PROSPECTING INTERNATIONAL CRIMES IN AFRICA: TRENDS/PROSPECT AND CHALLENGES

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BENIN CITY, EDO STATE.

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A LONG ESSAY WRITTEN IN THE FACULTY OF LAW AND SUBMITTED TO THE FACULTY OF LAW, IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF BACHELOR OF LAWS (LL.B) OF THE UNIVERSITY OF BENIN, BENIN CITY, EDO STATE.

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CERTIFICATION

I, **Blessing Osato OMORUYI** (Mat. No. **LAW1810535**) hereby certify that apart from the references made to other people's work as duly acknowledged herein, this entire project is the product of my personal research, and has neither in part nor in whole been presented for another degree elsewhere.

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APPROVAL

We certify that this project work was completed and written by **Blessing Osato OMORUYI** (Mat. No. **LAW1810535**), in partial fulfilment of the requirements for the award of the Bachelor of Laws (LL.B) Degree of the University of Benin.

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DEDICATION

This Project is dedicated to God Almighty, the one who gave me life and reason for my existence.

I also dedicate this to my lovely parents Rev and Deaconess Mrs Michael Omoruyi, for their endless love, support and prayers .

And Also to my Grandmothers Deaconess Mrs Grace Omoruyi and Evangelist Helen Edo.

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Vomero, Owen (lizard) Anwuli (wu-lee) Timi the activist, Alex (hip-hop nerd) ,Floxylux and Uche (U-baby)

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I Won.

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LIST OF ABBREVIATIONS

ACDEG	African Charter on Democracy, Election, and Governance
ACJHR	African Court of Justice and Human Rights
AU	African Union
CPA	Comprehensive Peace Agreement
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
JEM	Justice and Equity Movement
OTP	Office of the Prosecutor
QB	Queens' Bench
SLA	Sudanese Liberation Army Movement
SOSL	Special Court of Sierra Leone
UK	United Kingdom
UNSC	United Nations Security Council

UNSC Res	United Nations Security Council Resolution
US	United States

ABSTRACT

Across continental Africa, victims of different types of international crime cry for justice is loud and clear, yet, impunity is a common denominator in Africa's conflicts, with those suspected of criminal responsibility for crimes under international law rarely held to account. All too often, national governments in Africa are unwilling or unable to conduct prompt, independent, impartial, and effective investigation into allegations of crimes under international law. This project seeks to examine critically prosecution of international crimes in Africa. This work takes a broad view of the concept of prosecution of international crimes, by considering the possibility, challenges, and the value of such in Africa, we have established that the proposed extension of the African Court on Human and People's Right to include a Criminal session is a round peg in a round hole. Thus detail analysis of the Malabo Protocol, establishing the criminal jurisdiction of the African Court on Human and People's right has been given priority viz-a-viz the Rome Statute establishing the International Criminal Court. We have argued that due to the ever increasing ratio of perpetuation of international crimes in Africa, prosecution of such crimes in the region becomes desirable and thus do not contradict the jurisdiction of the International Criminal Court, but rather complement it. This work consists of seven chapters-chapter one detail the historical development of prosecution of international crime in Africa, chapter two examines international crimes, such as the crime of unconstitutional change of government as provided for in the Malabo Protocol establishing the criminal jurisdiction of the African Court, viz-a-viz international crimes provided for under the Rome statute establishing the International Criminal Court. Chapter three considered the value and rational of prosecution of international crimes in Africa. Chapter four gives a critical analysis of the prospects of prosecution of international crimes in Africa. Jurisdiction of the African Court in prosecuting international crimes is examined in chapter five, while chapter six examined the challenges of prosecuting international crimes in Africa. Finally, taking into account all the arguments and views in the above chapters, we offer suggestions and recommendations to aid an effective regime of prosecution of international crimes in Africa in Chapter seven.

CHAPTER ONE

THE HISTORICAL DEVELOPMENT OF PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA

1.1 Introduction

The South African government refusal to comply with its obligation to detain Sudan's President Omar at Bashir has sparked renewed debate on the role of the International Criminal Court (ICC) in Africa.[1] A number of governments, civil society organizations and prominent academics have leveled accusations of bias at the ICC, noting that all eight States in which the court is currently intervening are African. Calls for Africa member states to withdraw from the ICC have often been augmented by the submission that a judicial body led by the African Union (AU) would be better placed to fill the role of "court of last resort" on the continent.

The African Union (AU) has called for a unified continental position on the ICC. It must however be noted that it has been submitted that however the African government views on the ICC and its members obligations under the founding treaty, the Rome Statute are not homogenous.[2]

Taking into cognizance that the African Union has thirty-four of its member states as state parties to the ICC, it must be noted that the AU's bone of contention is not with the ICC, as a

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[1] According to Article 86 of the Rome Statute (1998), ICC State Parties arc duty bound to ‘co-operate fully with the court in its investigations and prosecution of crimes within the jurisdiction of the court.’ In 2002, the South African Parliament passed the implementation of the Rome Statute and this domesticated the government was therefore obliged to arrest al-Bashir as soon as he landed in South Africa on 13 June 2015 in order to facilitate the ICC prosecution

[2] African Evids to international Criminal Justice - Max du placesis, 2018, Institute for security Studies. Max du plesisi <www.issufrica.org.> accessed 20 April, 2024.

court, neither is it with the jurisdiction of the court to try international criminal cases in Africa, but rather with the prosecutorial policy adopted by the ICC, the powers of the United Nation - security council, and chiefly with some of the provisions of the Rome Statute establishing the ICC. Thus for keen observers of happening at the ICC, especially from the African Context, there is a serious concern that the dominant world powers are using the United Nation security council as a back door to impose their will and caprices on weaker countries. Added to that, serious doubts about the ICC independence and capacity to address human rights violations has been raised with regard to its failure to bring any case against the powerful non-African countries.

On 15 November 2013,[3] immediately after the United Nations Security Council (UNSC) voted against the African Union's (AU) request for deferral of the trials of Kenya's President Uhuru Kenyatta and Vice President William Ruto by the ICC for a year, the United Kingdom (UK) Permanent Representative to the UN, announced that "there is a right place and wrong place" to present the AU's requests for deferral of cases.[4] Without doubt, he was referring to the Assembly of Stats Parties (ASP) of ICC. It must be noted that the normal interpretation of the Ambassador had further given impetus to the reluctancy of the United Nation Security council to act in tandem with the request of the African Union. The frequency could better be appreciated when the demand by the AU is seen to have been inspired by the ultimate question of whether the UNSC had exercised its power in manner that enhanced its legitimacy or not. Indeed, for this reason, it should be recalled that the

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3 UN News Centre, “Security Council: Bid to defer International Criminal Court Cases of Kenyan Leaders fails" <http://www.un.ny.psneaslstory.asp?> accessed 20 April, 2024

4 Foreign and Commonwealth Office, UK abstains on UN Security Council Resolution in <ICC-http://www.gov.uk/government/speeches/uk_abstains_on_Security_Council_resolution_on_icc> accessed 20 April 2024.

Permanent Representatives of various African countries expressed their total disappointment on the double standard of UNSC and its failure to discharge its responsibility.

Also, both the President of the ICC and the Chair of the Assembly of State Parties (ASP) of ICC have been keen in arguing that African countries had referred five cases to the ICC and that the ICC had not specifically targeted African countries.[5] It must however be submitted that this argument are not only evasive, but also suffer from over-simplicity of the challenges the ICC is facing in solving its contentious relations with Africa.

The AU's dispute with regard to the ICC is not whether African countries have referred five cases to the ICC,[6] but rather why the ICC is only prosecuting Africa. Are Africans the only ones committing crimes prescribed by the Rome Statute? Did the UNSC referral and deferral powers politicize the ICC's judicial role and led to the application of a double standard? Does unrepresented nature of the UNSC and longstanding demands for its reform affect the stand of the ICC in the eyes of the weakest countries? Did the activist prosecutorial policy and selective prosecution policy pursued by the former Chief Prosecutor, Mr. Luise Ocampo, Place the ICC in a position conducive to political wrangling and selective justice. Is the UNSC's failure to formally respond to AU requests to defer trials for a year appropriate? Did the ICC fail to dispel the widespread misunderstanding about the work of the ICC and the political misuse of the referral of cases by African states? These and many other questions create reasonable doubts in the minds of many Africans with regards to the rationale of the ICC prosecution of International crimes in continental Africa.

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5 AFP, ICC has never targeted any African country, 17 October, 2013 - <http://www.google.con/hostednevws/afip/articles/> accessed 15 April, 2024

6 M.T. Maru, The Future of the ICC and Africa: The Good, the Bad and the Ugly, Al-Jazeera Net, 11 October 2013, 15:03- <http://www.aljazeera.com/indepth/opinion/2013/io/future.icc.africa good bad ugly_> accessed 19 April, 2024.

Public perceptions have been high that the ICC is an instrument of powerful countries such as America and Europe. Of the seven African cases before the ICC, only three were referred by African State parties to the Rome Statute, while two, Sudan and Libya were referred by the UNSC. The leaders of both Sudan and Libya were known for their political role with dominate Western powers with veto power in the UNSC. Officials of some countries in the America, Europe and the Middle East have been exempted from investigation either due to the undemocratic nature of the UNSC or the failure of the prosecutor. Russia, China, and the Western permanent members of the UNSC are yet to face any investigation against their citizens or officials. In short, USA refers cases to the ICC through the UNSC, even though bilateral agreements and the American Service members Protection Act shield American citizens from prosecution by the ICC. This, it must be submitted constitutes the most problematic aspect of the regime of the prosecution of international crimes. Thus, for many scholars and ordinary people, there is a serious concern that the dominant world powers are using the UNSC and ICC as a back door to impose their will on weaker countries. This situation will lead to the weakest body prosecuted as has been illustrated via the prosecutions of African leaders, while the strongest remain exempt from prosecution.

It should be established that referrals of cases from African states should not be considered as the best and only way to establish the success of a court such as the ICC. On the contrary, the independence of the court could be called into question for the fact that it is closely cooperating with state that was implicated in violations of human rights. More gravely, the ICC's failure to bring any case against the powerful non-African countries raises serious doubts about its independence and capacity to address human rights violations.

In other words, under the current ICC Statute, paraphrasing George Orwell “all countries are equal before the ICC, but some are more equal than others". Because they have UNSC veto powers. Thus, to understand the African Union grievances in the prosecution of international crimes by the ICC, the first port of call should necessarily be a searchlight on the prosecution of international crimes in the continent. To this we now turn.

1.2 Prosecution Of International Crimes At National Level

Prior to the creation of the ICC in 2002 and the advent of ad hoc tribunals such as the Special Court of Sierra Leone (SOSL) and the International Criminal Tribunal for Rwanda (ICTR), it was left to the domestic criminal courts of states to investigate and prosecute international crimes. On several occasions, this has been done by relying wholly or partly on the principle of universal jurisdiction.

It must not escape mention that Africa has shown that prosecution of the most serious crimes is indeed possible as could be evidenced through the cases of Hissene Habro. Mengister Hailu Mariam, etc. Hissene Habre ruled Chad from 1982 until he was deposed in 1990 by President Idris Deby Itno. Habre's eight-year reign was marked by severe political repression. The trust commission appointed after Habre's fail to investigate his crimes estimated that he is responsible for the torture and death of 40,000 individuals. Some of these victims were reportedly massacred in their villages as a response to Habre's suspicion that a particular ethic group opposed him. Files of Habre's political police, the Direction de in documentation of de la security, discovered in 2004, reportedly revealed the names of more than a thousand persons who died in detention. A total of more than 12,000 victims of human rights violations were reportedly mentioned in the files. After being deposed, Habre fled to

Senegal. This trial was the first African led prosecution, incorporating a blend of international and domestic laws. Despite experiencing financial difficulties, deposed Chadian President Hissene Habre was convicted on 30 May, 2016 by the Extraordinary African Chambers in the Senegalese Court system for crimes including war crimes, crimes against humanity, torture, sexual violence and rape. He was sentenced to life in prison.[7]

Also, in the case of Mengistu Haile Mariam, who was the most prominent officer of the Deqgue, the Military junta that governed Ethiopia from 1974 to 1987, and the President of the People's Democratic Republic of Ethiopia. The Derque (Coordinating Committee of the Armed Forces, Police and Territorial Army) was formed by junior officers of the Ethiopian army on the eve of the 1974 revolution. Once the monarch had been brought down through a widespread popular uprising, the members of the Derque seized power. Subsequently, they began targeting individuals and groups likely to post a threat to military rule. In 1991, shortly before his regime was toppled by a coalition of rebels, Mengistu fled to Zimbabwe. The following year, the transitional government decided to bring him and his associates to trial for crimes committed during his reign.

The sentencing judgment was issued on 11 January 2007 by the Ethiopian Federal High Court. This was the first trial in the African Continent where representatives of an entire regime were found guilty, including Mengistu (who remained in exile in Zimbabwe).[8]

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7 Ibid note 5

8 Ibid note 6

1.3 The Advent of the Ad Hoc and Mixed Tribunal

From the foregone paragraphs, it has been established that African states before the emergence of the ICC have felt compelled to take action against individuals guilty of international crimes such as genocide, war crimes and crimes against humanity. It must however, not escape mentioned that there were many practical, diplomatic and legal hiccups that stand in the way of states seeking to prosecute international crimes on the basis of universal jurisdiction or on the basis of the active or passive personality principle.

Consequently, in certain exceptional circumstances following large-scale atrocities in Africa, courts were created by the UN to try persons guilty of international crimes. The setting up, the practice and contribution of these courts to the jurisprudence of international crimes in Africa are examined below:

The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (hereinafter referred to as the ICTR) was established by the Security Council acting under Chapter VII of the Charter of the United Nation in light of offences committed in Rwanda during the mass-scale atrocities that took place in the months following 6 April 1994. The crimes within the jurisdiction of the court located in Arusha, Tanzania include genocide, crime against humanity. violations of Article 3 common to Genera Conventions and the Additional Protocol II.

In adjudicating serious international crimes, the ICTR, like its sister tribunal, the ICTY, confronted multiple novel legal issues never before elaborated in international law, and without or with limited precedents to draw from. From its first cases. Notably *Prosecutor v.*

Akayesu[9] and *Prosecutor v. Kambonda*,[10] the Tribunal has implemented a process of interpreting and giving content to substantives, evidentiary and procedural aspects of international criminal law.

While some aspects of the jurisprudence engendered by ICTR are contentions, this ICTR's jurisprudence constitutes foundational attempt at elucidating a complex notion in the absence of existing precedents or extensive scholarly literature. For instance, the Akayesu case finds that the group notion refers to stable groups constituted in a permanent fusion and whose membership is determined by birth in a continuous and irremediable manner.[11]

Moreover, the groups which are protected are not limited to enumerated four, but extend to any stable and permanent grip.[12]

The ICTR's jurisprudence, like that of the ICTYs has emphasized that in charging international crimes indictments must spell not the material factors underpinning the charges, as well as the specific modes of criminal responsibility by which the accused perpetrated the crimes (i.e. commission, ordering, instigation, aiding and abetting or command responsibility).[13]

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9 ICTR-96-4-7-Judgement 2 September 1998

10 ICTR-96-4-7-Judgement and Sentence l I September 1998

11 *Prosecutor v. Akayesu* para 5 1l1

12 *Prosecutor v. Akayesu* para 516

13 *Prosecutor v. Ntakirutimana and Gerand Ntakirutimana* - (ICTR-96-10-4 and ICTR-98-17-4) 13 December, 2004 paras 25, 469-476.

Prosecution and Punishment of international Crimes by the Special Court from Sierra Leone.

Following the crimes committed during a non-international armed conflict between rebel forces and armed forces of the government of Sierra Leone from 1991 to 2002, the government of Sierra Leone requested the United Nations (UN) to assist in establishing a court that would prosecute and punish persons responsible for international crimes. Thus, by Resolution 1315 of 14 August, 2000, the UN Security Council decided to establish the Special Court for Sierra Leone (SCSL) on the bases of the agreement between the UN and the Government of Sierra Leone.[14] Worthy to note is that Sierra Leone later enacted domestic legislations to give effect to the agreement with the United Nations on the establishment of the SCSLS.[15]

The SCSL is a hybrid criminal court,[16] Even though it has characteristics that may classify it as an international criminal tribunal. It is composed of international and national judges, lawyers and other appointed staff. It applies international law and domestic laws.[17]

The SCSL commenced its operation on 1 July 2002. The first thirteen indictment were approved by the Court on 7 March 2003.[18] Of the thirteen indictments, only twelve persons were arrested. John Paul Koroma still remains at large, but may have died in Liberia. Before

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14 UNSC Res 1315 (2000) of 15 August 2000 (UN Doc/S/RES/1315).

15 The Special Court Agreement (Reification) A of 9 of 2012 supplement to the Sierra Leone Gazette, cxxxiii (22) 25 April 2002

16 C. Bhohe 'The trial of Charles Taylor: Conflict Prevention, International Law and an Impunity – Free America' AV Menon (ed) War Crimes and Law, (2008) 174-215.

