to admit the possibility of withdrawal then the provision regarding treaty interpretation under the Vienna Convention on the Law of Treatise must be applied.¹⁰⁸

To determine whether the nature of the treaty is one that can be withdrawn then it will be important to juxtapose the African Court Protocol and other regional treaties such as the American Convention on Human Rights and the European Convention on Human Rights and Fundamental Freedoms. This shall be discussed in detail in Chapter four. However, unlike the African Court Protocol the other regional treatise have a withdrawal clause from the court.¹⁰⁹ Even though withdrawal may be legally possible under the general interpretation of treatise under the Vienna Convention of the Law of Treatise it may not be easy taking consideration the nature of the Court on questions of Human and Peoples' Rights.¹¹⁰

In determining the legality of the withdrawal from the African Court, First, the African Court Protocol is established to protect rights under the African Charter which are rights guaranteed under the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights which are regarded as the International Bill of Human Rights and therefore it doesn't have a temporary character which

¹⁰⁷ Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, S.Rept. 192 (2001) [hereinafter *Treaties and Other International Agreements*] (surveying the principles related to withdrawal from international agreements under international law and the domestic law of the United States)

¹⁰⁸ VCLT note 1, Art. 31-38.

¹⁰⁹ See Art. 78 of the American Convention on Human Rights Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969; Art. 58 of the European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13

¹¹⁰ Supra Note 12.

is a typical to the treaties that the right to withdraw is deemed to be admitted. This is irrespective of whether their existence of a withdrawal clause.¹¹¹

Secondly, the exclusion of the withdrawal clause from the African Court protocol was founded on a peculiar conception. Taking into consideration that the African Court Protocol was created after the European Convention on Human Rights and the American Convention on Human Right and Fundamental Freedom which both have a withdrawal clause. The framers of the Protocol therefore if they had intended for a withdrawal to be in existence then that would have been expressly provided.

3.2. Legitimacy of withdrawal by the African States from the International Criminal Court and the African Court.

3.2.1. Legitimacy of withdrawal by African States from the International Criminal Court.

However, much the withdrawal by African States may be legal as seen above. The crucial question is whether the withdrawal is legitimate. In determining this question it would be crucial to take note of the principle of good faith and abuse of rights.¹¹² As guaranteed under the Vienna Convention on the Law of Treatise. A state that is entering into a treaty must do so in good faith; this principle is known as *pacta sunt servanda*.¹¹³

It is important to note the principle of good faith does not generally limit a state from withdrawing from a treaty. The obligation under the Vienna Convention on the Law of Treatise is that treaties

¹¹¹ Deborah Russo, *Procedural obligations and good faith: the case of the human rights treaties*, on Jun 9, 2014, Available at <http://www.qil-qdi.org/procedural-obligations-and-good-faith-the-case-of-the-human-rights-treaties/> accessed 30/05/2018.

¹¹² Timothy Meyer, *Good faith, withdrawal, and the judicialization of international politics*, May 11, 2014. Available at <http://www.qil-qdi.org/good-faith-withdrawal-and-the-judicialization-of-international-politics/> accessed 30/5/2018.

¹¹³ VCLT Supra Note 1, Art. 26.

do bind state parties and their performance should be in good faith. There are circumstances when this principle will limit the right of a state to withdraw.¹¹⁴

The principle of good faith will limit withdrawal from a substantive and jurisdictional commitment not in good faith.¹¹⁵ The Rome Statute is both a jurisdictional and substantive treaty which permits cases of genocide, crimes against humanity, war crimes and the crime of aggression to be tried before the International Criminal Court.¹¹⁶ Where a state decides to withdraw from the jurisdictional commitment of a treaty such as the Rome Statute in bad faith then such a state shall be limited to withdraw from the treaty.¹¹⁷

The rationale behind the withdrawal of the African States such as South Africa, Burundi and those African states that a threatening to withdraw is based on escaping the jurisdictional commitment that such a state has under the Rome Statute.¹¹⁸ For example, South African decided to withdraw after the court had put it on pressure after failing to arrest Sudan's President Omar Al-Bashir whom an arrest warrant had been issued against him when he entered their country¹¹⁹. The principle of

¹¹⁴ Supra Note 18.

