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REVISITING THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND AFRICA

Abstract

It is a notorious fact that the establishment of the International Criminal Court (ICC) by the international community was in response to the need to ensure that the perpetrators of heinous crimes against humanity and violators of humanitarian laws are brought to justice.This became necessary in the absence of effective national or regional human rights enforcement mechanisms to hold sitting Heads of State and their agents accountable. It is on record that African countries were supportive of the initiative of establishing the ICC and indeed mostly members. However, in carrying out its role, there have been accusations of bias and lack of fairness by African countries against the ICC. In reaction, the African Union (AU) came up with a joint position that African States should pull out of the ICC for lacking in objectivity and fairness by targeting Africans, unless it meets three conditions including immunity from prosecution for sitting Heads of State. The article analyses the AU position against the background that the AU till today has not been able to operationalize any regional alternative. The article argued that in the absence of a regional alternative, pulling out of ICC is not a viable option, in that, to do so will invariably promote leadership impunity and leave African citizens more vulnerable to human rights violations without accountability. It concluded with the recommendation that that the AU should rather pursue the promotion of democratic governance in member States and the speedy operationalization of a regional alternative to the ICC.

Keywords: Accountability; Complementarity; Immunity; Impunity; Universal Jurisdiction

Introduction

The history of humankind is replete with the perpetration of heinous crimes and unimaginable inhuman atrocities against innocent human beings by wicked war lords, conscienceless rulers[1] and other wicked individuals. Unfortunately, the perpetrators of these acts in most cases went away unpunished while the world looked helplessly in deep shock and horror. It is noteworthy, as was stated in the Judgment of the International Criminal Tribunal at Nuremberg that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'. In other words, establishing the principle of individual criminal accountability for all those who commit such acts is critical as the cornerstone of international criminal law and justice, thereby giving effect to the principle of *ubiremediumibi jus*.

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nder classical international law, the enforcement of the core principles of constitutionalism and rule of law (especially criminal justice administration), can be classified among those matters that come within the domestic jurisdiction of individual states. In exercise of their sovereign powers, states make provisions for their entrenchment in national constitutions and therefore have obligation to enforce them. However, some states may be too weak and as such lack the

* **OSY EZECHUKWUNYERE NWEBO, LL.D, Ph.D, MSC, LL.M, B.L, LL.B (Hons.),**
Professor of Public Law and International Constitutionalism, Faculty of Law, Imo State University, Owerri, Nigeria.

[1]Sometimes against their own citizens.

institutional institutions needed to bring the perpetrators to justice or may be unwilling to prosecute them because the constitutional order has been undermined or the officials are complicit. With the development and globalization, these principles have grown beyond the states and now fall within those matters which states subscribed to and pledged to observe by ratifying the relevant international legal instruments. Accordingly, states also have obligation under international law to enforce them domestically. Thus, the world and its international institutions cannot stay aloof while the states violate them with impunity or completely ignore them to the detriment of their own citizens.

Thus, the world had in a number of cases taken the initiative to respond by establishing *ad hoc* tribunals to investigate, prosecute and punish the perpetrators of such crimes whose magnitude and impact were beyond national level. Such *ad hoc* tribunals include the Nuremberg, the Tokyo, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The success of these tribunals especially the ICTY and the ICTR provided the impetus that catalyzed the idea of establishing the International Criminal Court(ICC) as a judicial body of global jurisdiction that is potentially able to respond on a permanent basis to violations occurring in any part of the world.

Apart from the shock and horror of these heinous crimes and the need to bring the perpetrators to justice, the inadequacy of the system of *ad hoc* tribunals and the urgent need to bring to an end the era of impunity, the establishment of the ICC became expedient. Furthermore, the establishment of the Court to deal with the investigation and prosecution of the perpetrators of international crimes was also conceived as constituting a deterrent to potential perpetrators thereby contributing to the prevention of such crimes and promoting international criminal justice, world peace, security and progress. The philosophy behind the establishment of the ICC was aptly captured by Kofi Anan when he stated thus:

> *In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.*[2]

As we have alluded to above, ordinarily the concept of state sovereignty implies that criminals should normally be brought to justice by their national judicial institutions with criminal jurisdiction. Experience has however shown that in times of conflict whether internal or international, such national institutions are often either unwilling or unable to act due to one reason or the other. This is especially the case where the perpetrators are in positions of power or if the local judicial mechanism is too weak to act or is inoperative due to a lack of resources, jurisdiction, corruption or lack of independence. It may simply be because the Governments concerned lack the political will to prosecute their own citizens, or even high-level officials, as was the case in the former Yugoslavia, or because of the collapse of national institutions as in the case of Rwanda. As a result, criminals commit international crimes with impunity and more often than not get away with them.