17 Art: 14 (1) and (2) Statute of the SCSL

18 *Prosecutor v. Koroma* (case SCSL -03 - 03); *Prosecutor v. Bockaris* (case SCSL -03 - 04): *Prosecutor v. Sankoh*(case SCSL -03 -02); *Prosecutor v. Norman* (case SCSL -03 – 08); *Prosecutor v. Fofana* (case SCSL -03 – 11); *Prosecutor v. Kondawa* (case SCSL -03 - 12); *Prosecutor v. Sasay*(case SCSL -03 -03)

the commencement of trials, two of the indictments died, while one died in detention whilst his trial was still proceeding. The court was thus left with nine persons who were prosecuted. Of these nine persons, eight have been convicted of war crimes and crimes against humanity. In the case against Charles Taylor, he was found guilty in 2012 of all eleven charges, including murder, terror and rape as levied by the special court and was thus sentenced to 50 years in prison.

Thus, the SCSL contribution to the jurisprudence of international criminal law in Africa has been the development of law on persons who bear the greatest responsibility for international crimes, joint criminal enterprise, and the immunity of state officials charged with international crimes.

1.4 Historical Development Of The International Criminal Court

In the aftermath of the Second World War (1939-1945) the international community recognised the need to deal with mass atrocities particularly those committed by Germany and Japan - at the international level. The International Military Tribunal (IMT) in Nuremburg, Germany, and the Tokyo War Crimes Tribunal, established as first generation tribunals to prosecute high-level individuals complicit in war crimes, came into force through the 1945 London Agreement signed by the major Allied powers (the United States, the United Kingdom, France and the Soviet Union). The Agreement included a charter or the establishment of an international military tribunal in which the major Axis war criminals would be tried for war crimes that had no particular geographical location. Additionally, the London Agreement included the Nurnberg Charter, which created four categories of international crimes; crimes against the peace involved the initiation of war, war crimes

involved murder ill treatment and deportation, crimes against humanity involved persecutions of civilians for race, ethnicity, political or religious beliefs, and genocide, which involved bringing about the destruction of a particular national, ethnic, racial or religious group. The Nuremberg Charter was quickly followed by the Tokyo Charter and the trials of Japanese war criminals by the International Military Tribunal for the Far East.

As WWII drew to a close several attempts at determining an enforceable definition of 'war crimes' eventually culminated in four Geneva Conventions revised and adopted in 1949. The Geneva Conventions established legal guidelines for the treatment of combatants, prisoners of war and civilians during wartime.

Nuremberg Trials

The idea of an international criminal justice system - largely a by-product of the end of the Cold War - thus began to emerge in the form of negotiations surrounding the ICC statute. Simultaneously, however, events in Yugoslavia, Sierra Leone and Rwanda saw the world witness mass atrocities for which the international system at the time was unprepared. In response, ad hoc tribunals were established to address each situation, although these tribunals had limited mandates and jurisdiction authorised by the UN. Undoubtedly the events of WWII, the dissolution of Yugoslavia and the genocide in Rwanda had a significant impact on the decision to construct the Rome Statute which established the permanent ICC. The signing of the Rome Statute marked, for the first time in history, a willingness by States to accept the jurisdiction of an international court to prosecute criminals for offenses of an international nature. The Court is mandated to try individuals for crimes which are considered international in nature, or harmful to the international community, namely, war

crimes, crimes against humanity, genocide and crimes of aggression. A consensus on the definitions of each of these crimes is absolutely imperative to delineating the ICC's areas of jurisdiction and informing procedures and outcomes of cases. The definitions of genocide and of what constitutes 'aggression' have been notoriously problematic, as witnessed in the case of Rwanda wherein the international community remained reluctant to classify the 1994 slaughter as a 'genocide,' as the label would require an intervention under international law.

Crimes against humanity' are considered to be "acts committed as part of a widespread or systematic attack directed against any civilian population" such as murder, enslavement, forcible removal or deportation, torture, any form of sexual violence, and the crime of apartheid. War crimes' include breaches of the Geneva Conventions and other crimes planned and committed on a large scale during armed conflict. These may include murder, torture, intentional attacks against civilians and infrastructure, pillaging, sexual violence and enlisting child soldiers. 'Genocide,' as outlined in the Rome Statute, concerns acts committed with the intent to destroy national, ethnical, religious or racial groups, while 'crimes of aggression' adopted during the review of the Rome Statute in 2010 – is considered to be the "planning, preparation, initiation or execution of an act of using armed force by a State against the sovereignty, territorial integrity or political independence of another State."

The 1CC is an independent entity able to try individuals for crimes within the jurisdiction of the court, without a mandate from the United Nations. The ICC is intended to act complementarily with a state's national courts, and is enabled to try individuals only when national courts are unwilling or unable to do so. Understanding the notion of complementarity is central to the realisation that national courts take priority over the ICC, unless they are unable or unwilling to conduct trials. Signatories to the Rome Statute pledge

to submit themselves to the jurisdiction of the ICC for the crimes outlined in the Statute, however, the ICC may only exercise jurisdiction over member states for crimes which occurred after the establishment of the ICC in 2002. The Court may not pursue offenses retroactively, unless authorised by the member state of the individual in question.

The Court prosecutes individuals, but not groups or states. None are exempt From prosecution based on status or Office, and amnesty cannot be used as defence before the Court. Those who committed crimes while under the age of 18 are, however, exempt from prosecution

1.5 The ICC's Arrest Warrant for AI-Bashir

In July 2008, the prosecutor of the International Criminal Court (ICC) Luis Moreno-Ocampo, accused Sudanese President Hassan Omar Al-Bashir of genocide, crime against humanity and war crimes in Darfur and requested the issuing of an arrest warrant against the sitting head of state. The A together with organization of the Islamic Conference sought to block this action by requesting the United Nations Security Council to defer ICC proceedings for twelve months in accordance with Article 16 Rome Statue, a request which has to date remained unanswered.[19] The court issued an arrest warrant for Al-Bashir on 4 March 2009 for the commission of war crimes and crimes against humanity but ruled that there was insufficient evidence at the time to prosecute him for genocide.[20] In his decision approving the arrest warrant, the ICC pre-trial chamber found that the information supplied

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19 C. Gosnell, 'The request for an arrest warrant in 'AI Bashir' *Journal of International Criminal Justice* (2008) (6), 841-891 and a Ciampi The proceeding against President Al Bashir and the prospects of their suspension under Article 16 CC Statutes' *Journal of International Criminal Justice* (2008)(6),8S5-897.

20 AT Cagley 'The Prosecutor's Strategy in seeking the arrest of Sudanese President AI Bashir on charges of genocide' *Journal of international Criminal Justice* (2008)(6), 829-840.

by the ICC prosecutor did not show reasonable grounds to believe that the Sudanese government acted with specific intent to destroy, in whole, or in part, the Fur, Masalit and Zaghawa groups charged of genocide were therefore not included for the arrest warrant.

One of the AU's most persistent criticisms of the ICC's actions in African has been that, by prosecuting active participants in ongoing or recently settled conflicts, the court risks prolonging the violence or endangering fragile peace processes currently in place in Sudan.[21] Thus, it becomes pertinent to peep into the political reality of Sudan's conflicts.

Sudan has been the scene of Africa's longest civil war the one between the Northern Khartoum governments are the South Sudan Peoples' Liberation Movement. The war was brought to an end following a protracted peace process culminating in a Comprehensive Peace Agreement (CPR) and the Interim National Constitution with both documents embracing an intricate design of the conflict management strategy namely, power sharing and autonomy. In the case of the North-South conflict, there are two main actors, each led by a dominant elite in the personalities of Al Bashir and Solva Kirr who commanded overwhelming support of their followers.[22]

Another conflict in the Darfur region is more complex and has more than two actors; the Northern Khartoum government, Janjawed Militia, two res movements, the Justice and Equity Movement (JEM) and the Sudanese Liberation Army Movement (SLA) comprising of Masalit, Fur and Zaghawa ethnic groups. A push towards a peaceful resolution of this conflict has seen the brokerage of a deal between the Khartoum government and Darfur's largest rebel group JEM. This two and power-sharing agreement was signed on 23 February

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21 'Communiqué of the 142d meeting of the Peace and Security Council' African Union (2008).

22 United Nations Treaty Database Regarding the Rome State

2010 in Doha Qatan, by Sudan's President Al- Bashir and JEM representative. From the foregoing, it is apparent that Al-Bashir is not only part of the problem in Sudan's seemingly intractable conflicts, but an integral part of the promulgated solutions that have so far bring about some dimensions of stability.

From the foregoing, it is lucid that the controversy sparked by Bashir's case is a wake-up call. It ought to be clear that this practice of international criminal law cannot be conducted devoid of attention to the political environment that informs it. It is apt to state that international criminal law does not operate in a vacuum, in the case of Sudan, it must function within the larger context of the country's history. The present-day Sudanese government is the result of a long period of international and regional negotiations and mediation between the two parties. Taking into cognizance of the fragility of the transactional arrangements, the issuing of an arrest warrant for AI Bashir by the ICC is arguably, badly-timed and capable of destabilizing the already fragile peace processes in place.[23]

1.6 International Criminal Court Cases Regarding the Democratic Republic of the Congo

The Democratic Republic of the Congo (DRC) acceded to the Rome Statute that established the International Criminal Court (ICC), on April 11, 2002. In April 2014, the government of the DRC referred the situation in the country to the prosecutor of the 1CC to investigate crimes within the jurisdiction of the court allegedly committed anywhere in the DRC since July 2002. In accordance with this request and the Rome Statute, the prosecutor investigated

[23] Press Release, ICC-OTP-200404-19-50.

such crimes, and on the basis of applications by the Prosecutor, the 1CC eventually issued arrest warrant for six defendants.[24]

The first case to be tried and the only conviction the ICC initially rendered in its ten- year existence was that of Thomas Lubanga Oyilo, which was appealed, with conviction confirmed of the other individuals, a conviction was rendered on March 7, 2014 for German Katanga; Mathiev Ngodjolo Chui was acquitted, and the acquittal was confirmed on appeal and was thus released charges against Calixts Mbarushimana were dismissed following a hearing on the confirmation of the charges and he was released.

1.7 The ICC Investigation in Kenya

The Kenya President, Uhuru Kenyatta, and Deputy President, William Samoer kuto of Kenya were charged by the ICC with crimes against humanity in connection with the violence that followed the 2007 presidential election in Kenya. In October 2014, Kenyatta became the first sitting head of State to appear before the ICC, but the prosecution of Kenvatta was besieged with difficulties from the beginning thus making the case against Kenyatta to collapse. In March 2015, the ICC terminated the case following the prosecution's application to withdraw the charges due to insufficiency of the evidence.

1.8 The International Criminal Court Case Regarding Mali

On January 16, 2013, the office of the Prosecutor (OTP) opened an investigation into alleged crimes committed in the territory of Mali since 2012.[25] The situation in Mali was referred to the court by the Government of Mali on July 13, 2012.

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24 <http://leverything explained to day/international Criminal Court Investigation in the Democratic Republic of the Congo-.> accessed 31 April, 2024.

25 Situations and Cases in the ICC, situation in Mali, available at <http://www.cpi.int/enmsnus/ icc/situations%20and%20cases/pages/situations/%20cases, aspi –> accessed 19 April 2024.

After conducting a preliminary examination of the situation, including an assessment of the admissibility of potential cases, the OTP determined that there was a reasonable basis to proceed with an investigation. The Prosecutor determined that Alhed Al-Fagi Al-Mahdi, a member of the Islamic court set up by Milian Jihadist to enforce strict Sharia Law:[26] should be arrested. The court issued an arrest warrant and, on September 26, 2015, Ahmed al-Faad, al-Mahdi was surrendered to the court by the government of Niger and transferred to the ICC's detention center in The Hague, Netherlands. The situation in Mali was then assigned to pre-trial chambers I where the confirmation hearing opened on March 1, 2016.

[26] The Guardian, Agency France – Press in The Hague, Destruction of Timbukto sites shocked humanity, prosecutor tells ICC, available at <http://www.the guardian.com/law/2018mar/0 1/destruction-of-timbbokto-sites-shocked-humanity-prosecutor-icc –> accessed 20 April, 2024

CHAPTER TWO

RATIONALE FOR PROSECUTING INTERNATIONAL CRIMES IN AFRICA

2.1 Prelude to the Criminal Chamber in the Africa Court

Following the indictment and trials of heads of State and senior governmental officials, by both European Courts and the International Criminal Court (ICC), the legitimacy of International Criminal Justice Mechanisms has been questioned by some on the African continent. The AU has viciously attacked the actions of the ICC and European Courts and the rhetoric of imperialism" “bias" and "neocolonialism" has trickled down to everyday African citizens who do not always have sufficient information to separate fact from political rhetoric.

Thus, at its 18th ordinary session in January 2012, the Assembly of Heads of States and Government of the African Union (hereinafter the “AU Assembly'"), requested the African union Commission (AUC) "to place the Progress Report of the Commission on the implementation of Assembly Decision on the ICC on the agenda of the forthcoming meeting of ministers of Justice and Attorney's General for additional input.[1] In a 2009 text, referred to herein as the “Assembly Decision", the AU requested that the AU, "in consultation with the African Commission on Human and People's Rights and the African Court on Human and People's Rights... examine the implications of the court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010.[2]

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1 Assembly/AU./Dec, 397 (XVII) (2012).

2 Assembly/AU./Dec, 213 (XII) (2012).

Consequently, there was the draft protocol, which amended the protocol on the statute of the court by examining its jurisdiction to cover international crimes'[3], and was endorsed by the African Ministers of Justice and Attorney General on Legal Matters in May 2012.[4] It should however be recalled that the July 2012 AU Assembly did not adopt the new Protocol. Instead, it requested the Commission in collaboration with the African Court of' Human and People's rights, to "prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the African Court" and urged the union to adopt a definition of the “crime of unconstitutional change of government". The Commission was to submit its report for consideration by the policy organs at the January 2013 Summit.[5]

A decision was reached on 19 and 20 December 2012 in Arusha, Tanzania, at an expert's meeting, which was convened by the AU on the essence of amending 'sub-articles I and 2 of Article 28E[6] (of the Draft Protocol), which embodies the crime of "unconstitutional change of government". With regard to the financial and structural implications, the group adopted an arguably simplistic and over-optimistic approach, concluding that the only additional expenses envisaged will be in the expanded structure and operation of AFCHPA.[7]

It is doubtful whether any future AU Assembly will adopt the Draft Protocol, but the prospect of the African regional court adjudicating on International crimes portends some troubling times for International Court (ICC), but more so, for international criminal justice

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3 Ex. CL/731 (XXI) a; (2013).

4 Min/Legal/ACJHR- RAP/3 (11) Rev. 1,5.

5 Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court on Human and People's Rights, Assembly of the African Union, 19th Ordinary Session, Assembly/AUDec/. 427 (XIX) (2012).

6 AFCHPR/LEGALIDoc., 3 at 4.

7 Ibid at note 82

in Africa. It could be submitted that the implication of this is the dent it will serve on the ICC with regard to its vital referral mechanism - self-referral by African ICC states. Parties, aside from losing "ad hoc referral" by African non-states parties to the Rome Statute. This could better be understood from the fact that of all the situations before the ICC, three were self-referred (Uganda, Democratic Republic of Congo, and the Central Africa Republic) and one involved the voluntary (ad hoc) acceptance of ICC Jurisdiction (Cote d'Ivoire)[8], on the other hand concerns have been raised as to an operational but ineffective international criminal jurisdiction - a presumably likely instance, raising myriad questions about what to do with African *genoci daries* and culpability of heads of state and other governmental officials.

Flowing from the foregone paragraphs, certain reasons could be deciphered to support the prosecution of international crimes by the African regional court, among which are:

2.2 Indictments or Prosecution of African State Official in Europe

In order to better grasp the reasons that led to the proposed establishment of the criminal Chamber proceedings, that were instituted against African State officials. Nothing could be more ironical than to recall that the Libyan leader, Maumar Gaddafi was indicted in France for torture and conspiracy to commit torture and terrorist acts, the court of Cassation of France rendered its judgment in favour of Gaddafi.[9] The former President of Mauritania, Maaouya Ould Sid'Ahmed Taya was also indicted in France in 2005.[10]

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8 *The Prosecutor v. Laurent Gbagbo,* case No. ICC-02/11-01/11

9 SOC Attentats et Bentrice Castle Inav d'Esnault C. Gadafy, 125 ILR 490, 508, 13 March 2001.

10 International Federation of Hunan Rights, *Defenders (FIDH) and other v. Ould Dah,* 8 July 2002 (Nomes Assize Court France).

Rwandan State officials have also been subjects to indictments in respect of international crimes committed in Rwanda in 1994. In 2007, a French Judge, Jean-Louis Bruguiere, indicted Rwandan State and military Officials for their alleged roles in the 1994 genocide in Rwanda. However, an arrest warrant could not be issued against President Paul Kagima due to his immunity from prosecution. Instead, Rosa Kabuye, a Rwandan State official who visited Germany in 2008, was arrested and extradited to France. Kabuye had been indicted in France for her role in the Rwandan genocide. The German authorities failed to prosecute Kabuye because of the provisions of sections l8, 19 and 20 of the "German Judiciary Act" which grant immunity to diplomatic missions and state officials on official invitation in Germany. Criminal Proceedings in France were terminated by a court in Paris, and Kabuye was released after a French judicial investigation found her no guilty of the crimes as charged.[11] It must be recalled that the prosecution of this Rwandan State officials in France resulted in a diplomatic vow between Rwanda and France, which saw Rwanda denounce its diplomatic ties with France, though diplomatic relations between the two States have since been restored.