¹¹⁵ O Dorr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2011) 431, 445-46. Sir Humphrey Waldock's draft article on *pacta sunt servanda* actually contained this original provision. Although the International Law Commission removed this language, it believed it 'clearly implicit in the obligation to perform the treaty in good faith.'

¹¹⁶ Article 5 of the Rome Statute. These provisions are further defined in detail in articles 6–8. In addition, article 9 provides for the preparation of Elements of Crimes to assist the Court in the interpretation and application of articles 6, 7 and 8. This was adopted on 9 September 2002 by the Assembly of States Parties, together with the Rules of Procedure and Evidence.

¹¹⁷ Supra Note 18.

¹¹⁸ See the text of the letter addressed to the UN Secretary General here: www.capetalk.co.za/articles/193225/southafrica-to-begin-exit-process-from-icc; Chan, S. and M. Simons. 2016. South Africa to withdraw from the International Criminal Court. *New York Times* 21 October 2016. October 2016: www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminalcourt.html?_r=0.

¹¹⁹ Africa Legal Aid, *ICC Withdrawals: Is Africa Running Away from Justice?*, 18 November 2016, World Forum, The Hague at pg 4.

good faith provides that a state party shall refrain from acts that would prevent the execution of a treaty.¹²⁰

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. To that effect it makes the process of withdrawal by African States illegitimate as it violates the principle of good faith.

The right of withdrawal is also based on the doctrine of sovereignty of states.¹²¹ States have a right to enter into treaties and withdraw whenever they want as long as it is permitted to withdraw. However, the principle of abuse of rights dictates that however much states under international law have rights. These rights seem to be abused and in such a situation then the right must be limited.¹²² In the *Lotus Case*¹²³, 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.

The African head of states decision of withdrawal is a right at their discretion. However, where the right is being abused then the withdrawal however much it has a legal backing it will be illegitimate.

¹²⁰ Supra Note 18.

¹²¹ Deborah Russo, *Reply To/Follow Up / Unilateral Withdrawal from Treaties with the Intent to Avoid Supervisory Mechanisms: Is It In Keeping With the Principle of Good Faith?*, on Jun 9, 2014, Available at <http://www.qil-qdi.org/procedural-obligations-and-good-faith-the-case-of-the-human-rights-treaties/> accessed 30/05/2018.

¹²² G. D. S. Taylor, LL.M., Ph.D. *Senior Lecturer in Law at Monash University, Melbourne, Australia; sometime Humanitarian Trust Student at the University of Cambridge; The Content of the Rule Against Abuse of Rights in International Law*, at pg 1.

¹²³ *The Lotus*, P.C.I.J., 1927, Ser. A, No. 20.

3.2.2. Legitimacy of withdrawal by African States from the African Court on Human and Peoples' Right.

The withdrawal from the African Court by African states is something that is unprecedented. However, the nature of the African Protocol is a treaty that establishes jurisdictional obligation and substantive obligation is provided under the African Charter. The principle of good faith shall be applicable to both the jurisdictional and substantive obligation treaty.¹²⁴ A state cannot purport to withdraw from the African Court Protocol for reason based on ousting the jurisdiction of the court on matters that happened at a time when the state was a party to the Protocol.¹²⁵

The UN High Commissioner for Human Rights in the 1999 resolution on the continuity of obligations under international human rights treaties highlighted that mostly states who withdraw from human rights treaties do so to escape the judicial control.¹²⁶

Further, treaties that do not have a withdrawal clause such as the African Court Protocol are not subject to withdrawal unless by consent of parties.¹²⁷ The nature of the African Court Protocol is

¹²⁴ Supra Note 18; Deborah Russo, *Procedural obligations and good faith: the case of the human rights treaties*, on Jun 9, 2014, Available at <http://www.qil-qdi.org/procedural-obligations-and-good-faith-the-case-of-the-human-rights-treaties/> accessed 30/05/2018.

¹²⁵ For example, in 2005 the United States withdrew from the Optional Protocol to the Vienna Convention on Consular Relations in part to avoid adverse decisions by the ICJ based on conduct like that at issue in the *Avena* case. One might claim that the United States should not be able to withdraw from the Optional Protocol, at least for claims based on actions that occurred while the United States was party to the Optional Protocol.