[2]Establishment of an International Criminal Court-Overview,https://legal.un.org/icc/general/overview.htm (accessed 5 April 2023).

Thus, the domestic judicial systems are in most cases, inadequate to try those responsible for these crimes through the ordinary domestic criminal justice mechanism. Therefore, to ensure that the perpetrators of these heinous crimes are held accountable, the need for the cooperation of the international criminal justice mechanisms beyond the ordinary domestic mechanisms cannot be over emphasized. Furthermore, the article argues that while the principle of universal jurisdiction and the complementarity of the jurisdiction of the ICC remain, its membership should not be optional.

The ICC was established to address the above gaps. The establishment of the ICC and its criminal jurisdiction raises the fundamental question of the relationship between the ICC and the national courts. This is in relation to the possible conflict in the exercise of jurisdiction to prosecute and punish international crimes. In other words, what role will the ICC play in relation to national courts, considering the primary responsibility of national courts to equally exercise jurisdiction to investigate and punish individuals who commit international crimes in their territories. It is in this regard that the concepts of complementarity and universal jurisdiction call for examination.

The African Union (AU) has for long been expressing concern over the operation of the ICC. The concerned is over an alleged uneven application of international criminal justice.It is particularly contended, that the ICC is being used as a political instrument specifically focusing solely on Africa and its leaders thereby undermining their sovereignty. This contention is predicated on the fact that so far, the Court has only prosecuted African leaders since it began operations, though this has been denied by the ICC. Consequently the AU deliberated on the issue and decided that member states who are members of the ICC should withdraw their membership *en masse*. However, not all the AU member states are in support of the decision. Opponents of the mass withdrawal option are concerned that the risk of violations of human rights with impunity in African states would increase. This article therefore makes a prognostic analysis of the above position based on the prevailing political realities in Africa especially, leadership impunity, democracy deficit and human rights abuses. It concludes that pulling out of ICC will promote leadership impunity and leave African nations more vulnerable to human rights violations. Therefore, it recommends that based on the principle of *pactasuntservanda* and in line with the requirements of Article 86 of the Statute, the cooperation of State parties is imperative for the achievement of the laudable objective of the ICC while salutary options for the AU remain on the table.

In analyzing the issues, the paper is structured into 5 sections including this introductory section. Section 2 examines the objective behind the establishment of the ICC, its jurisdiction and modus operandi. The issues of complementarity and universal jurisdiction *vis a vis* the role of member states are explained. Section 3 analyses the accusation of bias and lack of fairness to African countries against the ICC by the AU, particularly its joint position that the ICC is selective in its operation and targets Africans and therefore, African State members should pull out of the ICC unless their demand for immunity from prosecution for sitting Heads of state is met. Section 4 analyses the AU position against the background that the AU till today has not been able to operationalize a regional alternative.Section 5 is the concluding remark which emphasises that the idea of granting immunity to serving African Heads of State and senior Government officials asbeing canvassed by the AU is counter-productive as far as combating international crime in Africa is concerned.

International Criminal Court
Establishment and Jurisdiction

The International Criminal Court is a permanent judicial body established by the Rome Statute of the International Criminal Court. The ICC is established under Article 1 of the Rome Statute, which came into force in 2002 after the ratification by the requisite number of countries. As at today, 133 countries have ratified the agreement including 33 African states.[3] It aims to prosecute and punish those who commit the worst international crimes, otherwise categorized as the most heinous crimes of concern to the international community. The ICC was established as a court of last resort with the aim of ending the impunity of the perpetrators of these heinous crimes thereby promoting the entrenchment of the emerging system of internationalization of the rule of law and human rights protection, by ensuring that those indicted of international crime in any country cannot escape justice.

It is instructive to note, that the establishment of the ICC marked the realization of the dream for a permanent international criminal justice system as opposed to *ad hoc* tribunals like the ICTY, ICTR and others. These tribunals were established under the auspices of the United Nations Security Council (UNSC), acting within its mandate under Chapter VII of the United Nations Charter for the purpose of maintaining international Peace and security. As a permanent judicial institution, the ICC is conferred with legal personality and jurisdiction to prosecute and bring to justice individuals accused of genocide, crimes against humanity, war crimes and crimes of aggression. It must be noted that there will be no prosecution in the case of the crime of 'aggression' until States agree to a definition of the term, which should be an item in the agenda of the Review Conference, seven years after the Statute comes into force. Nevertheless, the above four categories of crimes are described as 'the most serious crimes of concern to the international community as a whole.