Similarly, in early 2004, a court in Paris issued indictments against five serving African presidents alleging corruption, namely: Denis session Nguessa of Congo; Teodoro Obian Nguema of Equatorial Guinea; Omar Bongo of Guban: Blaise Compaore of Bukina Faso and Eduardo dos Santos of Angola,[12] Omar Bongo of Gabon died later in 2009.

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[11] Amnesty International, 'Germany: End Impunity through Universal Jurisdiction (Amnesty International Publications,' *No State Have Series*, (2008)3, 70.

[12] Five African Leaders sued for corruption; Rando France International, available at <http://www.rfi.frlactuen/article-960.asp.> accessed 20 April 2024.

Robert Mugabe, the Zimbabwe President was fortunate to have been sued by a Magistrate Court in England in January 2004 following a private application for his arrest and extradition in England.[13] It will be recalled that the Bous Street Magistrate's Court relied on the rules of customary international law on immunity of serving heads of State to reject the application against Robert Mugabe.

Furthermore, Authorities in Belgium have also indicted several African State officials, at least before an amendment to the Belgium Code of Criminal procedure that was introduced on 5 August 2003. For example, complaints were filed by private individuals against President Laurent Gbagbo of Ivory Coast, President Denis Sassou Ngucsso of Congo, President Kagame of Rwanda and President Angle-Felix Patasse of the Central African Republic.[14]

Also, the case against Abdulaye Yerodia Ndombasi, former Minister of Foreign Affairs of the Democratic Republic of the Congo (DRC),[15] attracted special attention by African States. At the time of his indictment and issuance of an arrest warrant by Belgium, Mr. Ndombasi was a serving Ministe of Foreign Affairs. Ndombasi's case resulted in diplomatic tensions between the DRC and Belgium, and led to the bringing of proceedings by the DRC against Belgium before the ICJ.[16] The ICJ held that Mr. Ndombasi enjoyed immunity from prosecution under customary international law on the ground that he was a serving Minister.

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13 Re Mugabe, ILDC 96 (UK 2003) 14 January, 2004, Bow Street Magistrate's Court.

14 The African Union-European Union Expert Report on the Principle of Universal Jurisdiction, Council of the European Union Brussels, 16 April 2004, 8672/1/09, REV I, at 24-29.

15 Public Prosecutor . Abdulaye Yerodia Ndombasi, 16 April 2002, Court of Appeal of Brussels, Belgium.

16 The Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo Belgium), Judgment of 14 Feb., 2002. ICJ R.

Thus, Belgium was ordered to terminate criminal proceedings, cancel the arrest warrant issued against Yerodia, and to inform the authorities to whom it had been circulated.

From the foregoing, it should be noted that a majority of the cases in European jurisdictions have been terminated on different grounds, including the immunity of serving state officials under customary international law and national laws. After having examined the above-mentioned cases, it is now pertinent to address the case against the Chadian president, Hisssene Habre, which deserves special attention with regard to the establishment of the proposed criminal chamber of the African Court.

2.3 The Hissene Habre Case and the Patway to the Criminal Chamber of the African Court

It is apt to state that when Habre was indicted in Belgium for crimes against humanity particularly torture, Senegal refuse to honour its extra diction obligation with Belgium. Senegal rather approached the AU on this matter. Consequently, the AU mandated Senegal to try Habre before its own domestic courts, acting in the interests of the AU.[17] With the chief aim of avoiding Habre's trial in Belgium. In short, the AU at its meeting in Sudan had asked a committee of eminent African Jurists to study the issue of the Belgian Extradition request and recommend how to deal with Habre's case, and future international crimes in Africa.[18]

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17 At its meeting in July 2006 at Banjul, The Gambia, the AU took a decision mandating the Republic of Senegal to 'prosecute and ensure that Hissene Habre is tried, on behalf of Africa by a competent Senegalese Court with guarantees of fair trial'. Decision Assembly /AU/Dec. 127 (VII), (Dec. Assembly/aU/3(VIII)

18 Report of the Committee of Eminent Jurists on the case of Hissene Habre, submitted to the Assembly of the African union, Ordinary session, July 2006, available at <http://www.africa-union-org> accessed 20 April 2024.

It should however be noted that even before the 2009 AU decision to establish a criminal Chamber with jurisdiction to try international crimes, the origin of an African idea or priority to prosecute international crimes in Africa had begun in 2006.[19] Worthy to note also is that as regards the African solution to Habre's trial, the committee considered the question of jurisdiction to try him and held that both Chad and Senegal had the necessary jurisdictional links to the Habre's case. Moreover, both states had ratified the 1984 Convention against Torture (CAT). The committee thereby suggested that since Habre was within the territory of Senegal, Senegal had jurisdiction to try him on the strength of the principle of territorial jurisdiction and on account of the fact that, it was a state party to the Convention against Torture.

Consequently, the committee recommended that an "African solution" should be opted for, and that Habre should be tried an African state, with preference giving to Senegal and Chad., More importantly, the committee also addressed the issue of how African states should deal with similar crimes in the future. It held that it was necessary to send the Senegal to African States that impunity is intolerable and no longer an option for Africa. In this light, the committee observed "The possibility of conferring criminal jurisdiction on the African Court of Justice (to confer criminal competence that can be adopted by States within a reasonable time frame, to make the respect for human rights at national, regional and continental levels a fundamental tenet for an African governance.[20] Thus, the committee observed that there was need for an African Court on Human and People's Rights to be conferred criminal jurisdiction to try international crimes in Africa. The committee reported that there is room

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19 M.K. Hansungule, 'The African Charter on human and People's Right: A Critical Review' *African Yearbook of international Law*, (2000), at 269-270.

20 Supra 95

in the Rome Statute for such a development and that it would not be a duplication of the work of the International Criminal Court.[21]

2.4 The Establishment of International Criminal Prosecution in Africa is a Legal Obligation

It will not be out of place to establish that Africa derives a distinct legal obligation to prosecute international crimes by virtue of the constitutive Act (AU Act) and other treaties to prosecute crimes proscribed in these treaties.

A porting here could be Article 4 (h) of the AU Act, which provides that "the right of the Union to intervene in a member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity as well as a serious threat to legitimate order to restore peace and stability to the member state of the union upon the recommendation of the peace and security council. These crimes are with the exception of "threat to legitimate order" (which is a new crime added to the provision by virtue of an amendment in 2003), the same crime over which the ICC has jurisdiction. Apt to posit that the prescription of these international crimes by the AU Act necessarily implies the obligation to take measures to redress violations. To argue otherwise, that the AU legislate on crimes it does not intend its own court to prosecute is to throw spanner into the settled doctrine of "power of Judicial Review".

A case in point here is the trial of Hissene Habre, the former president of Chad. Belgium had issued an arrest warrant against Habre, who was in asylum in Senegal.[22] Senegal however

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21 Supra note 95

22 'Ex-Chad Dictator Indicted in Belgium' Human Right Watch, 29 Sept, 2015, available at <www.hrw.org/news/2005/09/29/ex-Chad-dictator-indicted-belgium-o> accessed 20 April 2024.

declared to extradite the culprit to Belgium, and with the blessing of the AU chose to try Habre Although Senegal and Chad possess the power to try Habre, Senegal, based on the claim of absolute immunity refuse to prosecute him or yield him over to Chad for prosecution. Thus, it could be concluded that with this type of attitude, the only option left was for the organization to turn to its own courts.

2.5 Obligation to Prosecute Crimes Peculiar to African States

It must not escape mention that the AU also has a distinct and separate obligation to prosecute crimes which are peculiar to Africa but over which the ICC has no jurisdiction.

The absence of such crimes in the ICC jurisdiction could either be because of a general believe among the majority of ICC states parties that such acts do not constitute international crimes at all or to a conception that such crimes, if international in nature are not grave" enough for the purposes of the ICC, an example of such crime is "unconstitutional changes of government (UCGS), and could be submitted to be one of the most common sources of conflict in Africa, irrespective of how they originate. To open a historical searchlight on this is to invoke the examples of Zimbabwe's Mugabe, Kenya's Kibaki and Ivory Coast's Gbagbo. It should also be recalled that the AU Adopted the African Charter on Democracy, Election, and Governance (ACDEG) in 2003 simply because of the menace of unconstitutional change of government in the continent. The treaty that become enforceable in February 2012 lists and criminalises the various acts constituting the VCG in Article 23, hoping to promote a greater respect for the rule of law and reducing armed conflicts.[23]

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[23] Assembly/AU/Dec, 147 (VIII) (2007)

Flowing from the foregoing, it is safe to conclude that the criminal chamber of the Africa Court is a round peg in a round hole, aimed are releasing an fulfilling the vision of the AU in enacting the ACDEG. Thus, while the Rome Statute could be submitted to be restrain to the most serious international crimes, which although common to the whole of mankind, are very often committed in the aftermath of the breakdown of law and order, the AU could be said to have aimed at preventing the occurrence of such crimes *ab initio* through the proscription of acts that may precipitate violence and disorder in a State.

2.6 The International Criminal Court and Prosecution of International Crimes in Africa

Based on the State referrals and referrals by the United Nations Security Council,[24] cases the ICC had presided over since its inception are mostly from Africa. Holding that there were reasonable grounds to believe that individuals had committed international crimes in Uganda, the DRC, Central Africa Republic and Darfur, Kenya and Libya, the ICC prosecutor requested the pre-trial chambers to issue warrants of arrest for various individuals, including the president of Sudan, Omar Hassan Al-Bashir, Muammar Gaddafi of Libya, the three Kenya State officials charged before the ICC and former President Laurent Gbagbo of lvory Coast. The ICC has also gone further in indicting the President of Sudan and the deposed leader of Libya, Muammar Gaddafi (who died on 20 October 2011) despite the fact that Sudan and Libya are not states parties to the Rome Statute.

A little detail about the situation in Darfur region of Sudan will suffice to give credence to the foregoing. The AU had maintains that the search for justice should be pursued in a way

[24] State referrals and referrals by the Security Council are governed by Art 13 1CC Statute.

that does not impede or jeopardize the promotion of peace in Sudan.[25] For the AU the process initiated by the ICC and the decision of its pre-trial chamber have the potential to seriously undermine the on-going efforts to address the many pressing peace and security challenges facing Sudan and may lead to further suffering for the people of the Sudan and greater destabilization of the country", It was in the light of this that the AU requested the United Nations Security Council to deter the investigation in respect of the Darfur situation, but the United Nations has not accepted such.[26] It must be stated that the AU argue that, whilst it does not tolerate impunity, it is nevertheless, concerned with the indictment and warrant of arrest issued by the ICC against President Bashir. The AU did not also fail in taking same position against the prosecution of Colonel Maummar Gaddafi of Libya and the three Kenya officials charged with international crimes before the ICC, thus, at its summit on 30 June and 1 July 2011, at Malabo, Equatorial Guinea, the AU decided that member states of the African Union shall not cooperate with the ICC in the execution of the warrant of arrest issued for colonel Maummar Gaddafi of Libya, making arguments that the warrant complicates efforts aimed at a negotiated political solution in Libya.

Conclusively, the AU's decisions not to cooperate with the ICC that has led to the call for establishment of a criminal chamber within the African Court to prosecute African individuals who commit international crimes in Africa. Hence, the AU position is the establishment of the Criminal Chamber with the African court as the only mechanism to address impunity in Africa through an African solution.

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25 Communiqué of the 175 meeting of the peace and security council of the African Union, 5 March 2009, PSC/PRComm (CLXXV), Addis Ababa, Ethiopia.

26 Decision on the Application by the International Criminal Court (ICC) Prosecution for the Indictment of the President of the Republic of Sudan, Decision Assembly/lAU/Dec, 221 (XII).

CHAPTER THREE

JURISDICTION OF THE AFRICAN COURT IN PROSECUTING INTERNATIONAL CRIMES

The Rome Statute of the International Criminal Court (ICC) recognizes "that during this century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity" as a result of armed conflicts. These "grave crimes, it has been submitted threaten the peace, security and well-being of the world.[1] Africa is a continent had its fair share of the problem,[2] thusly; efforts to pursue, make and keep the peace have been intensified over the past half a century. One of such emerging trends of a unique feature of peace and the peculiar means for attaining peace is to punish certain actions and omissions that are considered international crimes wherever they may take place in the continent.

As noted earlier, the ICC has been invoked in respect of some conflict situations in Africa, which has definitely bring about some rift between the African Union (AU), as a continental body, and the ICC owing to the AU's perception of the ICC as pursuing selective justice. Against this background, a criminal chamber has been proposed for the African Court to try international crimes in Africa, to the structure and modus operandi of the proposed criminal jurisdiction of the African Court, we now turn.

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1 Preamble to the Statute of the International Criminal Court 1998, U.N. Doc. A/CONF.183/9. <www.un.org/law/icc/statute/tomefra.htm, paras, 2 and 3>. accessed 20 April 2024

2 In the Conflicts in Sierra Leone, Liberia, Uganda, Kenya, Rwanda, Cote d'ivore, Democratic Republic of Congo and others, women were subjected to Rape, Sexual Slavery and Other Forms of Sexual Abuse. Others were amputations and killings.

3.1 Substantive Provisions of the Malabo Protocol

A full comprehension of the Malabo Protocol requires awareness on a number of inter-related instruments, such as the Protocol to the African Charter on the Establishment of the African Court on Human and People 's Rights, which establishes the African Court on Human and People's rights (African Human Rights Court). The Protocol was adopted on 10 June 1998 and entered into force on 25 January 2004. A total of 27 African States have ratified the Protocol. The African Human rights Court is at present the only operational judicial body in Africa, with the primary role of complementing the protective mandate of the African Commission on Human and People's Rights (African Commission) by issuing binding judgments relating to human rights violations. There is also the protocol of the Court of Justice of the African Union which was adopted on 11 July 2003 and entered into force on 11 February 2009, with only 11 states ratifying it. As the principal judicial organ of the AU, the court has jurisdiction over all disputes and applications relating to the AU constitutive Act and other treaties and subsidiary legal instruments adopted within the framework of the AU. Worthy of note is that this court has not been operational, and thus could not be said to have exist beyond the black letter of the law.

Furthermore, there is the protocol on the Statute of the African Court of Justice and Human Rights which was adopted on 1 July 2008. It requires 15 ratifications to enter into force. Only five states have ratified the Protocol and it has therefore not entered into force. The objective of the Protocol is to merge the African Human Rights Court and the African Court of justice into a single court. If or when it is operational, this court will replace both the African Human Rights Court and the African Court of justice, hence the Malabo protocol

seeks to extend the jurisdiction of this court to cover crimes under international law and transnational crimes.

3.2 List of Crimes Contained in the Malabo Protocol

The Malabo Protocol contains an extensive and ambitious list of crimes. Thus, a critical perusal will reveal that the ACJHR will have jurisdiction to try fourteen different crimes, ranging from; genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.[3] Succinct to posit that some of these crimes, such as genocide, crime against humanity and war crimes, are already well established in international criminal law, while other crimes such as mercenarism, terrorism, corruption, money laundering, and trafficking on hazardous waste are already defined in existing AU treaties.[4] It must not also escape mention that the list contains crimes over which the ICC and other International Courts have no jurisdiction. The Malabo Protocol also leaves open the possibility of new crimes to be added, aside the extensive list of crimes.[5]

Arguably, the list covers areas of crimes which have particular relevance to the African Continent. However, some crimes included under the jurisdiction of the ACJHR are yet to be well articulated and established in international law, prominent among these is the crime

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3 Article 28A, Amended ACJHR.

4 Examples are Convention for the Elimination of mercenarism in Africa, adopted 3 July 1997 and entered into force 22 April 1985, OAU.AU Convention on the Prevention and Combating of Terrorism, adopted 1 July 1989 and entered into force December 2002, AU Convention and Combating Corruption, adopted 1 July 2003 and entered into force 5 August 2006; and the Bamako Convention on the Ban of the Import into Africa and the Control of Trans-boundary movement and Management of Hazardous Wastes within Africa, entered into force 22 April, 1998

5 Article 28(A) (2) Amended ACJHR.

of unconstitutional change of government. Unconstitutional change in government is a phenomenon that is considered as "one of the essential causes of insecurity, instability and violent conflict in Africa.[6] It must however be noted that the definition of the crime of unconstitutional change of government was contentious throughout the drafting process. At the centre of this controversy was whether to include popular uprising as a form of unconstitutional change of government. The concern of including popular uprising as constituting a crime of unconstitutional change of government was that this would result in criminalizing protest. Thus, the issue of popular uprising" was deleted from the definition adopted in the Malabo Protocol. Despite this positive amendment, such phenomenon has not been widely prosecuted as a crime at the international level and it remains to be seen what effect the criminalization of this crime within the Malabo Protocol will have regionally.

It is noteworthy that conflict and crimes committed in this context (such as genocide, crimes against humanity, and war crimes) have intractable connections to most; if not all, of the transnational or organized crimes listed in the Malabo Protocol. For instance, according to the United Nations Office on Drugs and Crimes (UNODC), the long-standing conflicts of Somalia and the smuggling of migrants from the country to Yemen and Saudi Arabia.[7]

The intersections between African conflicts and illicit exploitation of natural resources, mainly minerals, is also well documented.[8] In short, illicit exploitation of natural resources, was a defining characteristic of the conflicts in Angola, Sierra Leone and Liberia and

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6 African Charter on Democracy, Elections and Governance, Preamble, para. 6.