¹²⁶ The resolution, while recognising that the withdrawal from a human rights mechanism may or may not be unlawful under the treaty in question, noted that in practice denunciation only occurred 'following a determination of violation of the relevant treaty commitment by the mechanism in question' (OHCHR, 'Continuing of obligations under international human rights treaties' Sub-Comm Res 1999/5, 25 August 1999); See D Germán Mejía-Lemos, 'Venezuela's Denunciation of the American Convention on Human Rights' (2013) 17/ASIL Insights, available at the website www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights Accessed on 30/05/2018.

¹²⁷ VCLT, Note 1 art. 54; Some rules of international law known as *jus cogens* are recognized by the international community as peremptory, permitting no derogation. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 301(1) (1987) [hereinafter THIRD RESTATEMENT] (defining "international agreement" as any agreement between two or more states or international organizations that is "intended to be legally binding and is governed by international law"). The Restatement is not binding law, but is considered by many to be persuasive authority. See WINER ET AL., INTERNATIONAL LAW LEGAL RESEARCH 242-43 (2013), § 102 cmt. k. These rules generally prevail regardless of the content or status of international agreements, *id.*, and thus would not be affected by withdrawal.

to safeguard the rights provided for under the African Charter. Some of this rights have obtain the status of *jus Cogens*¹²⁸ and for a state to withdraw from such a treaty with jurisdictional obligation so as to run away from the substantive jurisdiction it has under the African Charter defeats the object and purpose of not only the African Court Protocol but also the African Charter.

Therefore the principle of good faith points out that in such a circumstance the withdrawal by a state from the jurisdictional treaty would be illegitimate if it's to defeat the object and purpose of the substantive treaty. A state that is withdrawing from a human right treaty or a human right jurisdictional commitment treaty such as the African Court Protocol gives heavy consequences to victims of human right violations by limiting them from accessing the international judicial bodies,¹²⁹ thus, the principle of good faith should prevent such treaties from withdrawal.¹³⁰

¹²⁸ See African Charter on Human and Peoples' Right. (Adopted in Nairobi June 27, 1981) (Entered into Force October 21, 1986) Art. 5 & 7.

¹²⁹ Deborah Russo, *Supra* Note 30.

¹³⁰ See UN Human Rights Committee General Comment No. 26/1997 regarding the withdrawal by North Korea from the ICCPR. The UNHRC concluded that the ICCPR was not capable of withdrawal or denunciation due to its nature.

CHAPTER FOUR

JUXTAPOSITION OF THE WITHDRAWAL PROCESS OF THE ICC AND THE AFRICAN COURT AND OTHER INTERNATIONAL JUDICIAL ORGANS.

This Chapter shall discuss the juxtaposition of the withdrawal process from the International Criminal Court and the International Court of Justice as well as the juxtaposition of the withdrawal process between the African Court and the European Court of Human Rights and The Inter-American Court of Human Rights.

4.0. JUXTAPOSITION OF WITHDRAWAL PROCESS BETWEEN THE ICC AND THE ICJ

4.0.1. Withdrawal Process under the International Court of Justice.

The International Court of Justice (ICJ) was established under the United Nations Charter as the Principal judicial organ of the United Nations.¹³¹ It is governed by the Statute of the International Court of Justice with its jurisdiction to determine contentious cases and give advisory opinion.¹³² The court can only be accessed by entities that are states in the contentious jurisdiction of the court.¹³³ For a state to be party to a contentious case before the ICJ, a state must have access and must have consented to the jurisdiction of the court.¹³⁴

States shall have access to the court if it's a party to the ICJ Statute.¹³⁵ However, where states that are not party to the ICJ Statute can still have access to the court if a state is a member of the United

¹³¹ The Charter of the United Nations signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945, Article 92.

¹³² Statute to the International Court of Justice Art. 36 & 65.

¹³³ Malcolm N. Shaw, *International Law*, (6th edn, Cambridge University Press, 2008), p. 1072

¹³⁴ Swiss Federal Department of Foreign Affairs FDFA, Directorate of International Law, *Handbook on accepting the jurisdiction of the International Court of Justice Model clauses and template*, 2014 Publication.

¹³⁵ Supra Note 2, Art. 35(1).