It must be noted, that the ICC is different from the International Court of Justice, in that, the ICJ is not only a world court but also a principal organ of the UN which deals with disputes between States, whereas the ICC is an independent judicial institution established under the Rome Treaty and only binding on members who have ratified same or opted to be bound by its provisions. In other words, non- ratifying members are not bound by any obligation to cooperate or duty bound to conform to the treaty obligations. The ICC has compulsory, concurrent and complementary jurisdiction over international crimes with State members, though the primary responsibility of criminal prosecution and punishment remains that of States. Therefore, the ICC can only assume jurisdiction over international crimes as defined under the statute.

Universal Jurisdiction and the ICC

It is apposite to begin by restating the traditional position with regard to the exercise of criminal jurisdiction under international law. Thus, under classical international law, the exercise of criminal jurisdiction is territorial. This implies that traditionally, national judicial institutions can only exercise criminal jurisdiction in cases where the alleged crime is committed within the territory of a particular State. However, with the development of international law, other forms of exercise of criminal jurisdiction developed and became recognized. One of such other forms of criminal jurisdiction of States is the exercise of universal jurisdiction by which all States have jurisdiction to bring to trial persons accused of international crimes regardless of the place of commission, or nationality of the author or victim.

[3]https://www.pgaction.org/ilhr/rome-statute/states-parties.html (accessed 20 February 2023).

The rationale behind the concept of universal jurisdiction can be summed up thus:

> *Some human rights violations are so atrocious that they affect us all, no matter who the victims are, no matter who the perpetrators are. Their cruelty exceeds any acceptable justification and represents an attack on the very essence of shared humanity. They move or should move the entire international community. That is why these gross violations of human rights have been classified as crimes under international criminal law: war crimes, crimes against humanity, genocide, torture, extrajudicial executions, enforced disappearances and also certain acts of violence against women. International law prohibits these acts, but it also establishes that they must be criminally prosecuted.*[4]

Thus, the term 'universal jurisdiction' refers to "the principle which allows States or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, the nationality of the accused, country of residence, or any other relation with the prosecuting entity".[5] Based on this idea national courts may prosecute individuals for serious crimes against international law, such as crimes against humanity, war crimes, genocide, piracy and torture. This is based on the principle that such crimes harm the international community or international order itself and can be classified as crimes *egaomnes*. Therefore, the international community have obligation to ensure that the perpetrators of these crimes are brought to justice.

It is instructive to note, that universal jurisdiction does not supersede States' traditional domestic criminal jurisdiction rather it is normally invoked when other traditional bases of criminal jurisdiction are not available. For example, where the defendant is not a national of the State and the defendant did not commit a crime in that State's territory or against its nationals, or the State's own national interests are not adversely affected. In this regard, national courts can exercise universal jurisdiction when the State has *sue moto* or following a treaty to which she is a party adopted a national legislation recognizing the relevant crimes and authorizing their prosecution. The principle complements the role of the ICC whose jurisdiction is ordinarily limited to those States who are members.

Complementarity and the Role of the ICC

The idea of complementarity in the role of the ICC arises against the background that primacy lies with States and their domestic mechanisms to resolving legal disputes under international law. Hence, the role of the ICC is that of a court of last resort in the investigation and prosecution of international crimes. In this connection, the general understanding is that the role of the ICC in the investigation and prosecution of international crimes should be complementary to the jurisdiction of national courts. Hence, the term complementarity was used to describe the nature of the relationship between the two institutions. This implies that States have the primary competence and authority to investigate and prosecute international crimes based on the principle of subsidiarity. Hence, the ICC may only exercise jurisdiction when national legal systems fail, are unwilling or unable to genuinely do so.[6]

[4]Sabina PuigCartes, "Reclaiming universal jurisdiction", https://www.icip.cat/en/opinion/reclaiming-universal-jurisdiction/.
[5] https://en.wikipedia.org/wiki/Universal_jurisdiction.
[6] The principle of complementarity is implemented by the ICC through Articles 17 and 53 of the Rome Statute, which deal with the conditions for a specific case to be admissible at the ICC.