7 UNODC, Transnational organized crime Eastern Africa, A Threat assessment, September 2013, available at <www.unodc.org/documents/data-and-analysis/studies/1TOC-East-AFrica-2003.pdf> accessed on 20 April, 2024.

8 International Alert, the role of the exploitation of natural resources in fuelling and prolonging crises in the Eastern DRC, 2009, available at <www.international-alert.org/sites/default/flies/publications /Natural Resources Jan 10.pdf > accessed on 18 April 2024.

remains a dominant feature of conflicts in the Democratic Republic of Congo (DRC) and Central African Republic (CAR). In September 2015, Amnesty International published a report demonstrating how the diamond industry in the Central African Republic (CAR) is financing armed groups in the country.[9] Corruption and trafficking in persons are also crimes that affect the enjoyment of human rights across the continent.

Also, the definition of genocide in the Malabo protocol is slightly more progressive and reflective of recent jurisprudence than the definition in the Rome Statute. Thus, under Article 28B(F) of the amended ACJHR statute acts of rape or any other form of sexual violence'" committed with intent to destroy, in whole or in part, a national, racial or religious group, as such, constitutes genocide. A similar provision is not available in the Rome Statute. However, following the Akayesu decision at the ICTR,[10] it is now commonly accepted that rape is a tool of war, which can be committed as an act of genocide. The clear inclusion of rape as an act of genocide within the Malabo protocol points towards a more progressive and an up-to-date document reflecting more recent jurisprudence and definitions of genocide.

3.3 The Legality of African International Criminal Prosecution vis-à-vis the Rome Statute

It has been asserted that there is no basis in the Rome Statute for allowing regional prosecution of International crimes, and that such jurisdiction as has been proposed for the African court of justice and Human rights is incompatible with the ICC Statute.[11] To the

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9 Amnesty International, Chains of Abuse, the global diamond supply chain and the case of the Central African Republic, September 2015, index: AFR 19/2494/2015.

10 *Prosecutor v. Akayesu,* Judgment case No ICTR-96-4-A.

11 Murungu, 'Towards a criminal chamber in the African Court of Justice and Human Right' *Int'l Criminal Justice,* (2011), 1067, at 1073

advocate of this view, three preliminary questions may be address. First, why should a court created by a multilateral treaty require the approval of another multilateral treaty creating a similar court to justify its own existence? Secondly, under what principle of international law, based on treaty or customary international law, do states ratifying a treaty to the exclusion of all other treaties, even those governing the same subject as the pre-existing one". Thirdly, why should the African Union, being a non-signatory to the Rome Statute, seek the validity and legality of its own court under that Statute?

For several reasons, it must be submitted that an inquiry into the legality of the proposed international criminal jurisdiction in Africa with reference to the Rome Statute is fallacious. No provision of the Statute forbids its state parties from concluding other treaties, even if those were to establish courts of a similar nature to the ICC. The Rome Statute is not a primus inter pares among treaties and cannot fetter the competence of its state parties to deploy their consent in international law. It is but a manifestation of uncritical appraisal now to regard the Rome Statute as the *fons et origo* of all international crimes and their international prosecution.

In short, by way of comparative analysis, despite the fact that Article 92 of the UN Charter designates the International Court of Justice (ICJ) as the "principal judicial organ" of the organization, several regional dispute settlement mechanism exercise similar jurisdiction with that of the ICJ. Before the creation of the ICC, the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY, ICTR) prosecuted the same crimes of the ICC now does, even if those two had a more limited mandate. No one has argued that the creation of those two tribunals extinguished the right of other International tribunals to prosecute the same crimes, lest the ICC would be the poorer for it.

In International law, there are two well-known situations in which the validity/legality of a subsequent treaty may be determined by reference to a pre-existing treaty. First, where the state parties to a treaty decide to conclude another treaty which establishes obligations similar to those in the previous treaty, the only legal requirement they must satisfy is that their obligations under the later treaty do not conflict with obligations assumed under the previous treaty, especially if there is a special provision in the pre- existing treaty to that effect. Thus, Article 103 of the UN Charter states:

> In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any other International agreement, their obligations under the present Charter shall prevail.

There is no provision of the Rome Statute comparable to this Article. Also, if a pre-existing treaty embodies a jus cogens obligation, then states parties to that treaty are forbidden to conclude another treaty containing a provision that violates a peremptory norm. Thus, if Treaty A to which states X, Y and Z are parties forbids the use of force (now widely regarded as jus cogens), then whereas these states are not precluded from adopting another treaty that may govern the use of force, they may not adopt Treaty B if one of its provisions violates the peremptory obligation in Treaty A.

The AU is an International organization with legal personality separate from those of the member state.[12] It must however be noted that the obligations assumed by any AU member state under the IC Statute, specifically with respect to the complementarity rule or other rules or principles, cannot apply to the Union. Under International Article 34 of the Vienna Convention on the Law of Treaty states that a treaty does not create either obligations or

[12] See APP, No. 002/2011, Femi Falanav. African Union, judgment of 26 June 2012.

rights for a third state without its consent." Thus, if there is an obligation imposed by the complementarity principle against the creation of an alternative International criminal jurisdiction and there is no convincing reason to believe that such an obligation exists - a simple application of the rules of International law dictates that the obligation can only apply to states parties to that Statute.

The right of the African Union to establish whatever courts it deems fit, regardless of what other court may have jurisdiction over the same crimes, is inviolable in International law, except in the context of peremptory norms, that there would be firewalls against the reach of state consent. Consequently, one does not need to construct "a progressive interpretation of positive complementarity of the Rome Statute or any other fanciful jargon".

3.4 Nomination, Appointment and Allocation of Judges

The proposed ACJHR will be composed of 16 Judges who are nationals of state parties to the Malabo Protocol,[13] and elected “from among persons of high moral character, who possesses the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in International law, International humanitarian law or International criminal law.[14] The judges are to be elected by the AU Executive Council and appointed by the Assembly.[15] The Assembly is required to ensure that there is equitable representation of the regions and the

[13] Amended ACJHR Statute, Article 3(1)

[14] Amended ACJHR Statute, Article 4

[15] Amended ACJHR Statute, Article 7(1)

principal legal traditions of the continent in the composition of the court.[16] The Assembly is also required to ensure equitable gender representation in the court.[17]

For the purpose of election, each state party to the Malabo Protocol may nominate up to two candidates.[18] State parties shall also choose the section of the court which they wish their nominees to be placed if they are elected.[19] At the point of election, the names of potential judges will be placed in three lists reflecting their specific competence and experience.[20] The first list is to contain the names of candidates with competence in International law, the second will contain the names of candidates with competence in International human rights law and International humanitarian law, while the third lost will contain the names of candidates with competence in International criminal law.[21] Judges will thus be elected to the court on the basis of their strength and competence in one of the three areas covered in the jurisdiction of the court.

Worthy to note also is that if and when the Malabo protocol comes into force, state parties will plan a critical role in shaping the composition of the court, and in order to ensure that the AU Executive Council has the broadest possible pool of qualified candidates, it will be essential that each state party nominates the maximum number of candidates allowed .snder the amended ACJHR Statute. This would provide a real choice and facilitate the nomination of only the most qualified candidates. More importantly, state parties should nominate, and the Executive Council should elect. candidates who will undertake their duties impartially

16 Amended ACJHR Statute, Article 7(4)

17 Amended ACJHR Statute, Article 3(4)

18 Amended ACJHR Statute, Article 5(2)

19 Amended ACJHR Statute, Article 6(2)

20 Amended ACJHR Statute, Article 6(1)

21 Amended ACJHR Statute, Article 6(1)

and consciously. This should disqualify candidates holding government positions. Relevant stakeholders in the past raised concerns about the lack of independence of individuals elected to the African Commission citing the position these individuals hold in their respective government.[22]

The procedure for allocating judges to the various sections of the court is spelled out in two separate provisions of the Amended ACJHR Statute, in Article 16(3) and 22(3) on the one hand, and Article 6(2) on the other hand. A critical perusal of these two sections however seems to introduce a conflict, for instance, while Article 16(3) provides that the "the allocation of judges to the respective sections and Chambers shall be determined by the court in its Rule " Article 22(3) provides that the "President and Vice President shall, in consultation with the members of the court and as provided for in the Rules of Court, assign judges to the sections".

The foregoing may aid in ensuring both capacity and independence of those appointed but may need to be matched with an overall appointment mechanism that ensures political independence of the process.

However, Articles l6(3) and 22(3) do not quite tie in with Article ó(2). As described above, Article ó(2) provides that it is the chairperson of the AU Commission who will separate out the lists of candidates into the different sections prior to their actual election. This implies that in practice the determination of which judges will sit in the various sections will be determined not by the court but by the AU. There is need to decide on this contradiction and a procedure adopted that ensures both the appointment of competent judges for the various

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22 F. Viljoen, 'Promising Profiles: An Interview with four new members of the African Commission on Human and Peoples' Rights,' *African Human Rights Law Journal*, 6(2006),243.

sections and the minimization of political interference by the AU in the administration of the ACJHR.

Pertinent to reiterate is the fact that it will be crucial to ensure that those judges who are appointed are both independent and competent and thus free from political interference.

The judges will be the most visible representatives of the court. The effectiveness and efficiency of the court will, to a large extent, depend on the personal and professional capacities of the judges, their skills and experience as well as their commitment and integrity.

The Rome Statute system provides for a model which could potentially be developed and strengthened by the AU to ensure that the most qualified candidates are elected as part of a merit-based election process. Article 36(4) of the Rome Statute provides for the establishment of an "Advisory Committee on Nominations" to independently review judicial candidates at every ICC judicial election. The Advisory Committee is composed of members who have "vast experience in relevant areas of international justice"[23] and competence and experience in criminal or international law. Members of the committee serve in their personal capacity and do not take instructions from any government. In practice, this advisory committee meets prior to any ICC Judicial election and undertakes interviews and a detailed assessment of judicial candidates based on the criteria for elections as an ICC judge in Article 36 of the Rome Statute. Although the Advisory Committee's findings are in no way binding on states parties, practice has shown that states parties do follow the recommendations of the committee and although the committee has not as yet found ICC judicial candidates to be explicitly "unqualified for judicial election, the committee has

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[23] Report of the Bureau on the Establishment of an Advisory Committee on nominations of judges of the International Criminal Court, ICC – ASP/10/36/

provided appraisals which enable states to ascertain which candidates are more suited than others. Such an independent mechanism, perhaps with a strengthened and more explicit mandate for assessing Judicial candidates as qualified or not qualified, could be adopted for the ACJHR and this would go some way to ensuring that suitable and qualified candidates are elected.

3.5 Institutional Structure

At the heart of the Malabo Protocol is the proposal to restructure the AU's judicial architecture. In terms of the protocol, the court shall be composed of four organs. The Presidency, the Office of the Prosecutor (0TP). The Registry, and the Defence Office. The amended ACJHR Statute further provides that there shall have three sections: A General Affairs Section; a Human and People's Rights section; and an International Criminal law section.

The Bureau of the Court will be composed of the President and the Vice President who will be elected by the full court to serve for a period of two years with the possibility of being re-elected once.[24] The two perform their functions on a full-time basis and will be required to reside at the seat of the court.[25] The rest of the Judges will perform their functions on a part-time basis,[26] with the AU Assembly reserving the right to determine when all the judges of the court will serve on a full-time basis.[27]

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24 Amended ACJHR Statute, Article 22(1) and (2)

25 Amended ACJHR Statute, Article 22(5)

26 Amended ACJHR Statute, Article 8(4)

27 Amended ACJHR Statute, Article 8(5)

The OTP will be an independent organ of the court[28] composed of a Prosecutor and two Deputy Prosecutors elected by the AU Assembly.[29] It is saddled with the responsibility of investigating and prosecuting the crimes listed in the Protocol.[30] The Prosecutor will serve for a single term of seven years while his/her Deputy may serve up to two terms or four years each.[31] The Prosecutor will have the powers to appoint the staff of the OTP subject to staff roles and regulations laid down by the AU. The remuneration and conditions of service of the Prosecution and the Deputies will be determined by the AU Assembly on the recommendation of the court made through the Executive Council.[32]

The Registry will be comprised of a Registrar and three Assistant Registrars, appointed by the court, and assisted by such other staff as may be necessary for the effective and efficient performance of the functions of the Registry. Like the Prosecutor, the Registrar will serve a single and non-renewable term of seven years. The Assistants may serve for a possible two terms of four years each. This unit will be responsible for providing protective measures and security arrangements, counseling and other appropriate assistance to witnesses and victims who will appear before the court.[33]

The Defence office will be responsible for protecting the rights of the suspects and accused persons and providing support and assistance to any defence counsel appearing before the court. The relevant provision of the Amended ACJHR Statute reflects those in Article 13 of the Statute of the Special Tribunal for Lebanon.

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28 Malabo Protocol, Article 2, Amended ACJHR Statute, Article 22(6)

29 Amended ACJHR Statute, Article 22A(1) and (2)

30 Amended ACJHR Statute, Article 22A(6)

31 Amended ACJHR Statute, Article 22A(3) and (4)

32 Amended ACJHR Statute, Article 22A(10)

33 Amended ACJHR Statute, Article 22B(9) (a)

CHAPTER FOUR

IMMUNITY OF STATE OFFICIALS AND THE PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA

It is apt to state that recent disagreement between the international criminal court (ICC) and African leaders have led to the African Union (AU) to move forward with a new possibility in international criminal law: the proposed African regional criminal court. In 2009, the heads of AU member states asked the AU to consider the creation of an international criminal chamber in the African court on Human and People's Rights, or an African Criminal Court.[1] The draft protocol that resulted extended the court's jurisdiction to include international crimes and thus changed the name of the court to the African Court of Justice and Human Rights (ACJHR).[2] Though the protocol has not yet entered into force at the time of this research, the seriousness of the AU members' state to ensure its emergence is not in doubt.

Flowing from the foregoing, suffice to posit that no other aspect of this new proposed court is as controversial as the inclusion of an immunity clause.[3] The purport of the provision is that it would not allow the office of the prosecutor to indict or prosecute heads of state and senior officials for international crimes while they are in office.[4] The immunity clause states that:

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1 Ademola Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects, and Challenges,' *EU. J INT'L* 24(2013), 933, 933..

2 Abass, supra note 27, at 934

3 Draft Protocol on Amendments to the Protocol on the Statute of the African Court of justice and Human Rights Annex Art. 46A bis, Ex. CV846 (KXX) (May 15, 2014) (hereinafter Draft Protocol)

4 Ibid

> No charges shall be commenced or continued before the court against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity or other senior state officials based on their functions during their tenure in office.

Immunity is defined by the Oxford Advanced Learner's Dictionary as "the state of being protected from something.[5] It should be added that the origin of the word "immunity" could be traced to the Latin Middle-English, which denotes "exemption from liability". In other words, immunity means excepting resistance, exemption, protection or invulnerability. It may also mean any exemption from a duty, liability or service of process; especially such an exemption granted to a public official. Thus, the Concise Law Dictionary put it thus:

> Personal favor granted by law contrary to the general rule. An immunity is a right peculiar to some individual or body; an exemption from some general duty or border; a personal benefit or favor granted by law contrary to eh general rule. Freedom from liability; exemption conferred by any law, from a general rule. (it can also mean) freedom or exemptions from penalty, burden or duty.[6]

It could therefore be gleaned from the foregoing that "immunity from prosecution means withdrawal from prosecution. The power of immunity may be invoked at any title in the course of the trial, but before judgment is delivered in a case.[7] It is in the light of this that Sehabas opined that immunity is "'a defense"[8] under international criminal law. Van Schaack and Slye opinion is not also different from the above.[9] It could therefore be submitted that immunity constitutes a defence to international criminal responsibility for

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5 Oxford Advanced Learner's Dictionary (2018) 776.

6 PR Aiyar 'Concise Law Dictionary: with Legal Maxims, Latin Termš and Words and Phrases' (20I8) 549. 550, *Jashir, Singh v. Vipin Kumar Jaggi* AIR 2001 Se 2734.

7 Aiyar (as above).

8 W. A. Schaba, 'An Introduction to the International Criminal Court' (2007), 231.

9 B. Va. Schaack and R. C. Slye, 'International Criminal Law and its Enforcement: Cases and Materials' (2007) 865-874

individuals accused of international crimes. That immunity is a defence under international law is a different topic of discussion as to whether it is enforceable under international law.

Suffices to state however is that it is a specie of defence commonly raised by state officials when subjected to international criminal proceedings. Having make attempt to clarify the term "immunity", it now become imperative to examine the development of the defence of immunity in international law.