Nations.¹³⁶ Further, the Security Council determined the conditions under which the Court shall be open to States which are not Parties to the Statute of the International Court of Justice.¹³⁷

Jurisdiction of the Court is based on the consent of the States to which it is open. In a specific case, the Court has jurisdiction if the Parties have consented to the Court settling their dispute.¹³⁸ This consent may be expressed by means of unilateral declarations (also referred to as 'optional clause' declarations),¹³⁹ in treaties or through special agreements,¹⁴⁰ and it can also be expressed after the Court has been seized (*forum prorogatum*).¹⁴¹

For state to withdraw from the jurisdiction of the International Court of Justice, it will depend with the mode in which such a state has consented to the jurisdiction of the Court. Where a state consents to the jurisdiction of the ICJ through a special agreement then the withdrawal by one party from such special agreement will withdraw jurisdiction from the International Court of Justice. However, this can be done before the agreement is submitted to the ICJ and the matter has already started.

Where a state has consented to the jurisdiction of the ICJ through other treaties and conventions, and such treaty or convention allows the withdrawal from such a treaty of the declaration giving ICJ jurisdiction then a state can revoke the declaration and the ICJ shall cease to have jurisdiction.¹⁴²

¹³⁶ Supra Note 1, Art. 93.

¹³⁷ Security Council resolution 9 (1946) of 15 October 1946; Supra Note 2, Art. 35(2).

¹³⁸ John G. Merrills, *International Dispute Settlement*, (5th edn, Cambridge Books Online, 2011) p. 117

¹³⁹ Supra note 2 Art. 36(2).

¹⁴⁰ Supra note 2 Art. 36(1).

¹⁴¹ Supra Note 4.

¹⁴² See Art.287 of United Nations Convention on the Law of the Sea.

Where a state has consented to the jurisdiction through the optional declaration then the law governing withdrawal from a declaration shall be applicable. The revocation of the declaration shall be effective by depositing the notice of revocation to the depository.¹⁴³

Unlike the Rome Statute which has a withdrawal clause, the ICJ Statute on the other hand does not have a provision for withdrawal. However, this does not mean a state cannot withdraw from the ICJ. The nature of matters within the jurisdiction of the ICJ is based on states disputes. Whereas its until states decides to approach the ICJ, the matter cannot be handled by the Court. On the other hand the ICC has jurisdiction over crimes whose nature brings an *erga omnes* obligation. Thus, states are to be bound by them and withdrawal must be limited on such crimes.

4.2. JUXTAPOSITION OF WITHDRAWAL PROCESS BETWEEN THE AFRICAN COURT AND THE EUROPEAN COURT AND INTER-AMERICAN COURT.

4.2.1. Withdrawal Process under the European Convention on Protection Human Rights and Fundamental Freedoms.

The European Region is governed by the European Convention on Human Rights (ECHR). The members of the Council of Europe, signed the European Convention on Human Rights on 4 November 1950. The ECHR is a binding treaty in international law, with its own court to interpret the application of the articles and to declare when a Contracting State is in breach.¹⁴⁴

¹⁴³ The notification of termination of the declaration of 17 October 1956 received from the Government of Israel on 21 November 1985 (dated 19 November 1985).

¹⁴⁴ European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, Article 19.

The European Court of Human Rights has a jurisdiction on matters of interpretation and application of the European Convention on Human Rights.¹⁴⁵ Where a question arises as to the jurisdiction of the court, the court itself shall determine its jurisdiction.¹⁴⁶

The European Court of Human Rights can only be accessed by state parties to the European Convention on Human Right, individuals and Non-Governmental Organizations. However, a matter can only be against a state party to the Convention.¹⁴⁷

The European Convention on Human Rights also has a built-in withdrawal mechanism.¹⁴⁸ Under Article 58(1) of the Convention it provides that a state party to the Convention can only withdraw from the Convention after the lapse of six months from the date the notice of withdrawal was made to the Secretary General of the Council of Europe. However, this withdrawal shall only be applicable to state parties that have been parties for a period not less than five years from the date on which the state became a party to the Convention.¹⁴⁹

Further, Article 58 of the European Convention on Human Rights, goes on to provide that such a denunciation is not retrospective, i.e. a Contracting Party is not excused from compliance with its obligations under the Convention in respect of anything done up to the expiry of the 6 months' notice, even after the denunciation has taken effect.¹⁵⁰

¹⁴⁵ *ibid* Article 32(1).

¹⁴⁶ *ibid* Article 32(2).

¹⁴⁷ The Registrar, European Court of Human Rights, Council of Europe, *Basic Guide for Applicants Taking their Case to The European Court of Human Rights*, pg 5.