Accordingly, the Rome Statute recognizes the sovereign right of States to exercise criminal jurisdiction to try individuals accused of crimes of both domestic and international nature in order to bring them to justice. Thus, the Rome Statute emphasized that 'the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions'. This implies that the national courts retain their primary jurisdiction to investigate and prosecute international crimes. It further implies that no person shall either be investigated or tried by the ICC while being investigated or tried at the national court for an international crime nor retried by the ICC for an offence in respect of which he has been convicted or acquitted in a national court. Thus, the ICC is established as a court of last resort to prosecute the most heinous offenses in cases where national courts fail to or are unwilling to act.

It therefore stands to reason that the Rome Statute requires the ICC to satisfy itself that it has jurisdiction in any case brought before it before embarking on the investigation and prosecution. Thus, the ICC can assume jurisdiction to try a case only in the following circumstances: if the crime took place on the territory of a State Party; referral of a situation by a state party;if the crimes were committed by a national of a State Party; if a state which has not ratified the Statute has made a declaration accepting the Court's jurisdiction over the crime; if the crimes were referred to the prosecutor by the United Nations Security Council, acting under Chapter V11 of the UN Charter; and where the prosecutor initiates a case *propriomotu* or the pre-trial chamber finds that there is a reasonable ground to proceed with the investigation of a case.

In any case, motions challenging admissibility or jurisdiction may be brought by a person under investigation or by a State with jurisdiction on the ground that it is investigating or has investigated the case or by the territorial State of the crime or the national State of the accused. The State bringing such motions need not be parties to the statute but the motion must be brought at the earliest opportunity and before the commencement of trial, though the court has a discretion in this regard in exceptional circumstances. In addition the prosecutor has an independent power to seek rulings on admissibility or jurisdiction and may request the review of previous decisions on the basis of new facts.

It should be noted, that the principle of *ne bis in idem* is made subject to the reasonable qualification that it does not apply where the national court's trial is a sham either because it was brought in order to shield the subject from further action, or because it was not conducted with any real intent to establish criminal responsibility. Accordingly, if a suspect is already being dealt with under national law in a manner which appears genuine and effective, then the ICC must stay action even if the suspect was declared as having no case to answer by the local authorities. However, the ICC has power to decide whether it was reasonable for the domestic prosecutors to drop the charges and may nonetheless pick up the case if satisfied that the decision was made to shield the suspect or because of a breakdown in local law enforcement.[7] At this juncture, it must be emphasized that the pivot of the octopus between the AU and the ICC revolves around the concept of referral and deferral in the context of the exercise of jurisdiction by the ICC. Referral of a case to the ICC could be self-referral that is by a State party under Article 14 or referral by States under Article 13(c). The most controversial aspect

[7] See generally, Chukwumaeze, UU *International Criminal Law* (2018) Owerri, Imo State University Press. PP. 229-232 on "Complementarity and Admissibility."

of referral arises in a situation where the United Nations Security Council (SC) refers a case to the ICC for investigation within its mandate under Chapter VII for the restoration of international peace and security as provided for under Article 13(b) and in a situation where the SC blocks or limits the jurisdiction of the ICC to investigate or prosecute in respect of a matter under its investigation by resolution under Chapter VII, as provided for under Article 16 of the Statute of the ICC.

Referral by the SC can be viewed as frustrating and as derogating from the independence of the ICC hence, both institutions are products of different treaties with different mandates. This is because the SC is an organ of the UN composed by members some of whom are not State parties to the ICC, while the ICC is an independent judicial institution whose membership is voluntary. Thus, the referral or deferral power of the SC whose membership includes non-State parties to the ICC unjustifiably enables it to exercise a controlling influence on the activities of the Court. Albeit, it can be argued that the ultimate objectives of both institutions revolve around the achievement of international peace and security. In this connection, it is apposite to note that it was the AU resistance and refusal to cooperate with the ICC with respect to the SC referral in the case of AL-Bashir and the refusal of the request of the AU for the SC to invoke Article 16 for the deferral of Al Bashir that heightened the resultant tension and crises of confidence between the AU and the ICC.