4.1 Developments on the Immunity of State Officials under Customary International Law

Apt to state is that for a principle to attain the status of customary international law, it has to satisfy certain requirements. Customary international law is constituted through "evidence of a general practice accepted as law".[10] It consists of the rules which, as a result of state practice over a period of time, have become accepted as legally binding. A rule of customary law is created by widespread state practice (usus) coupled with *opinio juris,* namely, a belief on the part of the state concerned that international law obliges it, or gives it a right, to act in a particular way.[11] It must not also escape mention that state practice may be derived from

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10 Article 38(1) Statute of the International Court of Justice

11 UK Ministry of Defence, 'The Manual of the Law of Armed Conflict' (2004) 5 Soc 1. 12-1, 12-2; Asylum case (*Colombia v. Peru*) judgment, 20 November 1950, ICJ Reports (1950), 126; *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)* Judgment, 20 February 1969, 1CJ Reports (1969) paras 70-78; case concerning Military and Paramilitary Activities in and Against *Nicaragua, (Nicaragua v. USA)* judgment, 27 June 1986, ICJ Reports (1986) para 77; 183-186; J. E. Ackerman and E. O. Sullivan 'Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia' (2000) 2-3; E. Kwakwa – 'The International Law of Armed Conflict; Personal and Material Fields of application' (1992) 30; T. Maluwa, International Law in Post-Colonial Africa (1995).

official pronouncements of governments to form rules of customary international law. *Opinio juris* on the other hand is an opinion of an existence of law.[12]

The immunity of state officials or persons in their "official capacity.[13] Finds its origin in customary international law.[14] Schabas succinctly posit that "customary international law recognizes certain degrees of immunity from criminal prosecution for head of state and other officials".[15] Thus, it will be right to submit that it exists by virtue of customary international law, and thus, it is chiefly a matter of custom.

Orakhelashvili observed that "historically, the original concept of immunity of high level state officials, Such as heads of state arose from the fact that they represent their states md to sue them was equivalent to suing an independent state.[16] This position has been given credence by Burns who argues that State officials "have with few exceptions been able to avoid responsibility for their conduct by wrapping themselves up in the blanket of state sovereignty.[17]

It must however be noted that the State and its officials are distinct and must not be confused; the two are different because a state can claim its own immunity from jurisdiction and execution from courts of other states. Arguably, the traditional doctrine of immunity from jurisdiction enjoyed by the State and the head of State is based on the doctrine of State

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12 M. du Plessis African Guide to International Criminal Justice (2008)

13 Art. 27 Rome Statute, 1998, uses the term 'official capacity'.

14 B. Stern, 'Immunities for Head of States where do we stand?' in M. Lattimer and P. Sands, 'Justice for Crimes against Humanity' (2003) 73-106.

15 W. A. Schabas, 'Genocide in International Law' (2000) 316; *Attorney-General of Israel v. Adolf Eichman* (1968) 36 ILR 227 (Supreme Court of Israel).

16 Y. Simbeye, 'Immunity and International Criminal Law' (2004). 105-109.

17 P. Burns, 'An International Criminal Tribunal: The Difficult Union of Principle and Politics', *Criminal Law Forums* (1994),341-342.

dignity. This is nation that a sovereign must not degrade the dignity of his nation by submitting to the jurisdiction of another State.[18] Consequently, a head off State is not to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation.[19]

Without prejudice to the foregoing, it must be noted that the rule on the immunity of State officials has witnessed changes in recent times. What seemed to be impossible in the past - that a State official could not be prosecuted before national courts even for international crimes - has now become possible under contemporary international law. The trend is that, State officials are open to prosecution and punishment for their crimes -especially international crimes - before international and even national courts. States are steadily beginning to prosecute their own former State officials for international crimes. In Africa, a reference could be made to Ethiopia, where the Ethiopian authorities prosecuted and sentenced former State official, Mengistu Haile - Mariam, for genocide and crimes against humanity,

4.2 Immunity of State Officials under Conventional International Law

In as much as no specific international treaty could be pinpointed on the doctrine of immunity of State officials, it must not however escape mentioned that immunity is now governed by international law as found in treaties and statutes of international courts and tribunals, For instance, the first international efforts to hold state officials responsible for

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[18] Dissenting opinion of Judge Yves De cara in the Case concerning certain Criminal Proceedings in *Prance (Republic of the Congo v. France),* Provisional Measures, Order of 17 June 2003, ICJ Reports 2003, 123.

[19] *The Schooner Exchange v. McFadden* (1I812) 11 US 137-138; *Mighell v. The Sultan of Johore* (1984) QB 149.

international crimes came after the World War I.[20] This is evidenced by the signing of the Treaty of peace between the Allied and Associated Powers and Germany at Versailles on 28 June 1919 (Versailles Treaty).[21] This was followed by a report presented to the preliminary peace Conference by the commission on Responsibility of Authors of the War and on the enforcement of penalties at Versailles in March 1919.[22] In Chapter II, the Report provided for the responsibility of State officials for international crimes, particularly former Kaiser Wilhelm II, "without distinction of rank, including chiefs of State", Though Kaiser Wilhelm II was never prosecuted.[23]

Thus, after the World War II, state officials from Germany were prosecuted and punished by the Nuremberg Tribunal[24] which was established by the Charter of the International Tribunal, annexed to the London Agreement signed on 8 August 1945.[25] The Charter outlawed state official's defence of immunity for crimes against peace (aggression), crimes against humanity and war crimes.[26] Therefore, it is safe to conclude that immunity of State officials

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20 M. C. Bassioni, 'The time has come for an International Criminal Court' *Indiana International and Comparative Law Review* (1991)(1)2-4.

21 Art. 227 of the Versailles Treaty called for the trial of the former head of State of Germany, Wilhelm II.

22 Conference of Paris 1919; reprinted *American Journal of International Law*, (1920)(14) 95.

23 E. J. Guilherme de Aragao 'Setting Standards for Domestic Prosecutions of Gross Violations of Human Rights through the ICC: International jurisdiction for willful killings in Brazil'. In European Inter-University Centre for Human Rights and Democratisation, the International Criminal Court: Challenges and Prospects, Proceedings of an International Conference organized by the European Inter-University Centre for Human rights and Democratisation (EIUC) (2005) 13-38 15, J. F. Willis Proloque to Nuremberg- The Politics and Diplomacy of Punishing War Criminals of the First World War (1982) 98.

24 M.P. Scharf Balkan Justice: The Story behind the first international crimes trial since Nuremberg (1997) 9-11. On the disposition and outcomes of the Nuremberg Trials, see M. C. Bassiouni Crimes against Humanity in International Law (1992) 586-589.

25 Art I Agreement by the government of the United States of America, the provisional government of the French Republic, The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the Major War Criminals of the European Axis.

26 Art 7. Charter of the International Military Tribunal, 1945.

has been rejected at least since the Nuremberg Trials,[27] though Adolf Hitler and Benito Mussolini were never indicted.

The Charter of the International Military Tribunal was followed by the Allied Control Council Law on the Punishment of Persons Guilty of War, Crime Against Peace and Against Humanity[28] which rejected the defence of immunity attaching to State officials[29] The proclamation by the Supreme Commander for the Allied Powers issued on 10 January 1946 at Tokyo further called for the establishment of an International military Tribunal for the Far East.[30] The Tribunal was established by the Charter of the International Military Tribunal for the Far East (The Tokyo Charter) in 1946.[31] Worthy to note is that the Tokyo Charter outlawed the defence of immunity of State officials in relation to international crimes.[32]

Recognizing the increasing problem of the immunity of State officials before national courts, the International Law Commission (ILC) has embarked on a study on the immunity of state officials from foreign Criminal Jurisdiction. Thus, at its fifty-eight session in 2006, the ILC Considered the topic in its long-term programme of work. At its fifty-ninth session in 2007. the ILC decided to include the topic "Immunity of state officials from foreign criminal

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27 K, Kittichaisaree International Criminal Law (2001), 209.

28 Official Gazette of the Control Council for Germany Berlin, 31 January 1946.

29 Art I1(4) (a) 995) Allied Control Council law, 10 on the Punishment of persons Guilty of War Crimes, crimes against peace and against Humanity.

30 Art 1. Proclamation by the Supreme Commander for the Allied Powers, Tokyo, 19 January 1946.The proclamation was ordered and signed by Douglas MacArthur (the Supreme Commander for the Allied Powers).

31 On the Tokyo Tribunal, see U Kei "Beyond the Judgment of Civilization: The Intellectual legacy of the Japanese War Crimes trials 1946-1949 (2003) 1-336; c. Hasaya et al, The Tokyo War Crimes trial (1986),1-226.

32 Art, 6 Charter of the International Military tribunal for the Far East, 1946.

jurisdiction" in its programme of work and Appointed Roman Kolodkin as special Rapporteur on the question of immunity.[33]

The foregoing section had examined the origin of immunity of state officials in international law, it will thus be pertinent to now examine the scope of immunity of state officials under the proposed African court.

4.3 African Union (AU) Arguments in favour of the Immunity Clause

The AU has vehemently contended that the immunity clause is necessary given the current tumultuous context of continental Africa. The ACJHR is designed to have jurisdiction over all member states of the AU, including those that are not member states of the ICC, thus the immunity clause, it has been submitted will aid increase those non-member states' willingness to submit to the jurisdiction of the ACJHR." The implication of the foregoing is that the individuals in these states would then be held accountable for the crimes under the ACJHR's jurisdiction, even if only after their term in office. Further, it has been established that given the immunity they would have while in office, the government officials of these African states would also be willing to cooperate and comply with the ACJHR,[34] aiding the functions of the court.

Also, the AU argues that the immunity clause will allow government officials to Bens on their responsibilities while in office. The AU illustrated this point by examining the effect that an ICC indictment of Kenya's president, president Uhuru Kenyatta, would have on the

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[33] At its 2940h meeting on 27 July 2007, official Records of the General Assembly sixty-second session, supplement 10 (A 162/10) para 376.

[34] Max Du Plessis, Shambolic, Shamefol and Symbolic: Implication of the African Union's Immunity for African Leaders, institute for Soc. Studies, paper 278 U (Nov. 2014)

nation in 2007.[35] The AU also stated that the Kenyan President was making efforts to bring about peace and reconciliation in the country after post-election violence in 2007.[36]

Indicting the president, the AU argued, would undermine the peace and reconciliation efforts being made and would prevent people implementation of reparation measures.

The AU further argues that the immunity clause prevents the constitutional duties of State officials from being disrupted. The AU sated that in 2007 that Kenya is playing a very specific role in combating terrorism in the world and in East Africa.[37] Hence, if a senior state official were indicted, he or she would be unable to focus on his or her responsibilities to ensure national and regional security. A month following the October 2013, AU declaration in favour of immunity clause, Kenya's Attorney General, Githu Mugai, argued that indicting a sitting head of State poses a threat to security in the region.[38]

The AU has also established that indicting sitting state officials would disrupt the functions of constitutional institutions. Thus, Beyond Kenya, many African countries have suffered from political instability since their independence.[39] These states, it has been opined .e suffered from hostile, military takeovers because of ineffective leadership, thus, for the

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35 African Union Decisions, Declarations, and Resolutions, Decision on Africa's Relationship with the International Criminal Court, 7 May, 2013, African Union Commission.

36 J. J. Wangui, 'African Court comes with Built in Impunity' Inst for War and Peace Reporting (July 26, 2015), https://wpr.not/global-voices/african-court-comes-built-impunity accessed April 22, 2024.

37 See who are Somalia's Al-Shabbab? BBC NEWS (April3, 2015), http//www.bbc.com/news/world-Africa-15336689 Accessed April 20, 2024 (explaining the terrorism group al-shabbab and the problems they cross for East Africa)

38 Lillian Ochieng, 'African Court No substitute for ICC" INST, For War & Peace Reporting (May 14, 2014)' <http:/inpr.nst/global-voices/african-court-n0-substitute-ice> accessed 30 April, 2024.

39 Antony Otien Ong'ayo, 'Political Instability in Africa: Where the Problem lies and Alternative Perspectives' African Diasporg Policy et (Sept.9 2008), <http://www.diaspora-centre.org/docs/politicalinstabili.pdf.> accessed 25 April 2024.

momentum towards good governance to continue, the AU argues for the continuity of leadership and state officials to remain in place.

Also, the immunity clause also preserves the sovereignty of African nations. The sovereignty of nations is based on the concept that states have exclusive jurisdiction over their own territory and population[40] and hence, do not interfere with the exclusive jurisdiction of other states. Thus, it has been argued that though the ICC is not a state, its indictment of State officials can be seen as undue interference of an international entity in the sovereign jurisdiction of African States.

4.4 Objections to the Immunity Clause

Notwithstanding the AU's argument in favour of the immunity clause, strong arguments however exist against including it in the ACJHR amended protocol. For example, Amnesty International wrote an open letter to state its concern with the clause,[41] while others like Steve Arther Lamony, Senior Adviser at coalition for the ICC have written to explain their opposition to it.[42]

The legal argument put forward against the clause is that it violates international court statutes, the AU constitutive Act[43] and even some AŮ member states' national laws. The AU argues that national laws and customary international law allows immunity for siting State

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40 Father Robert Araujo, 'the meaning of International Law', *Fordham Int'l L.J.* (2000) (24) 1477, 1488

41 Betty Waitherero, 'Immunities Clause at the African Court of Justice and Human Rights is outrageous,' *Daily Nation* (Feb. 7 2014) <http://mobile.nation.co.he/blogs/-Heads-of-state-immunities-clause/-1949942/23696/-/format/xhtm/-/7/ahgiz/-/index.html> accessed 10 March 2024.

42 Ibid

43 Constitutive Act of the African Union, Nov. 7, 2000, African Union Commission (Codifying the Framework under which the AU operates)

officials,[44] it must however be recalled that thirty-four AU countries have ratified the Rome Statute of the ICC, where article 27 states that a person's official capacity will not exempt them from criminal responsibility,[45] hence, granting immunity to leaders from prosecution would, at minimum, violate these countries' obligations under the Rome Statute.[46]

Additional policy contention gives impetus to the proposition that the immunity clause should be removed from the ACJHR Amended Protocol.[47] For instance, there is a policy argument against immunity clause to the effect that the ambiguous, broad description of "anybody acting or entitled to act in such capacity, or other senior state officials" within the clause may lead to immunity for any senior government official, irrespective of the gravity of crime he or she commits. Another argument is that the immunity clause denies justice for victims of the serious crimes under the ACJHR's jurisdiction because governmental officials are never indicted for the harms they have caused.[48] Amnesty international has also argues that the immunity clause creates separate and disparate rules for the prosecution of perpetrators of serious crimes in positions of power within African States.[49] Furthermore, a law professor of Florida International University, Charles Jalloh, submit that the immunity

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44 AU Decision and Declaration Decision on Africa's Relationship with the International Criminal Court (ICC) 6-7, Oct, 2013.

45 Rome Statute, Art. 27.

46 'Immunity of Heads of State and Government for International Crimes? The African Union Must Act with Coherence and Political Courage,' *The International Federation for Human Rights* (June 20, 2014). <https://www.fidh.org/en/1560-immunity-of-heads-of-state-and-government-for-international-crimes> accessed 29 April 2024.

47 'AU Summit Decision a Backward Step for International Justice", Amnesty International, (July 1, 2014),<https://www.amnesty.org/en/latest/news/2014/07/au-summit-decision-backward-step-international-justice> accessed 29 April 2024.

48 Ibid

49 Amnesty International open Letter, supra

clause could incentivize African suspects of international crimes to gain positions of power to avoid proceedings against them, either democratically or through more violent means.[50]

He also argues that the immunity clause may incentivize leaders already in power to use any means necessary to maintain their power.[51] It could therefore be asserted that the immunity clause threaten the national and international legitimacy of African leaders and their governments and thus should be discouraged from surfacing in the proposed African Criminal Court.

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50 Charles C, Jalloh. 'Reflections on the Indictment of sitting Heads of State and Government and its Consequences for Peace and Stability and Reconciliation in Africa,' *Afr. J. L. Stud.* (2014) 43(48)7.

51 Ibid

CHAPTER FIVE

CHALLENGES OF PROSECUTING INTERNATIONAL CRIMES IN AFRICA

Africa is the largest regional grouping of countries within the ICC's Assembly of state. The idea of an autonomous apolitical international court attracted overwhelming support on the African continent. In spite of the perceived support of the ICC and its ideals, it became clear that a number of African countries have now turned hostile towards the very institution it has pledged to support. Forerunners of this hostility seem to have come from the African Union (AU), the one organization that represents all the countries on the African continent. Needless to say that this is an organization whose Charter on Human and People's Right very clearly states in the preamble that signatories will "coordinate and intensify their cooperation and efforts to achieve a better life for the people of Africa and promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights and further recognizes that human beings are entitled to national and international protection.

The foregoing principles were given credence in the AU's Constitutive Act as its objectives "encourage international cooperation" and "promote and protect human and people's rights" in accordance with the Charter of the UN and the Universal Declaration of Human Rights (African Union, 2000).[1]

As noted in the foregone chapters, it is worthy to reiterate once more that a number of high-profile, much publicized incidents have precipitated a change from initial support of the ICC to the AU's current hostile stance. The indictment of Sudanese President Omar-

[1] Art. 3 of the Constitutive Act of the African Union.

al-Bashir by the ICC Prosecutor and the African countries perceived[2] refusal to assist in his arrest was followed by the indictment of Kenya's Uhuru Kenyatta and William Ruto who were subsequently elected president and deputy-president respectively. It has been argued that Africans hostility should be seen as a rejection of international justice per se, but rather a rejection of the continuing power plays by the more powerful nations in the international community. The perception remains that in spite of a number of conflicts throughout the world, to date the ICC has focused exclusively on Africa.[3] This has created a wariness amongst African leaders regarding the agenda of the ICC. It has been argued that Africa is being singled out since the ICC cannot risk alienating its biggest financial supporters, and Africa lacks the diplomatic and economic power of other countries.