¹⁴⁸ *Supra* Note 14, Article 58.

¹⁴⁹ *Supra* Note 14, Article 58(1).

¹⁵⁰ *Supra* Note 14, Article 58(2).

States that seize to be member states of the Council of Europe also shall seize to be parties to the European Convention of Human Rights and thus seize to be subject to the jurisdiction of the European Court.¹⁵¹

Unlike the African Charter and the African Court Protocol, the European convention on Human Rights does have a withdrawal clause and permits states to withdraw from it.¹⁵² There is a legal basis of withdrawal from the European Convention and thus its crucial to point out that the African Court Protocol which was created after the European Convention would have borrowed the same analogy of the European Convention to have a withdrawal clause if the parties had intended to admit the possibility of withdrawal from the African Court Protocol.

4.2.3. Withdrawal Process under the American Convention on Human Rights.

The Inter-American Court of Human Rights was established by the Organization of American States under the American Convention on Human Rights.¹⁵³ The Court was created to safeguard the rights enshrined in the Convention.

The jurisdiction of the court is based on matters of interpretation and application of the American Convention of Human Rights as long as the state parties to the Organization of American States have recognized such a jurisdiction.¹⁵⁴ Where a state is a member of the Organization of American States but has not recognized the jurisdiction of the court then at that time the American Commission of Human Rights shall have jurisdiction to handle the matters of human rights violation against such a state.

¹⁵¹ Supra Note 14, Article 58(3).

¹⁵² In December 1969, Greece announced its decision to withdraw from Council of Europe and submitted the six months' advance notice to denounce the Convention.

¹⁵³ American Convention on Human Rights Adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, Article 33(b).

¹⁵⁴ *Ibid* Article 62(3).

The Court is also competent do deal with matters from other treaties as long as the state have ratified the treaty and has recognized the jurisdiction of the court regarding that treaty.¹⁵⁵

The American Convention on Human Rights further contains a withdrawal or denunciation provision.¹⁵⁶The withdrawal shall take effect after one year from the date a notice of withdrawal has been submitted to the Secretary General of the Organization of the American States who shall inform the other states. However, this withdrawal is only applicable to states after the expiration of five years from the time the American Convention has entered into force against that state.¹⁵⁷ The denouncing State Party therefore remains bound by the obligations set forth in the Convention with respect to any actions taken by the State prior to the effective date of the denunciation.¹⁵⁸Therefore, a state can withdraw from the American Convention of Human Rights.¹⁵⁹

However, the American Convention of Human Rights does not have a provision for withdrawal of the declaration accepting the jurisdiction of the Inter-American Court. The court in the *Ivcher Bronstein*¹⁶⁰ and *Constitutional Court*¹⁶¹ cases, the Inter-American Court held that Peru's withdrawal from its jurisdiction was invalid because no provision in the American Convention provides for a State to withdraw its acceptance of the Inter-American Court's jurisdiction.

¹⁵⁵ *Portugal v. Panama* Judgment of August 12, 2008; *Bayarri v. Argentina* Judgment of October 30, 2008 which concerned the Inter-American Convention to Prevent and Punish Torture, adopted the 9th of December 1985 in Cartagena de Indias (Colombia).

¹⁵⁶ Supra Note 23, Article 78.

¹⁵⁷ Supra Note 23, Article 78(1).

¹⁵⁸ Supra Note 23, Article 78(2).

¹⁵⁹ Jo M. Pasqualucci, *The Practice & Procedure of the Inter-American Court of Human Rights*, p. 115-116 (2003).

¹⁶⁰ Inter-American Court of Human Rights Case of *Ivcher-Bronstein v. Peru* Judgment of September 24, 1999.

¹⁶¹ Inter-American Court of Human Rights Case of the *Constitutional Court v. Peru* Judgment of September 24, 1999

On May 26, 1998, **Trinidad and Tobago** announced its withdrawal from the American Convention.¹⁶² Trinidad and Tobago still remained bound by the Convention between May 26, 1998 and May 26, 1999, during which time the Inter-American Court issued provisional measures ordering Trinidad and Tobago to suspend the executions until the prisoners' claims had been resolved.¹⁶³

A state that validly withdraws from the American Convention of Human Rights shall not be regarded to have fully withdrawn from the Inter-American Human Rights System. In order to completely withdraw from the jurisdiction of the Inter-American Commission and the Inter-American Court, a State must withdraw its membership from the Organization of American States.¹⁶⁴

The African Human Right System on the other hand does not have a provision for denunciation under the African Charter or the African Court Protocol. A state therefore can neither withdraw from the Charter nor the African Court Protocol unless the parties admit the possibility of withdrawal from either of the two. Unlike the American Convention which will require withdrawal from the Convention and being a member of the Organization of the American States for a withdrawal from the Court to be effective.