The AU Position on the Role of the ICC

This section analyses the sour relationship between the AU and the ICC. To this effect, it is apposite to provide a brief background of what the AU generally stands for. The idea is to enable the reader appreciate that the objectives of the AU and that of the ICC are mutually supportive. It will be recalled, that despite the adoption of the African Charter on Human and Peoples' Rights more than thirty six years ago during the era of the Organisation of African Unity (OAU), many African governments continued to disregard their legal obligations with the persistent violations of the Charter's provisions and extreme abuses of human rights including: arbitrary arrest and detention; torture; poverty, underdevelopment and economic inequality. A doctrinal shift from the OAU doctrine of non-interference in the internal affairs of member states to that of non-indifference to violent political conflicts and human rights abuses in member States became necessary and urgent. It was the growing realization of the urgent need for greater efficiency and effectiveness of the organization to meet with the challenges of a fast globalizing and changing world that motivated the transformation of the OAU to the present AU.

Against the above background, the Heads of State and Government of member states of the OAU, 'Determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law; Further determined to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively', agreed to establish the AU. To this end, the AU was established with various objectives amongst which the relevant ones to this paper include: to promote peace, security and stability on the continent; to promote democratic principles and institutions, popular participation and good governance; and to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments. The emphasis on the promotion and protection of human rights is based on the growing understanding by the African leaders of the ineluctable nexus between democracy, good governance, human rights and development. This brief background indicates that the

objective of the AU is not inconsistent with that of the ICC but rather relatively mutually supportive.

However, based on the said long standing allegations of bias against ICC, in April 2016 the AU mandated its Economic, Social, and Cultural Council to evaluate the Council's relationship with the ICC. On July 16, an AU advisory board reported that the ICC had focused its investigations on African leaders from its founding. The Council then recommended that African nations should pull out of the ICC. This recommendation which was adopted by the AU represents the AU position on the ICC and is the main issue for analysis in this article.
In analyzing the justification or otherwise of the AU position, it must be acknowledged, that war crimes, mass atrocities and heinous crimes are witnessed in various parts of the world including regions outside Africa. However, it cannot be denied that most of the conflicts and violations of human rights and other hostilities being witnessed all over the world today are mostly prevalent in Africa.[8] The contention of the AU is that though the past and present war and conflicts leading to human rights violations are witnessed in other regions of the world as well, the ICC's prosecutorial interventions are currently focusing exclusively on African cases. For instance, 10 of the 11 situations currently under investigation are in Africa (the exception is Georgia), while 26 ICC prosecutions to date relate to the African region, and so far only African leaders have been indicted. These cases include: the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Sudan (Darfur), Uganda (Northern), Libya, Cote d'Ivoire, and Kenya. These cases have come about as a result of a combination of self-initiated interventions by the ICC's First Chief Prosecutor (Kenya March 2010, Ivory Coast October 2011 and Burundi 2017), two UN Security Council referrals (Darfur 2005 and Libya 2011), and the submissions by individual African governments to the court (specifically, CAR, DRC, and Uganda).

It is against the above background that the perception exists among several African governments that the ICC Prosecutor is selective in submitting cases to the Pre-Trial Chambers of the court. The alleged selective justice in the current ICC prosecutions is perceived by AU as an injustice towards the African continent. In other words, it appears to the AU member States that the ICC is only keen on prosecuting cases in the African continent while ignoring those of other regions. However, it is argued, that the alleged selective enforcement of international crimes targeting Africans could be countered by the fact that the ICC assumed jurisdiction over most of the cases as a result of self- referrals or referrals from the SC. Therefore, the blame of selectivity and targeting is not tenable and even if they exist, the blame should go to Africans themselves or the SC and not to the ICC.

There is no doubt, that the alleged apparent Afro-centric focusing of ICC prosecutorial interventions can justify the perception of the African leaders regarding the intention in establishing the court. However, the reality is that currently, most of the atrocious and brutal crimes against humanity are committed by African leaders against their own people. These are committed in countries that lack the necessary judicial mechanism to bring the perpetrators to justice, whereas ordinary citizens of the developed and Western countries have functional judicial systems that can be used to hold their leaders and governments accountable for heinous crimes against their citizens. Thus, the internationalization of constitutionalism and human

[8]Omorogbe, EY 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response? *Netherlands International Law Review* volume 66, pages287–311(2019) https://link.springer.com/article/10.1007/s40802-019-00143-5(accessed (accessed 19 November 2019).

rights principles warrants that every African citizen must have the right to resort to available regional, continental and international judicial institutions including the ICC for redress against state sponsored human rights abuses and impunity. More so, in the present situation when there is obvious absence of an African court with jurisdiction to try international crimes on the continent.