This argument, it must be submitted, loses traction, especially if one considers the fact that a number of the prosecutions and investigations before the court were due to self-referral by African States. Cases in point here are Uganda, The Democratic Republic of the Congo (DRC) and the Central African Republic.

One of the objectives of the ICC is to end impunity, and the hostility towards the ICC raises concerns regarding the fate of other human rights treaties and international criminal justice in general. One only need look at the relative importance of the African Human Rights Commission, who can only make recommendations and the lack of political will implementing their suggestions. The message of the ICC is that serious international crimes such as genocide, crime against humanity and war crimes cannot be tolerated. This is an important rationale for international criminal justice on intolerance

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2 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 coincide with regional peacebuilding efforts

3 Discussion in DU Plessis et al, 2013.

for impunity should act as deterrent. This requires that the international structures put in place to enforce international jurisdiction remain credible. It is by ending impunity that the ICC assists emerging democracies in strengthening their own laws, thereby supporting respect for human rights. Thus, the continued tension between the AU, the UNSC and the ICC will necessarily fitter down to these emerging democracies. Tensions are most visible in the African context and consequently, it has been argued that the impact of the ICC on global justice will be determined in Africa, where most human rights treaties do not have any means that countries should be compelled to comply with the indictments. The challenge arises when a body is dependent on the cooperation of a government to fulfill its mandate, yet it is that same government that stands to be investigated. Without the political will of its state parties, the ICC cannot function effectively. It frequently happens that those accused of atrocities in civil war end up as leaders in the post-conflict government. Some African countries blatantly disregard for the actions taken by the ICC does not bode well for its credibility.

The foregoing necessarily raises the important question: Does Africa have an alternative solution? This could be answered in the affirmative by quickly pinpointing the proposed criminal Chamber of the African court on human and people's right. Then, the next question that arise from this is, what are the likely challenges of utilizing the African court in prosecuting international crimes in Africa, to this, the next pages are holistically dedicated.

5.1 The Complementarity Principle of the Proposed Criminal Chamber of the African Court

The first port of call here is Article 46 of the new protocol which succinctly provides for the complementarity principle. The Article states that "the jurisdiction of the court shall

he complementary to that of the National Courts, and to the courts of the Regional Economic Communities (REC) where specifically provided for by the communities.

By implication, the African court can accept a case not only after the national court of an indicted person has proved "unwilling" or "unable" to prosecute, but also after an REC court has also failed to prosecute that person. Thus, instead of the scheme of complementarity under the Rome Statute, which makes a case admissible once a national court has failed. The twin criteria, admissibility of cases to the African Court demands the double failure" of national courts and REC's under the same twin standard.

The implication of the doctrine of complementarity operated by the ICC makes it the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.[4] This is unlike the intentional criminal tribunal for Yugoslavia 1CTY),[5] International criminal Tribunal for Rwanda (ICTR)[6] and the Special Court for Sierra Leone (SCSL),[7] which has primacy over national jurisdictions on the prosecution of international crimes. The complementarity principle recognized as the hallmarks of the Rome Statute is not peculiar to the treaty as its origin predates negotiations leading to the adoption of the Rome Statute.[8] Thus, the ICC is expected to complement and support the prosecution of international crimes by national or regional jurisdictions.[9]

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4 Arts 1 and 17 Rome Statute, M. Benzing 'The complementarity regime of the International Criminal Court, International Criminal Justice between states Sovereignty and the Fight against impunity' *Max Planch Yearbook of United Nations Law,* (2003),591, 592.

5 UNSC Res 827 of 25 May 1993, establishing the International Criminal Tribunal for the Former Yugoslavia.

6 UNSC Res 955 of 8 November 1994 establishing the International Criminal Tribunal for Rwanda.

7 UNSC Res 1315 of 14 August 2000 establishing Special Court for Sierra Leone.

8 M Ei-Zeidy 'The Principle of complementarity: A new machinery to implement international Criminal Law' *Michigan Journal of International Law,* (2003) (23)869, 896.

9 M. Newton Comparative Complementarity: Domestic Jurisdiction consistent with the Rome Statute of the International Criminal Court' *Military Law Review,* (2001) 20(26)167

The principle of complementarity is based not only on respect for the primary jurisdiction of States, but also on practical considerations of efficiency and effectiveness, since states will generally have the best access to evidence, witnesses and resources to carryout proceedings.[10] Worthy to note is that before the adoption of the Rome Statute in 1998, some international treaties had indirectly made reference to the principle of complementarity by encouraging prosecution at the national level. These treaties include the Geneva Convention for the Amelioration of the Condition of the wounded and sick in Armed Forces in the Field.[11] The International Convention on the Suppression of the Punishment of the crime of Apartheid,[12] and the convention on the prevention and punishment of the crime of Genocide.[13]

The current provision of the complementarity principle in the Rome Statute has its origin in the 1994 International Law Commission (ILC) Draft Statute,[14] generally seen as the cornerstone for the construction of the notion of complementarity as currently provided in the Rome Statute. In short, the 1994 ILC Draft provides in its preamble that the ICC is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.[15] The ILC Draft also proposed circumstances under which an ICC investigation or prosecution may be

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10 R. Cryer, et al 'An Introduction to International Criminal Law and Procedure' (2007) 127

11 Art 49 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, entered into force on 21 October, 1950.

12 Art 4(b) international Convention on the Suppression and Punishment of the Crime of Apartheid UN Doc A/9030 (1974) entered into force on July, 1976.

13 Arts 5 and 6 Convention on the prevention and punishment of the crimes of Genocide, entered into force on 12 January, 1951.

14 The Draft Statute for an international Criminal Court was adopted by the ILC at the forty-sixth session. In 1994, and was submitted to the General Assembly as a part of the ILC's Report covering the work of that session (1994) ILC Draft).

15 Para 3 1994 ILC Draft.

inadmissible. The complementarity principle went through several changes during the preparatory committee (precom) meetings convened by the UN.[16]

However, some of the thorny issues surrounding the complementarity principle were agreed upon before the Rome Conference. For example, states were interested in the relationship between the proposed court and national courts and were hesitant to accept any compromise proposal without knowing the legal relationship between the two. Thus, according to John Holmes, the uniqueness of the legislative history concerning the complementarity regime is that most of the issues were largely resolved in the preparatory committee prior to the Rome Conference.[17] This shows that States were actually interested in how the ICC would affect their sovereignty and also wanted to ensure that the ICC would not take over genuine efforts by national judicial institutions to make their citizens accountable for crimes committed in their jurisdiction. Furthermore, with regard to the complementarity principle, the Chief Prosecutor of the ICC stated that the effectiveness of the international criminal court should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this court, as a consequence of the regular functioning of National institutions, would be a major success.[18] This is generally seen as a core activity of the ICC to hold their nationals accountable and to offer help and assistance where

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16 The ad hoc committee that drafted the ILC Draft in 1994 was replaced by the preparatory committee in 1996..

17 J. Holmes "Principle of Complementarity"

18 ICC Statement made by Mr. Luis Moreno Ocampo during the ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003; <http://www.jcc-gpi.int.NR/rdenlyres/D7522226-264A-436885E32673648134896/143589/143585/030616 -moreno-camp-english.pdf> accessed 26 April 2024).

necessary to achieve the desired goal of complementarity and prosecution at national and regional level.[19]

Positive complementarity has been defined by the OTP as a proactive policy of cooperation aimed at promoting national proceedings.[20] It has been regarded as a managerial concept that governs the relationship between the court and domestic jurisdictions on the basis of three cardinal principles: the idea of a shared burden of responsibility; the management of effective investigations and prosecutions; and the two-pronged nature of the cooperation regime. It is a process which actively encourage investigation and prosecution of international crimes within the court's jurisdiction by national jurisdiction. State can do so where there is reason to believe that such states may be able or willing to undertake genuine investigations and prosecutions...[21]

On the other hand, the Assembly of States Parties (ASP) Report of the Bureau on Complementarity refers to positive complementarity as:[22]

> All activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for states to assist each other on a voluntary basis.

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19 ICC Prosecutorial strategy 2009: 2012, 1 February 2010, <http://www.icc.int/NR/rdonlyres/66A8DcDc-3650-4514-AA62-D229101128F65/281506/0TTPPreosecutorialStrategy20092013pdf> accessed 30 April 2024.

20 C. Stahn, Complementarity: A Tale of two nations (2008) 19 Criminal Law Forum, 87, 1 13.

21 W. Burke-White, "Implementing a Policy of Positive complementarity in the Rome System of Justice *Criminal Law Forum,* (2008) 59(12)19

22 Para 16 Report of the Bureau on stocking. Complementarity, <http://www.icc-cpi.int/iccdocs/asp-dois- IASP8R/ICC-ASP-8-51-ENG-pdf> accessed 15 April 2024.

The definition has been criticized as limiting the role of the ICC as an institution. The intention is for states to reduce the amount of money spent on the ICC.[23] This is because the ASP had initially envisaged a role for the ICC in the application of positive complementarity in its activities.

Positive complementarity is an important tool in the fight against impunity and should not be ignored for several reasons. The ICC can only try a few of those who take responsibility for crimes of international concern. If there are no effective national judicial mechanisms, there will be serious issues of impunity which could undermine any success recorded by the ICC. National and regional judicial institutions most often than not also offer the best places to try these crimes, as they would serve as a deterrent to others and give victims an opportunity to participate and closely follow the proceedings at the national level.

Furthermore, positive complementarity will ensure the development of national judicial systems in the prosecution of international crimes. With regard to Article 46 Malabo Protocol establishing the complementarity principle for the proposed criminal jurisdiction of the Africa Court, it must be asserted that this provision is not only problematic but also ill-advised, and ill-informed. To start with is the fact that many states in Africa belong to more than one Regional Economic Communities (REC). For instance, the majority of ECOWAS member states are also members of CENSAD.[24] It should also be posited that there is a colossal overlap between the membership of

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23 M. Wierda, 'Stocktaking: Complementarity' International Centre for Transitional Justice Briefing Paper,' May 2010.

24 The Community of Sahel-Saharan States established on 14 February, 1998 with its seat in Libya see <www.africa-union.org/root/au/RECs/censad.htm> accessed 10 April 2024.

COMESA[25] and that of SADC[26] Therefore, the question is which of the REC's court should be given consideration for the purpose of the complementarity principle where the national state of an accused person holds multiple members. Added to the aforementioned challenge is the fact that wile national courts are accessible to individuals, some regional courts are not automatically accessible to individuals.

For instance, it is trite that the African Court on Human and People's Rights can only admit a case directly from an individual if the respondent state has deposed to the court's jurisdiction under article 34(6) of the Protocol establishing the court. Thus, in *Michelot Yogogombaye v, the Republic of Senegal*,[27] the court decline jurisdiction chiefly on this basis. Worthy to also note is that community courts, by their very nature, do not deal with criminal responsibility of individuals. For instance, the contentious jurisdiction of the ECOWAS Court of Justice, for instance, concerns only violations of human rights of ECOWAS citizens. The ultimate question therefore is what is the rationale behind the position that a court not accessible to individuals, or which cannot determine the criminal responsibility of individuals, be asked to make an initial determination of such a nature before their member states national court has recourse to the African court?

A deeper probe of Article 46 provision on complementarity also shows another serious lacuna relating to the requirement of "inability to prosecute." The formula adopted in the Rome Statute is that there must be "genuine" inability to prosecute. The word "genuine" serves to prevent a trivialization of that criterion by states. However, the formula adopted by the draft protocol dispenses with "genuineness". The non-qualification of "inability to

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25 The Common Market for Eastern and Southern Africa was established in December 1994, with its headquarters in Lusaka, Zambia, see <http:/about.comssa.int/index.php?optim=com-Content&view=articlerd=75-hamod=106> accessed 12 April 2024.

26 The South African Development Community was established on 1 April, 1980, and has its seat in Gaborone, Botswana.

27 Ibid

prosecute'" dangerously lowers the evidentiary standard of "inability" and may seriously undermine that criterion. It implies that African States will easily avoid prosecuting their nations and thus offload such cases on to the African Court, thereby unduly burdening the court and making it a court of first rather than last resort.

Furthermore, a critical perusal of the Malabo Protocol shows that a glaring omission in the protocol is that no where in the complementarity provisions is the ICC or Rome Statute mentioned. Thus, according to DU Plessis:

> It is unfathomable that the draft protocol nowhere mentions the ICC, Either this is a sign that the AU hopes its members will side stop the ICC, or it is a case of irresponsible treaty making/forcing signatories to become party to an instrument that willfully or negligently ignores the complicated relationship that will exist for states parties to the Rome Statute.[28]

Garth Abraham further contended that, the only reasonable interpretation of this exclusion can be that it is a conscious snub to the ICC by the AU.[29] On the other hand, Don Deya, director of PALU, the organization that was tasked with drafting the Malabo Protocol, however appeared adamant that it is not a deliberate snub, and that throughout the process it has been clear that the ACJHR intends to cooperate with and complement the ICC.[30] He proudly points to Article 46L, which allows the court to 'seek the cooperation or assistance of... international courts,... and may thereby conclude Agreements for that purpose and therefore suggests that the ACJHR could sign a memorandum of understanding with the ICC at the earliest opportunity that would set out how the two institutions will work together.

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28 D. U. Plessis, M. Implications of the AU decision to give the African Court Jurisdiction over International crimespage <https://issafricas3-amazonaws.com..site/uploads/paper-235 Africacourtpdf > accessed 30 April, 2024.

29 Abraham G. 'Africa's Evolving Continental Court Structures: At the Crossroads?' 12, <http://www,saiia.org,za/occassional-papers/669-africa-evolving-continental-court-structures-at-the-croassroad > accessed 15 April 2024.

30 Deya D (Personal Communication, August 26, 2015).

Another pertinent question that could be asked is whether complementarity under the Pome Statute extends to regional courts, such as the ACJHR, or is it intended to apply only to national courts.[31] If the latter were true, it would create serious tension between the two institutions, as the ICC could refuse to accept that an individual they wished to try could be tried by the ACJHR instead. The implication of the foregoing is that any state that is a party to the founding treaties of both the AU and their ICC could find itself in a position where it risks breaching obligations under one treaty by complying with the other treaty. However, it could be contended that in the spirit of 'positive' complementarity, the ICC will not find it cumbersome to allow, encourage and support an added layer of regional courts, even if the Assembly of States parties to the Rome Statute to amend the wording of the Rome Statute accordingly. This would of course be subject to the condition that the purpose of the said regional court was not seemingly to shield certain individuals from prosecution – an accusation that the ACJHR may face due to the addition of immunity provision. From the foregoing, it is apt to posit that cooperation between the ICC and the ACIHR would undoubtedly benefit both institutions and the African continent greatly. Such will give room for a shared responsibility of ending impunity in Africa, as the case load will be shared, with the ICC focusing on the highest-level perpetrators of core international crimes, while the ACJHR concentrated on perpetrators of crimes not under the jurisdiction of the ICC, or mid-level perpetrators of the core crimes. Ensuring the foreign, could also be a good opportunity Tor the lCC to re-legitimse its image in Africa and re-establish the strong relationship it once had with the AU. Worthy to note also, is that, it is of paramount interest to the sake of justice that the ACJHR does not hinder the work of the ICC by prioritizing political grandstanding over securing justice for victims. If this were to happen, the court would

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31 Murungu, C. 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' *JICL* (2011) (9)1067, 1081..

instantly lose its credibility among both the international community and a significant portion of Africans.

Without prejudice to the foregoing, it is important to establish that the AU has also made efforts to work with the ICC on the idea of regional complementarity. For example, Kenya has submitted a proposed amendment to the Rome Statute to the Working Group on Amendments with respect to the preamble of the Rome Statute. At present, the preamble states, “Emphasising that the international criminal court established under the Statute shall be complementary to national criminal jurisdiction."[32] It was Kenya's proposal that it be amended to read, "emphasizing that the International Criminal Court established under the statute shall be complementary to national and regional criminal jurisdiction.[33] The Kenya delegates said that regional complementarity "is not a way to oust the ICC. It is the opposite. The regional jurisdiction gets just the first bite. National jurisdiction may be difficult to exercise. Rather than spring-boarding (from nation to international jurisdictions) the ICC should be what it was meant to be, the last resort." The delegation of Kenya also identified that the proposal to include regional courts would "allow judicial proceedings to take place closer to the location where the alleged crimes had been committed.[34] Thus, through this lens, regional complementarity is a compelling concept. At present, the status of the amendment is pending. Interestingly, according to an attendee of the Working Group on Amendments, "the meetings left the impression that states were quite open to the substance of the proposed amendment but concerned that the change in the preamble might require maybe more complicated

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32 The Rome Statute of the International Criminal Court (1998) available at <http://legal.un.org/licc/statute/99coverpreamble.html> accessed 29 April 2024.

33 African Union with drawal Strategy, Draft 2 version 12.01, p.9, available at <http://www.hrw.org/sites/defaut/files/supporting-resources/icc-withdrawal-strategy-jan-2017> accessed 29 April 2024.

34 International Criminal Court Assembly of States parties, ‘Report of the working Group on Amendments’ Fourteenth session (18-26 November 2015) ICC -ASP/14/34, para E, p.3.

amendments in addition.[35] Analogously, the use of regional criminal law mechanisms might result in a similar outcome.