In Conclusion, the Juxtaposition of the withdrawal process of the other regional Human Rights Systems that were established before the African Human Rights System gives a clear picture as to

¹⁶² Natasha Parassram Concepcion, Comment, *The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights*, 848 Am. U. Int'l L. Rev. 847, 850 (2002).

¹⁶³ *Ibid* 872

¹⁶⁴ Doug Cassel, *Opinio Juris*, *Will Chavez Remove Venezuela from the Inter-American Commission?*

Available at <http://opiniojuris.org/2012/05/11/chavez-removes-venezuela-from-iachr/> Accessed on 6/6/2018.

whether the African states had intended to admit the possibility of withdrawal from the African Court.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMENDATIONS FOR AFRICAN STATES IN SOLVING THE CONFLICT WITH ICC

5.0. SUMMARY

The research has provided a deep analysis of the legality and legitimacy of withdrawal by African States from the ICC and the African Court. The research does comprise of five chapters. The research started by appreciating the topic of study which was able to point out the research problems and the mode of how the research would be conducted in order to achieve certain goals. The research further went to look at the laws governing the International Criminal Court and the African Court on Human and Peoples' Right, analyzing the jurisdiction, admissibility and *locus standi*.

Furthermore, the research discussed the legality and legitimacy of withdrawal from the ICC and the African Court, pointing out that it is legal to withdraw from the ICC, but it may be illegitimate. On the other hand, it may both be illegal and illegitimate to withdraw from the African Court. This is because neither the African Charter nor the African Court Protocol have a withdrawal clause from the court. The parties have also not shown they had intended to admit the possibility of withdrawal.

The research further juxtaposed the withdrawal process of the International Criminal Court and the International Court of Justice as well as the withdrawal process between the African Court and the European Court of Human Rights and the Inter-American Court of Human Rights.

This Chapter shall look at the findings and solutions to the problem of withdrawal from the ICC and the African Court by African States. A look at the Malabo Protocol that is yet to get into force and if it will be a solution to the problem.

5.1 CONCLUSION

The general conclusion drawn from the preceding chapters is that the withdrawal by African States from the ICC may be legal but illegitimate. This is because the Rome Statute of the International Criminal Court provides for a withdrawal clause from the Court. However, the nature of crimes within the jurisdiction of the Court are one of an *erga omnes* obligation and are regarded as peremptory norms thus it is illegitimate to withdraw. Further, the parties intending to withdraw or already withdrawn do so to run away from the jurisdictional liability/obligation of the court a reason that is illegitimate.

On the other hand, the withdrawal process from the African Court is neither legal nor legitimate. This is because the African Charter and the African Court Protocol do not contain a withdrawal or denunciation provision thus the general rule under the Vienna Convention on the Laws of Treaty do apply. Such a treaty is not subject to withdrawal unless parties show that they intended to admit the possibility of withdrawal. The African Charter is a treaty of unique compared to the other treaty it is the only treaty to contain all the rights under the International Bill of Rights in one document. The African Court was created to protect those rights and thus its nature is one that did not intend for withdrawal to be possible. Similarly, the preceded regional human rights treaties did contain provisions of withdrawal thus, if the framers had intended to allow withdrawal then withdrawal would have been provided under the African Charter or African Court Protocol.

5.3 RECOMMENDATIONS

5.3.1. Assembly of State Parties.

African States should actively engage with each other in actively pursuing appropriate reforms within the Assembly of State Parties, with a view to making the ICC more effective in advancing

the objectives of international justice rather than rushing to withdraw from the Rome Statute of the International Criminal Court.

The African States should proceed to discuss reforms to the legislative body of the International Criminal Court and make amendments to the Rome Statute in order to remove the provisions they feel are the ones that are more oppressing to the African States rather than taking the option of withdrawing from the Court.