On the other hand, African countries consciously participated in negotiating the establishment of the ICC and voluntarily signed up to be subject to its jurisdiction and there is no probative evidence that the court is doing its work with bias. Rather, upon a critical examination of each of the cases an objective observer can easily find justification for the intervention of the ICC most of which arose from complaints emanating from the African citizens who are victims of the alleged atrocities. On that score, it may not be justified to conclude that the ICC is a neo-colonialist institution with a neo-colonialist agenda of humiliating African leaders by prosecuting only cases from Africa. However, the AU's central legal argument which was made explicit in 2012 is that incumbent heads of non-party States are entitled to immunity from arrest in international law, and that that immunity has not been affected by the Rome Statute. In support of the claim, the AU particularly placed reliance on the provisions of Article 98 of the Rome Statute which recognizes the obligation of States under international law and the requirement of the waiver of immunity by a requesting state or third state before a suspect can be surrendered to the ICC. The AU contends that the above Article is in conflict with the provisions of Article 27 which clearly bars any exemption of any person from criminal responsibility or the Court's exercise of jurisdiction on grounds of immunity or special procedural rules attached to the person's official capacity.

Though arguably, the AU resolution in favour of mass withdrawal is non-binding, it clearly expresses the preponderant feeling of disappointment of AU member States regarding the *modus operandi* of the ICC and this undermines the credibility of the Court. It must be noted however, that the influential member States like Nigeria and Senegal are opposed to the idea of mass withdrawal from the ICC. Nevertheless, the threat of mass withdrawal alone, blocking the opening of the ICC Liaison Office in Addis, and announcing non-cooperation in the arrest of suspects no doubt have negative impact on the credibility and legitimacy of the ICC as a global criminal justice mechanism. Further impacting negatively on the credibility and legitimacy of the ICC, is the fact that the leading and influential members of the Security Council including the United States of America, Russia and China are not members of the ICC. The point however, is that the opponents of the mass withdrawal option are concerned that the risk of violations of human rights in African states would increase if the recommendation is carried out. Thus,this paper argues that the ICC plays an important role in holding leaders accountable for their actions. This fact underscores the fact that though South Africa, the Gambia, and Burundi are in the forefront of those States clamouring for mass withdrawal but so far, only Burundi has actually withdrawn from her membership of ICC.

In any case, the current situation suggests that the AU has adopted a judicial process in attempting to vindicate its claim as against its earlier confrontational and political approach. Thus, at the latest AU summit, 'which wrapped up recently in Addis Ababa, the AU-ICC controversy went into its next round; this time, however, with a rather constructive proposal for easing the tensions that had built up over the past decade or so as a result of the uneven application of international criminal justice'. The AU latest proposal is to request for an advisory opinion of the International Court of Justice through the General Assembly on the question of immunities of Heads of State and Government and other Senior Officials as it

relates to the relationship between Article 27 and 28 of the Rome Statute, as well as in relation to Article 98 with respect to a waiver of immunity and consent to surrender. This latest AU stand has been described as 'a more constructive, de-escalatory approach, using the tools of international law – instead of international politics – to make its voice heard'.

For the avoidance of doubt, as we have noted earlier in this article, the AU's position is that incumbent Heads of non-party States are entitled to immunity from arrest in third States under customary international law. Therefore it is argued, that the immunity subsists irrespective of the nature of the crimes and that was established, a priori, by the International Court of Justice (ICJ) in the *Arrest Warrants* case (2002) and the Rome Statute has not affected that immunity. The AU further argues that Article 98 of the Rome Statute recognizes that limitation. Another related question borders on how a SC referral affects the enjoyment of immunities of officials of non-State parties, as well as the obligations of States Parties under customary international law.

As a follow up, at the 32nd Ordinary Session, the Assembly considered the progress report of the Commission on the implementation of the Assembly decision on the ICC and the recommendation of the 'Open-ended Committee of Ministers of Foreign Affairs' on the ICC. The Assembly there and then reiterated; the unflinching commitment of the AU and its member States to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with the Constitutive Act of the AU; Its previous decisions on the deferral or termination of proceedings against President Omar Al Bashir of the Republic of the Sudan in accordance with Article 16 of the Rome Statue; the need for all Members States, in particular those that are also State Parties to the Rome Statue, to continue to comply with the Assembly Decisions on the warrant of arrest issued by the ICC against President Al Bashir of The Sudan pursuant to Article 23(2) of the Constitutive Act of the African Union and Article 98 of the Rome Statue of the ICC; and the call for member States to ratify the Protocol on Amendments to the Protocol of the African Court of Justice and Human and Peoples' Rights (Malabo Protocol) which established the international crime section with jurisdiction to prosecute international crimes.