The contemporary standard is one of judicial accountability and punishment for international crimes. As such, states withdrawing from the Rome Statute and signing the ACJHR becomes an important concern jurisdictional gaps that may result in impunity ought to be avoided. After all, the most fundamental rule of law principle dictates that no individual and no state is above the law. It should even be noted, that, withdrawing from the Rome Statute and being bound by the ACJHR, do not stop the United Nations Security Council from referring cases dealing with head of states to the ICC or any other individual for that matter. However, with an additional level of complementarity jurisdiction to consider proving an inability and/or unwillingness to prosecute will be more slow and complex than it already is.[36]

Thus, it should be noted also, that while the substance of the proposed amendment may be agreeable, process restricts behaviour and action; a limiting factor. Treating the preamble to the Rome Statute like a delicate woven thread that might unravel at the slightest fug of a statutory change at the ICC.

In short, it is submitted without no iota of doubt that closing the door on a potential mechanism for survivors to see justice done could deny access to many; punishing a greater number of severe crimes at a more local level ought to be encouraged to foster greater transparency with those most affected.

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35 Jutta F. Bertram-Nothnagel, 'A Seed for World Peace Growing in Africa: The Kampala Amendments on the crime of Aggression and the Monsoon of Malabo,' In the International Criminal Court of Africa: One Decade on, Evelyn A, Ankumah (ed), (Intersentia; 2016), 369.

36 F. Megret and M. Samson, 'Holding the line on complementarity in Libya: the case for Tolerated flawed Domestic Trials,' *Journal of International Criminal Justice* (2013)(11)571-589.

Another heartwarming question to consider is the implications of competing obligations of states parties to both Rome Statute and the ACJHR. Since a key aspect of complementarity is the integration of the Rome Statute into domestic law, it remains unclear how double signatories might implement competing obligations (e.g. head of state immunity: potential conflicts with respect to the definition of crimes such as terrorism and unconstitutional change of government).[37] This is an important point, since the foundation of South Africa's initial withdrawal from the Rome Statute stemmed from their conflicting obligations to the AU and the ICC with respect to the (non) arrest of Al-Bashir.[38] The decision was made to uphold South Africa's commitment to the AU: this thus raises suspicion about the nature of competing obligations and African regional political interests and dynamics. The predicted incompatibility between the Malabo protocol and the Rome Statute in key areas raise questions about competing obligations in the international context as well as the hierarchy/supremacy of competing international judicial institutions and obligations.

In 2016, at the peak of the "ICC with drawal movement" initiated by South Africa, Burundi, and the Gambia to withdraw from the Rome Statute (predictably) should have followed suit, never did (e.g. Kenya, Uganda, Namibia), This is further confused by the fact that the Gambia has reversed its decision by deciding to stay in the ICC, and South Africa halting their withdrawal. Thus, Burundi remains the sole dissenter for transparent reasons.[39]

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37 Malabo Protocol, Article 28G, 28 E.

38 Franziska Boehme, 'We chose Africa' South Africa and the Regional Politics of Cooperation with the International Criminal Court' *International Journal of Transitional Justice* (2016).

39 "Burundi on Regressive Path following ICC Withdrawal Vote", Coalition for the International Criminal Court" 12 October 2016, available at <http://www.iccnow.org/documents/CCCPR-BurundilCCwithdrawal oct2016.pdf> accessed 29 April 2024.

It should be noted that Burundi withdrawal was not rooted in an appropriate justification by any standard, it was purely based on self-interest and cowardice. Thus, "Brundi civil society is clear that their government is withdrawing from democracy, human rights and the rule of law, not the ICC".

Thus, the foregoing demonstrates that Africa concerns with the ICC outside of Burundi are not generally rooted in a desire to forego international legal obligation, or the rule of law, but are instead a manifestation of unresolved dispute. This is further reflected in the soft language enacted throughout the AU's most recent proposed withdrawal strategy. It is however important to note that these disagreements are likely better understood by giving consideration to colonial histories and deeply embedded asymmetrical power relations. Such imbalances ultimately shape a mutually constructed skepticism on the part of both "Africa and the West", which will continue to make cooperation and trust difficult in the absence of genuine deliberation.[40]

5.2 Ethnic Tensions

The challenge of prosecuting perpetrators of evil in Africa is complicated by decades of mutual distrust among the ethnic groups that comprise the nation. Deeply rooted distrust and reciprocal hatred among the ethnic groups continues to sustain the prevailing crede that emphasizes ethnic identity above loyalty to the nation.[41] In short, every government action is viewed through the lens of ethnicity, thus making it difficult, if not impossible for citizens to fairly and objectively evaluate important issues like economic policies and programs, political initiative, and even the administration of justice.[42] Depending on the

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40 Ibid at 38.

41 Alemante G. Selessie, 'Ethnic Identity and Constitutional Design for Africa,' *STAN. J. Int' L. J.* (1992) (12),29

42 Okechukwu, Oko, 'Partition or Perish: Restoring Social Equilibrium in Nigeria through Reconfiguration,' *IND. INT'L & COM. L. Rev.* (1998)(8)319.

background of the defendant's international criminal prosecution is either acclaimed as an effort to promote accountability or as an attempt to silence a particular ethnic group by disabling their leaders.[43] The objects of criminal prosecution lament their loss of power and accuse prosecutors of doing the bidding of their political opponents with the blessing or backing of the international community. For instance, the ICTR's alleged failure to issue indictments against the Totsis despite allegations of abuse against the Totsis lead many in Rwanda to view the tribunal as a vehicle to persecute. .. Hutus, rather than promote a return to impartial rule of law.[44]

Claims of bias, even though unsubstantiated for the most part, have historical resonance because most African countries are fractured societies marked by deep-seated ethnic animosities, Prosecuting authorities face an avalanche of negative sentiments from citizens who either impute improper motives or impugn their integrity. Criminal prosecutions conducted amidst accusations and counter-accusations of bias generate public dissatisfaction, fuel citizens' anger, and ultimately diminish the likelihood of reconciliation.

5.3 Attitude Towards Litigation

Africans generally dislike litigation and typically go to court as the last resort after exhausting every available means of conflict resolution. Distaste for litigation is both cultural and experiential. It is generally understood among the citizens that good members of the community need not go to court to resolve their differences: they typically worn out their differences on their own or with the support of the community's

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43 Kingsley Moghalu, 'Reconciling Fractured Societies: An African Perspectives on the Role of Judicial Prosecutions,' From Sovereign Impunity to International Accountability. The Search for Justice in A World of States 197, 217-18 (Ramesh Thakur & Peter Malcon tents eds. 2004).

44 Adam Smith, 'Transitional Justice in Iraqi: The Iraqi Special Tribunal and the Future of a Nation,' *Int'l AFF*. (2005) 5(6)14.

dispute resolution machinery. The few cases that make it to trial leave bitter memories in the minds of the parties. Trials are adversarial and parties, in an attempt to bolster their case, trade accusations that reignite old hostilities. The exchange of unpleasantries in court severs whatever is left of the bonds of friendship between the parties, making it almost impossible for them to reestablish any relationship.

Trials in the context of post conflict present unique problems and challenges for the parties and, more. So, for the international criminal tribunal that has as one of its mandates the reconciliation of the parties. Parties who come from the same community, or who are neighbours or old friends, find it difficult to reestablish social harmony after a rancorous and protracted trial before a foreign tribunal.[45] Publicly trading accusation in a court foreclose a prospects of reestablishing peaceful relationship among the parties.

A way out may be to resort to the traditional justice system, which is less confrontational and more conducive for dealing with conflicts in Africa societies.

5.4 The Capacity of the Court to Deliver On Its Mandate

It will not be blown out of proportion to assert to that the proposal to expand the jurisdiction of the ACJHR to cover international crimes is an overly ambitious one. Serious doubts thus, exist as to whether the court envisaged in the Malabo Protocol will have the capacity to deliver on its mandate. Firstly, the jurisdiction of the court will be so wide such that it would be considerably difficult for the court to effectively and efficiently discharge its mandate. Also tied to the question of the wide breadth of jurisdiction will be the difficulty of finding judges, prosecutors, investigators and defence counsel with expertise and competence on all matters covered by the court's

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[45] Jackson, N, Maogoto, 'The International Tribunal for Rwanda: A poor umbrella in the Rain Initial Pitfalls and Brighter Prospects.' *NORDICJ INT'L L*. (2004)(73)187, 205

jurisdiction. It is also doubtful whether the International criminal law section of the court will have the requisite number of judges to preside over the various stages of cases. The court's ability to serve as a deterrence to perpetration of international crimes on the continent will be undermined by the immunity clause.

Thus, one of the lucid challenge of expanding the jurisdiction of the ACJHR to cover crimes under international law (and other transnational and organized crimes) is that it will overload the court and thus undermine its capacity to deliver on its mandate. This is so in the light of the fact that this will be the first regional or international court to have such an expensive jurisdiction. As outlined earlier, the court will have jurisdiction over general matters of international law, violations of human rights and crimes under international law.

Further, it should be noted that the Malabo Protocol expands the criminal jurisdiction of the court beyond the core crimes criminalized by the Rome Statute. Hence, it will have the mandate to interpret and apply a long list of regional and international treaties and instruments.

It is unrealistic to imagine that the court will effectively deliver on all these fronts. The ability of any court to handle such a wide range of issues should be of immense concern to a passionate observer. This could better be appreciated if taking into consideration that the court will have total of 16 judges, with only five judges dedicated to the General Affairs sections, another five to the Human Rights section, and the last six to the international criminal law section. It is manifestly obvious that these numbers are undoubtedly insufficient for the proper functioning of the court.

If compared with the ICC, one will discovered that the ICC only conducts investigations into three core international crimes provided for in the Amended ACJHR Statute. In

short, despite its restricted jurisdictional Scope, the ICC still has huge needs in terms of expertise resources and capacity. For example, the ICC has four organs, each with a number of sub-divisions (for example, the office of the Prosecutor has three sub-divisions) and the registry which has numerous supporting officers and sections, undertaking all of the support functions for the OPT, as well as these functions relevant to witness protection, outreach and communication, victims and defence representative, amongst many more. All of these takes place with vast human and financial resources. Despite this, the ICC in 2016; according to its budget could only carry out four or five active investigations and conduct hearings into four cases.[46] A lot of thought will therefore need to be given to the expertise resources and capacity required by the ACJHR to meet the requirement of its much increased jurisdictional scope and to meet the demands that such an increased jurisdictional Scope will place upon it. Article 22(4) of the Amended ACJHR statute envisages that there are situations in which the judges of the ACJHR will sit as a full court. The situations are not specified, and will have to be clarified in the courts Rules of Procedure. However, given that the judges of the court will be appointed on the basis of their expertise in only one of the three thematic areas covered in the jurisdiction of the court, it seems that the judges of the court will in certain instances sit to adjudicate over issues that they have little or no expertise.

The judges attached to the international criminal section will also encounter additional challenges. Only six judges with competence in international criminal law will be appointed to the international criminal law section of the court. In reality, it will be an uphill task to find a blend of judges with competence and experience in all the 14 crimes covered under the criminal jurisdiction of the court. Some of the crimes falling under the

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46 Proposed Programmer Budget for 2016 of the International Criminal Court ICC - ASP/141, available at <http://www:icc cpi.int/iccdos/ dos/ASP14/-> (Accessed 26 April, 2024).

jurisdiction of the court require specialized knowledge not only on the part of the judges but also on the part of investigators. It would appear that huge resources will have to be dedicated to the training of the judges and investigators on areas that required specialized knowledge and competence.

5.5 Effect of the Immunity Clause

The immunity clause is considered to be the most controversial provision in the Amended ACJHR statute. This relevant provision reads as follows:[47]

> No charges shall be commenced or continued before the court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.

The foregoing provision was approved despite the fact that during discussions delegation at the Ministerial meeting raised concerned regarding its conformity with international law, domestic law of member states and jurisprudence.[48] Delegation also underlined the challenges inherent in widening immunities, the lack of a precise definition of senior state official and the difficulty in providing an exhaustive list of persons who should be included in the category of senior state officials.

Under customary international law, serving Heads of States and government and Senior state officials enjoy immunity from criminal jurisdiction of a third state. However, there are exceptions to this general rule including that Heads of State and Government and senior state officials do not necessarily enjoy immunity from criminal proceedings initiated before international criminal courts such as the ACJHR.

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47 Amended ACJHR, Article 46A, 615

48 The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on justice and Legal Affairs, Malabo, Equatorial Guinea, 20-24 June 20 14 ED, CL./846 (v = xxx), para 25.

Other international criminal or hybrid courts have not provided immunity for heads of states or senior officials and this reflected in their statutes. The special court for Sierra Leone, in relation to Charles Taylor, for instance, held that "the principle seems now established that the sovereign equality of states does not prevent a Head of State from being prosecuted before an international criminal tribunal or court.[49]

Added to the above, the practice of the ACHJR will also deviate from the established practice of international criminal courts including the international criminal tribunal for the Former Yugoslavia (ICTY) and the ICTR

Apt to posit is that the immunity clause will have serious implications for the fight against impunity for international crimes in Africa and for the legitimacy and credibility of the ACJHR. The clause will effectively prevent the investigation and prosecution of serving Heads of States and Government who use their position or authority to order, plan, finance or otherwise mastermind crimes against humanity, war crimes or acts of genocide.

Experience has shown that on the African continent, as obtainable elsewhere, it is those 1n positions of power who typically abuse their authority and state resources to commit international crime. The immunity clause essentially promotes and strengthens the culture of impunity that is already entrenched in most African countries. It rolls back the gains that have already been realized in the fight against impunity in some African countries.

It is also instructed that the immunity clause is at odds with and incompatible with the objectives and organizing principles of the AU. A key objective of the AU is the

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[49] Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor Case No. SCSL - 2003 - 01-1, Appeals Chambers, Decision on Immunity from Jurisdiction (31 May 2004).

promotion and production of human right as contained in the African Charter and other human rights instrument. Article 4(h) of the AU Constitutive Act grants the AU the right to intervene if war crimes, crimes against humanity and acts of genocide are being committed in a member state. Article 4(m) requires the AU to respect human rights while article 4(0) requires it to ensure the sanctity of human life and to reject impunity. The immunity clause undermines these objectives and principles.

For the ACJHR, the immunity clause will pose serious risks to its integrity, legitimacy and credibility. The court will lack the capacity to address the scourge of war genocide that have affected the continent for decades now, As such, and contrary to what is stated in the preamble of the Malabo Protocol, the court will neither complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and people's rights now will it ensure accountability for these violations wherever they occur. Ultimately, the court will struggle to enjoy or harness the confidence and support of the African population and especially of the victims of gross violations of human rights.

Double Financial Burden

Pertinent to posit is that the ACJHR is a treaty body established within the framework of the AU. In this regard, the AU Assembly will be responsible for a number of activities related to the operationalization and functioning of the court, including: appointment of the judges, the prosecutor, and Deputy Prosecutors of the court, determining when all the judges of the court will perform their functions on a full-time basis.[50]

[50] Amended ACJHR Statute, Article 8(5).

Determining the salaries and conditions of service of the judges, and members and staff of the OTP and the Registry,[51] inserting, it necessary, additional crimes into the jurisdiction of the court,[52] establishing the Trust Fund,[53] receiving the annual activity reports of the court,[54] and monitoring state compliance with the judgments of the court.[55]

For the AU, the most obvious implication of the decision to expand the jurisdiction the ACJHR relates to its financial ability to effectively operationalize and sustain the court. As i highlighted in preceding chapters, on two separate Occasions during the process of drafting the Malabo Protocol the AU commission was requested to prepare a study on the financial and structural implications of expanding the jurisdiction of the ACJHR.[56] It is therefore apparent that even the AU itself is concerned about the financial implications of operationalizing the ACJHR. Indeed, a key reason for the earlier decision to merge the African Human Rights Court and the African Court of Justice was the realization by the AU that it would not have the requisite resources to service two separate courts on the continent.

More recently, in January 2015, at its 26h Ordinary session, the AU Executive Council while emphasizing the need to "expeditiously operationalize" the ACJHR also underscored the need to ensure predictable and sustainable funding".[57] The AU Executives also decided to establish a "special fund" and to convene a resource

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51 Amended ACJHR Statute, Article 11A(10) and 22B(10).

52 Amended ACJHR Statute, Article 28A(2\5).

53 S.3 Amended ACJHR Statute, Article 46(V).

54 S4 Amended ACJHR Statute, Article 57

55 Amended ACJHR Statute, Article 46(4) and (5).

56 Decision on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, Assembly/AU/Dec.427 (XIX) para.2.

57 Decision on the Progress Report of the Commission on the Implication of Previous Decision on the International Criminal Court (ICC), Ex. C/Dec.868 (xxvi) para XII

mobilization conference to raise funds that will enable the operations of the ACJHR to be initiated and sustained.[58]

These twin efforts have the possibility of raising the resources to start off the operations of the court, but it doubtful whether they are sustainable sources of funding. The ideal source of funding for the court should be the state parties themselves and/or the AU. Yet, the AU has traditionally struggled to adequately finance the operations of its own institutions, including human rights treaty bodies.