5.3.2. Domestic Courts and Tribunal Jurisdiction.

African states should put in place legislation required to empower domestic courts with the ability to try genocide, war crimes, crimes against humanity and crime of aggression. This will enable the domestic courts to try the crimes with no need to transfer the cases to the ICC. Very few African States have incorporated the Rome Statute of the International Criminal Court into their domestic legislations thus not giving domestic courts and tribunals a chance to try individuals who commit the international atrocities within the jurisdiction of the ICC.

The Habré Trial in Senegal put a precedent and gave hope for the possibility of domestic courts to try individual who are perpetrators of the crimes falling under the ICC. The Extraordinary African Chambers in Senegalese Judicial system dealing with crimes on 30th May 2016, convicted the deposed Chadian President Hisséne Habré of crimes including war crimes, crimes against humanity, torture, sexual violence and rape.

Therefore, it will be important if the Rome Statute will be incorporated in the domestic laws of African States to have individuals being tried under the domestic courts rather than be brought under the ICC.

5.3.3. Regional Courts

After the establishment of the African Court on Human and Peoples' Rights which a judicial body created do deal with human rights matters. It was clear after some time that the court had no powers to deal with the international crimes under the jurisdiction of the ICC. The Constitutive Act of the African Union had envisaged the establishment of the African Court of Justice. However, the court is yet to be established.

The African Union later decided to merge the two courts together. The African Court of Justice and the African Court on Human and Peoples' Right to form the African Court of Justice and Human Rights. The Court is established by the Malabo Protocol which is yet to come into force since only five out of fifteen-member states of the African Union have ratified for it to come into force.

The jurisdiction of the court is to handle disputes between member states of the African Union and cases of violation of Human Rights. However, due to the conflict between the African Union and the ICC, the African Union declared its interest to expand the jurisdiction of the African Court of Justice and Human Rights to handle cases relating to the international crimes of war crimes, genocide and crimes against humanity.

When the African Court of Justice and Human Rights is established and given further jurisdiction of handling the crimes under the jurisdiction of the ICC, it would be more advanced than the counterpart courts of the European, Inter-American as well as the International Criminal Court itself.

BIBLIOGRAPHY

ARTICLES

Africa Legal Aid, *ICC Withdrawals: Is Africa Running Away from Justice?* 18 November 2016, World Forum, The Hague.

Coalition for the International Criminal Court, "*The Crime of Aggression*," Delivering on the promise of a fair, effective and independent Court.

Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, S.Rept. 192 (2001) [hereinafter *Treaties and Other International Agreements*] (surveying the principles related to withdrawal from international agreements under international law and the domestic law of the United States).

G. D. S. Taylor, LL.M., Ph.D. *Senior Lecturer in Law at Monash University, Melbourne, Australia; sometime Humanitarian Trust Student at the University of Cambridge; The Content of the Rule Against Abuse of Rights in International Law.*

International Federation for Human Rights, *Practical Guide the African Court on Human and Peoples' Right towards the African Court of Justice and Human Rights*, April 2010.

Jo M. Pasqualucci, *The Practice & Procedure of the Inter-American Court of Human Rights*, p. 115-116 (2003).

Matthew Gillett," *The anatomy of an international crime: Aggression at the International Criminal Court*," *International Criminal Law Review*.

Natasha Parassram Concepcion, Comment, *The Legal Implications of Trinidad & Tobago's Withdrawal from the American Convention on Human Rights*, 848 Am. U. Int'l L. Rev. 847, 850 (2002).

O Dorr and K Schmalenbach (eds), *Vienna Convention on the Law of Treaties* (Springer 2011) 431, 445-46.

Stephen P. Mulligan, Legislative Attorney, *Withdrawal from International Agreements: Legal Framework, the Paris Agreement, and the Iran Nuclear Agreement*, May 4, 2018.

Swiss Federal Department of Foreign Affairs FDFA, Directorate of International Law, *Handbook on accepting the jurisdiction of the International Court of Justice Model clauses and template*, 2014 Publication.

The Registrar, European Court of Human Rights, Council of Europe, *Basic Guide for Applicants Taking their Case to The European Court of Human Rights*.

Winer Et Al., *International Law Legal Research* 242-43 (2013), § 102.

INTERNET SOURCES

Available at <<http://opiniojuris.org/2012/05/11/chavez-removes-venezuela-from-iachr/>>

Accessed on 6/6/2018.