The Assembly in particular commended the efforts of the Commission and the African Group in new York in successfully placing on the Agenda of the United Nations General Assembly (UNGA), the request for an Advisory Opinion of the International Court of Justice (ICJ) on the Question of Immunities of Heads of State and Government and other Senior Officials as it relates to the obligations of States Parties under the Rome Statute and international law, and requested the Commission to finalize the question based on the recommendations of the Open-ended Ministerial Committee and called on all African Member States in New York, during consideration of the Agenda item by the UNGA, to support the transfer of the request for advisory opinion of the ICJ in order for all States, in particular those that are States Parties to the ICC Rome Statue, to obtain clarity on this issue of immunities; and also called on the ICC to respect the duty of all States Parties to the Rome Statute to honour their other international obligations as stipulated in Article 98, which includes the right to host international meetings and to ensure the participation of all invited delegations and high officials.

The Assembly further called on Members States to oppose any decision of the Appeals Chamber that is at variance with the AU Common position and customary international law and requested amongst others for the African Group in New York and The Hague to request ASP to convene the working group of experts from amongst its Member States to propose a

declaratory or interpretative clarification of the relationship between Articles 27 and 98, and other contested issues relating to the conflicting obligations of States Parties under international law.

From the foregoing, it cannot be gainsaid that apparently the AU has indeed abandoned its mass withdrawal approach in making its case against the ICC in favour of a diplomatic and legal option. In our view the latest approach is a better strategic option and indeed the right way to go, in that it is less confrontational, more constructive, matured and will create opportunity for the further development of international law. It is hoped that all parties involved will abide by the ICJ's advisory opinion on all the issues when given, so that the crises will be put to rest and enable the world to move forward. Meanwhile, it is instructive to note that Omar al-Bashir, the deposed former president of Sudan, was sentenced to 2 years incarceration for corruption by a Sudanese court. He however remains wanted by the ICC for war crimes, though the ICC lacks the capacity to arrest him for trial without the cooperation and assistance of States.

Conclusion

It is said that 'violence begets further violence' and 'one slaughter is the parent of the next' and that 'there can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance'.[9] Thus, the guarantee that at least some perpetrators of war crimes or genocide may be brought to justice acts as a deterrent and enhances the possibility of bringing a conflict to an end. Therefore, with the establishment of the ICC, it is hoped that war lords and all those who would incite genocide; embark on a campaign of ethnic cleansing; murder, rape and brutalize civilians caught in an armed conflict; or use children for barbarous medical experiments will no longer find protection under the canopy of sovereignty or willing helpers. This means that potential war lords and perpetrators of the above heinous crimes will be dissuaded being aware that international mechanism exists to bring them to justice in case of any violations. On the other hand, if African states were to comply with the call to withdraw *en masse* from membership of the ICC in the absence of an African alternative, potential war lords and perpetrators of the above heinous crimes will not be dissuaded and impunity will increase rather than abate.

It must be noted that membership of the ICC is voluntary. Therefore, no state can claim that it was forced to be a party to the treaty establishing the ICC or claim ignorance of its obligations under same, accordingly the principle of *pactasuntservanda* applies to disallow African countries to avoid their obligations as members of the ICC. Furthermore, the decision of states to become parties was that of the individual states and they became parties in their individual capacity, not as a group or members of the AU. On the other hand, legally speaking the AU is not in a position to impose a withdrawal obligation on its members. In any case, the justification for the decision is not factually convincing hence the allegations against the suspects have not been shown to be frivolous or concocted. Furthermore, a party to a treaty cannot justifiably withdraw its membership simply because the implementation turns out to be painful or does not favour its political group interest.

[9] Benjamin B. Ferencz, a former Nürnberg prosecutor Gordon, Melissa (1995) "Justice On Trial: The Efficacy of The International Criminal Tribunal For Rwanda," *ILSA Journal of International & Comparative Law*: Vol. 1: Iss. 1, Article 10, https://nsuworks.nova.edu/ilsajournal/vol1/iss1/10 (accessed 19 August 2022).