Burundi's notification to the UNSG here:

<<https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf>>

Chan, S. and M. Simons. 2016. South Africa to withdraw from the International Criminal Court.

New York Times 21 October 2016. October 2016:

<www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminalcourt.html?_r=0>

accessed 30/05/2018.

D Germán Mejía-Lemos, 'Venezuela's Denunciation of the American Convention on Human Rights' (2013) 17 ASIL Insights, available at the website

<[www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-](http://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights)

[human-rights](http://www.asil.org/insights/volume/17/issue/1/venezuelas-denunciation-american-convention-human-rights)> Accessed on 30/05/2018.

Deborah Russo, *Procedural obligations and good faith: the case of the human rights treaties*,

on Jun 9, 2014, Available at <[http://www.qil-qdi.org/procedural-obligations-and-good-faith-the-](http://www.qil-qdi.org/procedural-obligations-and-good-faith-the-case-of-the-human-rights-treaties/)

[case-of-the-human-rights-treaties/](http://www.qil-qdi.org/procedural-obligations-and-good-faith-the-case-of-the-human-rights-treaties/)> accessed 30/05/2018.

Deborah Russo, *Reply To/Follow Up / Unilateral Withdrawal from Treaties with the Intent to Avoid Supervisory Mechanisms: Is It In Keeping With the Principle of Good Faith?*, on Jun 9, 2014, Available at <<http://www.qil-qdi.org/procedural-obligations-and-good-faith-the-case-of-the-human-rights-treaties/>> accessed 30/05/2018.

Doug Cassel, *Opinio Juris*, Will Chavez Remove Venezuela from the Inter-American Commission? In the Article "ICC Membership Withdrawal: A legal or Political Question?" Posted on 11th May 2017 Available at <<https://thebestofafrika.org/icc-membership-withdrawal-legal-political-question/>> Accessed on 22nd February, 2018.

Ndungu Wainaina, *Why Withdrawal From The Rome Statute (ICC) Will Not Be Easy*, Available at <<https://www.kenya-today.com/facing-justice/withdrwal-rome-statute-icc-will-easy>> Accessed on 30/05/2018.

Sheena McKenzie, *Russia Quits International Criminal Court*, CNN (Nov. 17, 2016, 3:25 AM), Available at <<http://www.cnn.com/2016/11/16/world/russia-quits-international-criminal-court/>> Accessed on 30/05/2018.

Text of the letter addressed to the UN Secretary General here: <www.capetalk.co.za/articles/193225/southafrica-to-begin-exit-process-from-icc>.

The Centre of Human Rights, Faculty of Law, University of Pretoria, held a panel discussion titled "*the legal and political consequences of Rwanda's withdrawal of its acceptance of direct*

individual access to the African Human Rights Court. “The panel discussion consisted of Professor Frans Viljoen, Director of the Centre for Human Rights; Professor Dire Tladi, Professor, Department of Public Law, Faculty of Law, University of Pretoria and a member of the International Law Commission; and Professor Michelo Hansungule, Professor, Centre for Human Rights; and legal counsel in two of the cases against Rwanda submitted to the Court. Available at <http://www.chr.up.ac.za/index.php/centre-news-a-events-2016/1604-report-rwandas-withdrawal-of-its-acceptance-of-direct-individual-access-to-the-african-human-rights-court.html>> Accessed on 26th February, 2018.

Timothy Meyer, *Good faith, withdrawal, and the judicialization of international politics*, May 11, 2014. Available at <http://www.qil-qdi.org/good-faith-withdrawal-and-the-judicialization-of-international-politics/>> accessed 30/5/2018

JOURNAL

A Guide to the African Human Rights System, *celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986-2016*, Pretoria University Law Press.

Laurence R. Helfer, *Exiting Treaties*, *Helperbook*, *Virginia Law Review* 10/26/2005.

Surendran Koran, “The International Criminal Court and the Crimes of Aggression: Beyond the Kampala Convention,” *Houston Journal of International Law*, Vol. 34, No. 2, 2012.

BOOKS

John G. Merrills, *International Dispute Settlement*, (5th edn, Cambridge Books Online, 2011).

Malcolm N. Shaw, *International Law*, (6th edn, Cambridge University Press, 2008).

William A. Schabas, *International Criminal Court*, 2nd Ed. 7-8, Cambridge University Press 2004.