As we have noted earlier in this paper, the previous AU position on ICC was based on the perception of the activities of the ICC in Africa as amounting to a neo-colonial interference due to the alleged uneven application of international criminal justice and the use of the Court as a political instrument targeting and intended to undermine Africa and its leaders. In this connection, it is instructive to note, that though the traditional respect for state sovereignty remains a hallowed principle of international law, it is argued that in the contemporary globalized world the idea of absolute state sovereignty has become outmoded. Thus, as earlier explained, international institutions have an obligation to take necessary action to enforce international obligations in states, especially where such states have failed in their obligations under their own constitutions.

Thus, in response to the allegation of partiality, this paper argues that while not supporting selectivity, targeting or disproportionate focusing on Africa in the enforcement of international crimes while neglecting similar cases in other parts of the world, it is submitted that 'the sea can only drown a person whose legs it finds'. This implies that the fact that somebody else had committed an offence and has not been brought to justice cannot constitute an excuse to the arrest and trial of another. In other words, it is neither the law nor the practice that unless every person who had been previously suspected of committing a crime has been brought to justice, subsequent suspects cannot be brought to justice. Nevertheless, it is recommended that the ICC should take into account the allegation by African nations to determine if there is merit in the claim. This is particularly imperative having regard to the fact that both the ICC and Africa (as represented by the AU) have shared vision of bringing perpetrators of war crimes to justice and to end impunity. Hence, mutual understanding, cooperation and support become imperative in order to realize the vision.

As we have alluded to above, one of the objectives of the Rome Statute which is also consistent with one of the objectives of the AU is to put an end to impunity for the perpetrators of international crimes and thus contribute to the prevention of such crimes. This assertion was buttressed in the AU Assembly decision, which reiterated 'the unflinching commitment of the African Union and its Member States to combating impunity and promoting democracy, the rule of law and good governance throughout the entire continent, in conformity with the 'Constitutive Act of the African Union'. To that extent, it cannot be gainsaid that Africa and the ICC share a common interest in ensuring that the perpetrators of international crimes are brought to justice and to end impunity. Though arguably, such crimes are also perpetrated in other parts of the world, it cannot be gainsaid that they are more rampant and destructive in Africa. Furthermore, preventing such crimes will serve the interest of the African citizens better than pursuing the mundane claim of partiality. Therefore, the latest decision of the AU Assembly to seek an advisory opinion from the ICJ is a welcome development. In any case, the preoccupation of the AU should be to support every effort aimed at preventing such crimes and ending impunity in Africa and not to shield the perpetrators under the ostensible excuse that the ICC is focusing on Africa and its leaders.

On the other hand, it is expected that the ICJ will sooner or later come up with its opinion in line with AU's later position by settling the controversy arising from the perceived contradiction between the provisions of Article 27 and that of Article 98 of the Rome Statute regarding the issue of immunity of Heads of State and other government officials. However, the position of this article is that the perceived contradiction between Article 27 and Article 98 is more apparent than real and therefore misconceived. Thus, it is opined that there is no confusion or contradiction between the two provisions. Article 27 clearly bars any form of

immunity from criminal responsibility or jurisdiction of the Court which may attach to a person's official capacity. Thus, the provisions of Article 27 and Article 98 of the Statute are distinct and deal with different issues of bar to immunity for state officials. In the final analysis, it is unlikely that the ICJ will agree with the position of the AU on immunity for serving Heads of State and senior government officials based on the provisions of the Rome Statute. If by any means this happens to be the case, it will imply that African states will continue to recognize Al-Bashir's immunity as well as that of others in like circumstances.

It is instructive to note that most African regional institutions have not demonstrated any capacity to effectively check the abuse of power by repressive governments due to enforcement gap arising from weak domestic and transnational governance institutions and would therefore, require the support of international judicial institution. Against the above background, it is submitted that granting immunity to serving Heads of State and senior government officials will be illogical and antithetical to the proclaimed commitment of the AU to combat impunity. This is because the serving Heads of State and the senior Government officials are in most cases the perpetrators or sponsors international crimes. Therefore, granting immunity for them will no doubt defeat the end of preventing impunity and dissuading war lords and potential perpetrators of heinous crimes from carrying out their nefarious atrocities. This will not augur well for good governance and development of Africa especially, considering her fragility and poor human rights records. However, the assurance of neutrality and confidence is required from the ICC in order to earn legitimacy and secure the cooperation of AU member States parties without which it is bound to suffer operational atrophy. This assurance is imperative in that the ICC will invariably have to rely on States and their institutions for the execution of their mandate, thereby making their cooperation inevitable.