The African Commission and the African Court have continually raised concerns about this meager resources allocated to them by the AU. Since its establishment, the African Commission has suffered from a perennial lack of resources, For about two decades, the budget of the African Commission was subsumed under that of the Political Affairs Department of the AU Commission. In July 2007, the Executive Council directed the African Commission to begin presenting and defending its own budget before the Permanent Representatives' Committee (PRC).[59] Thus, in 2008, the African Commission received USD6 million, marking a significant boost from the USDI.2 million it had received in 2007.[60] Hence, the commission's budget had increased to USD 7.9 million by 2011,[61] but this dropped to USD 6.3 million in 2014.[62] The USD6.3 million allocated to the African Commission in 2014 it should be noted did not include funds for program activities.[63] Similarly, the AU did not allocate any funds for programme activities in its

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58 Ibid note 51

59 Decision on the 21 Activity Report of the African Commission on Human and People's Rights, Ex-CL/Dec. 344(X), para 2(iv)

60 23r Activity Report of the African Commission on Human and People's Rights, Ex-CI/Dec. 344(x),para 2(iv). Commission on human and People's Rights, para 246.

61 Combined 32"d and 33rd Activity Report of the African Commission on human and People's Rights, Ex-CV782 (xxii)) Rev. 2. Para. 58.

62 37th Activity Report of the African Commission on human and People's Rights, Para. 48.

63 Ibid, para 49

2015 budget allocation to the Commission.[64] The implication of the foregoing is that for the year 2014 and 2015, the African Commission relied fully on donor funding to execute its program activities,[65] and as observed by the Commission in its 37th Activity Report, it is submitted that "such a situation cannot be right.[66]

Apt to state is that although the African Human Rights Court is better resourced than the African Commission, the funding it ordinarily receives matches neither the task it is entrusted nor its resources requirements. The 2014 budget of the African Human Rights Court, for instance, was just under USD 9 million, which is comprised of USD 6.6m from state contributions and USD 2.2 million from partner funds.[67] In short, the funding it receives pales in comparison to the funding allocated to other regional human rights court, especially the European Court of Human Rights (ECHR). For instance, the budget of the ECHR stood at 67.650,400 Euros in 2014.[68] In the same year, the ECHR received additional voluntary funding of more than 2,000,000 Euros from member States.[69]

It should be recalled that in 2003, the AU Ministerial Conference on Human Rights in Africa acknowledged that the continent's human rights institutions are not adequately funded or resources.[70] Thus, the conference did not fail to call upon the AU policy organs to establish a voluntary human rights fund which would be used to provide additional finances to the human rights institutions.

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64 Ibid

65 Ibid

66 Ibid

67 Annual Report of the African Court on Human and People's Rights, 2013.

68 European Court of Human Rights, Annual Report 2014, p.14, available at <http://www.echr.coe.int/Documents/Annual-Report-2014-ENG-pdf> accessed on 30 April, 2024.

69 Ibid

70 Declaration of the 1" African Union (AU) Ministerial Conference on Human Rights in Africa, 8 May 2003, (Kigali Declaration), Para 23.

From the foregoing financial analysis, it is apparent that without the assistance of donors, the AU will not be able to adequately finance the operations of the ACJHR. Yet, donors who have traditionally financed the AU may be reluctant to finance the court to the inclusion of the immunity clause in the Malabo Protocol and other concerns they may have. The European Union, Indeed, has been very clear on this issue. At the November 2015 African Judicial Dialogue, the EU representatives stated that:[71]

> Regarding the matter of an expanded African Court, I can reconfirm that the EU is not in a position to support the Malabo Protocol creating the Additional Criminal Chamber as it includes the provision of immunity for sitting Heads of State and Senior State Officials and lacks complementarity with the ICC.

Accordingly predicting the future budget and expenditure of the ACJHR, is a difficult task to embark on. However, given the broad mandate of the court there is no doubt that the operationalization and functioning of the court will require vast resources. The functioning of the international crimes section will particularly demand significant financial and human resources. Unlike the General Affairs section and the Human Rights section, the International crimes section has different and additional resource requirements.

As already envisaged in the Malabo Protocol, the international crimes section will be supported by a number of other organs and units including the TOP, Defence office, victims and witnesses unit, and the Detention Management Unit. Worthy to note is that, these organs and units will not only require staffing, but more importantly, they will also require dedicated facilities, For example, the court is expected to maintain a detention facility and a house, and to bear the associated costs of keeping indicts in the detention

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71 'EU Statement of the African Judicial Dialogue, 6 November 2015, Arusha, Tanzania' available <http:/eeas.uropa.eu/delegations/africanunion/documents/presscorner/eu-statement-judicial-dialogue-06-11-2015-en.pdf> accessed 13 June, 2024.

facility and witnesses in the safe house. In addition, the ACJHR will have to be partly responsible for 1itigation costs before it, in keeping with the practice of International Criminal Courts.

The 2012 AU Commission report on the financial and structural implications of extending the jurisdiction of the ACJHR to cover international crimes estimated that at the outset, the OTP will require four legal officers and two investigators.[72] The AU Commission also projected that the entire court would require a total of 211 staff members, including the judges, prosecutors, registrars, and defence counsels.[73] If the staffing levels of the ICC and other hybrid or ad hoc criminal tribunals are considered, it will not be difficult to conclude that the AU Commission grossly underestimated the funding and staff needs of the international criminal division.

In a nutshell, the experience of the ICC and International ad hoc and hybrid criminal tribunals shows that hundreds of millions of dollars are required on an annual basis for the effective and smooth running of an International Criminal Court. The SCSL spent on average around UAD 30 million per year while the ICTR reached an overall spend of nearly USD 1 billion. Since 2002, until 2016, the ICC has received approximately 1.33 billion Euros in budget appropriation.

Further, it will be important to note that the ACJHR's independence and ability to fulfill its mandate is not compromised through its budget appropriation and the process through which its budget is allocated. This will thus require a transparent budgeting process which will enable the principals of the ACJHR to propose a budget that they require to meet the demands placed upon the court.

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72 Report on the Financial and Structural implications of extending the jurisdiction of the African Court of Justice and Human Rights to Encompass International Crimes, Appendix 1.

73 Ibid

5.6 Inability of Individuals and Civil Society Organizations to Access the ACJHR

One of the implications of expanding the mandate of the ACJHR to include international crimes is its negative impact on the ability of individuals and CSOs to access the ACJHR. Presently, the African Human Rights Court "may entitle relevant Non-Governmental Organisations (NGOs) with observer status before the African Commission, and individuals to institute cases directly before it", and if the state against which the case is lodged has made a declaration allowing NGOs and individuals to file cases against it.[74]

Thus, this provision has been criticized for its limited docket so far of the African Human rights Court.

Needless to posit that the amended ACJHR is more restrictive, as it allows only «African individuals or African non-governmental organization with observer status with the African Union or its organs or institutions to cases or application before the ACJHR.[75] The protocol define Africa NGOs as Non-governmental Organisation at the sub-regional, regional or inter-African levels as well as those in the Diaspora as may be defined by the Executive Council" Whether international NGOs would be admitted under this definition is debatable and of great concern. "African individuals" are not defined in the preamble. In addition to potentially preventing foreign nationals and NGOs from accessing the court, this personal jurisdiction or standing issue also risks having implications on the material jurisdiction of the court in cases raising extra-territorial obligations and violations questions.

The amended ACJHR Statute further limits the range of actors who may request an advisory opinion from the ACJHR. At present, in addition to state parties and AU

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74 Protocol on the Establishment of African Court on Human and People's Rights, Articles 5 and 34(6).

75 Amended ACJHR Statute, Article 30(f).

organized by the AU" has been interpreted to include NGOs with observer statutes with the African Commission and several such NGOs have requested for an advisory opinion from the African Human rights Court. Article 53 of the amended ACJHR Statute states that:

> The court may give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the peace and Security Council, the Economic, Social and Cultural Council (ECOSOCC), the Financial Institutions or any other organ of the Union as may be authorized by the Assembly.

In essence, only the AU organs and institutions will be allowed to seek for an advisory opinion under the Malabo Protocol, NGOs have lost the access they enjoyed before the African Human Rights Court.

Attitudinal Problems

The success of any international criminal prosecution and the ability to achieve the stated objectives of reconciliation and deterrence ultimately depend on the support and persistence by the public whose conduct it seeks to influence.[76] Unfortunately, the persistence and pervasiveness of anti-western sentiment continues to foster a climate of public opinion unreceptive to the activities of international criminal tribunals in Africa.

International criminal prosecutions are treated with suspicion even hostility, by a vast majority of Africans, partly because they are viewed as another symptom of the deep-seated paternalism that pervades much of the West's dealing with Africa and party because the model of justice implicit in the ICTR and sought by the West is inconsistent with traditional notions of justice. Lingering accusations of paternalism disaffect the citizens and diminish the already low level of interest in anything sponsored by the west.

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[76] A Justice System Functions optimally when it enjoys the support, confidence and respect of the citizens. U.N. General Assembly, Report of the Redesign Panel on the United Nations System of Administration of Justice, 18 U.N. Doc, A/61/205/ (July 28, 2006).

Inevitably and even perfunctorily, some Africans resent and distrust international criminal tribunals. They continue to question the ability and integrity of international criminal tribunals to dispense justice in African. Citizens, most of whom have long-standing complaints about the attitude of the West towards Africa, view international criminal law with skepticism. They deride international criminal prosecutions as judicial, colonialism, imperial condescension, or worse, as ersatz efforts by the West to imbricate its failure to prevent violence that continue to disfigure Africa. Amidst allegations of paternalism, bias, and imperial condescendism, most citizens lose sight of what international criminal prosecutions seek to accomplish and are therefore generally dismissive of efforts by international criminal tribunals to promote accountability. Questions about the legitimacy of international tribunals make it difficult for citizens to respect the verdicts of the tribunal. Continuing disdain for the tribunals undermines the tribunal's ability to attain the professed goal of promoting reconciliation.[77]

Lack of public support accounts for the disinterest and dismissive attitude toward the activities of international criminal tribunals in Africa, Three factors, namely, the nature and practice of the tribunals, locations, and contradictions with the African concept of justice, continue to fuel public disenchantment with international criminal prosecutions in Africa.

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[77] David Cohen, 'Hybrid Justice in East Timor, Sierra Leone, and Cambodia, "Lesson learned" and Prospects for the future.' *STANJ. INT'L-L* (2007) (I6)43

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

Chapter six will examine in general the entire scope of this research work, a summary of the entire research work will be reviewed in which a chapter by chapter break-down will be given, conclusions will also be given for the main problematic issues raised in the work and finally recommendations will be put forward with regards to the future.

6.1 Summary

Chapter one examined in general the historical development of the prosecution of international crimes in Africa. The fact that the African union has thirty-four of its members states as state parties to the ICC, and that its contention is not with the ICC as an institution, nor with the judicial power of the court to try international criminal cases in Africa, but with the prosecutorial policy adopted by the ICC, the hegemonie powers of the United Nation Security Council and chiefly with some of the provisions of the Rome Statute establishing the ICC. The issue of the United Nations Security Council (UNSC) voting against African Union's (AU) request for deferral of the trials of Kenya's President, Uhuru Kenyatta and Vice - President, William Ruto by the ICC for a year was examined. An attempt was made at throwing a historical light at the prosecution of international crimes at National level such as the Hissene Habro, Mengister Hailu Mariam cases. The establishment of ad hoc and mixed tribunal such as the international criminal tribunal for Rwanda, the Special Court from Sierra Leone, including the prosecution of international crimes in Africa by the ICC are all adequately examined.

Chapter two examined the rationale, value and importance of prosecuting international crimes in Africa. The legitimacy of international criminal justice mechanisms as adopted

by the international criminal court, European court and other tribunals. A detail analysis of the AU attack on the actions of the ICC and European courts and the question of imperialism", "bias", and "neocolonialism" are also considered, thus, various reasons were analysed for the prosecution of international crimes in Africa.

Chapter three examined the Institutional structure of the proposed Criminal Chamber of the African Court in prosecuting international crimes in Africa. Substantive provisions of the Malabo Protocol, the legality of African integration criminal prosecution vis-à-vis the Rome Statute, nomination, appointment and allocation of judges and other institutional structures that aid the jurisdiction of the African court in prosecuting international crimes are examined.

Chapter four considered and examine the immunity of State officials and the prosecution of International crimes in Africa. The controversial provision enacting the immunity of African head of states and state officials is widely examined and considered.

The development on the immunity of state officials under customary International law and conventional International law are examined in details. The African Union (AU) arguments in favour of the immunity clause and objections to the immunity clause are also examined.

Chapter five is basically concerned about the challenges and problems of prosecuting International crimes in Africa. Attitudinal challenge, Africans perspective on litigation serving as a challenge to prosecution of crimes in Africa, ethnic sentiments, financial burden of adding a criminal chamber to the African court, and the immunity clause are adequately considered. The chapter also consider in details the complementarity principle as enshrined .the Rome Statute, vis-à-vis the Malabo Protocol, and whether the principle of complementarity also extend to regional courts.

6.2 Conclusions

Reactions to the Malabo Protocol have been mixed. Although there is nothing inherently wrong with an African court with jurisdiction over International crimes, critics have expressed serious doubts about the validity, efficacy, and purpose of the proposed ACJHR, particularly with regards to the immunity provision and the question of finance.

By contract, proponents of the court see an opportunity to add a layer of accountability that has so far been lacking on the African continent. They argued that, while there will undoubtedly be obstacles, these can be overcome, and that to simply condemn the court before it has been created is unhelpful. The ACJHR has the potential to shift Africa's focus from constantly fighting the ICC to working towards an innovative, empowering and credible court that confronts crimes that are particularly damaging to the continent and, crucially, offers an avenue of justice for victims.

A key reason for such a significant split n opinion is that, throughout the process, there has been a serious disconnect between civil society, the general public, and the African Union. The drafting of the Malabo Protocol would have benefited significantly from greater involvement of both civil society and the general public. The result has been suspicion and confusion as to the purpose and effect of the Malabo Protocol.

This lack of engagement, however, is not solely the fault of the AU: CSO have shown an unwillingness to engage in the process so far and have been criticized by the drafters as being unnecessarily dismissive. One thing is clear, the wheels are rolling, and the possibility of a regional court being established is real. The rate of ratifications may be slow, but it must be remembered that even the most enthusiastic proponents of the Rome Statute thought it would take at least a decade to come into force, if at all - it took any

four years. Therefore, neither a wholly confident nor wholly dismissive attitude will be constructive.

The proposed expansion of the jurisdiction of the ACJHR will have significant legal and institutional implications for a range of actors involved in issues of International justice in Africa. With a jurisdiction covering three areas of International law, it is doubtful whether the ACJHR as envisaged under the Malabo Protocol with 16 judges will have the capacity to effectively and efficiently deliver on its mandate. It is also unclear whether the AU will have the requisite resources to operationalize and sustain an efficient ACJHR. The AU must thus carefully reflect on how it would ensure that the operations of the court do not stall on account of lack of financial and human resources. Worthy to note is that the immunity clause included in the Malabo Protocol violates International consensus and practice by providing immunities to heads of states and government and by going further even and making provision for immunity to Senior state officials". The immunity clause, it is submitted stands to bring the whole statute into disrepute as a way to protect senior politician from accountability for their crimes.

Also, the Malabo Protocol may have a deleterious effect on the human rights jurisdiction of the African Human Rights Court Statute. In the Malabo Protocol and the Amended ACJHR Statute, AU member states have also introduced amendments that will likely restrict the ability of International NGOs with a presence in Africa from accessing the ACIHR.

6.3 Recommendations

Considering all the above conclusions, it will be necessary to put forward some recommendations.

- Firstly, it will be apposite to note that the protocol include a provision for amendments to be adopted by simple majority of the Assembly, upon recommendation by a State party or the court (Art. 12). All state parties would do well to use this provision to introduce amendments to the protocol before it enters into force, in a bid to strengthen its effectiveness, efficacy, and legitimacy. The following amendments are thereby recommended.
- Article 46A bis should be removed entirely. No immunity should be provided to any individual, regardless of their official position. This would place the Protocol more in line with both the AU constitutive Act's rejection of impunity and the policy of international criminal tribunals around the world.
- The Protocol should be allowed to operate with the AU's policy of sequencing peace and justice, a provision can be added to the Protocol that allows the peace and security council of the African Union to request the court to defer a trial for a year if it was in the interest of space and stability. The final determination as to whether to grant the request for deferral must however tie with the judges, to avoid the situation that currently occurs at the ICC where the UN Security Council's power to defer judicial proceedings amount to a potential interference with the independence of the court.
- The number of judges should be expanded to at least 33; i.e. 19 judges with experience in each of the court's three jurisdictional bases. This would enable the court to handle cases in a more efficient and effective manner.
- The definition of the crime of unconstitutional change of government (Art. 2òE) should be amended to reintroduce a proviso that "any act of a sovereign people peacefully exercising their inherent right shall not constitute an offence under this

article. This is a necessary limitation for an otherwise extremely broad definition that criminalizes the democratic right of a people to initiate a peaceful uprising.

- Article 46H on complementary jurisdiction" should be amended to cement the court's commitment to work with the ICC and make clear to African States that being a member of the ACJHR does not mean abandoning their obligations under the Rome Statute. This could simply entails amending section l of the Article to State: "The jurisdiction of the National Courts, the Court of the Regional Economic Communities where specifically provided for by the Communities and to the International Criminal Court".

Secondly, the Assembly should adopt a resolution affirming that the ACJHR would be complementary to the work of the ICC and it not intended to shield those in power from prosecutions in other national, regional, or international courts. The ACJHR's reputation and legitimacy will be doomed if it is perceived as nothing more than a "conscious snub" to the ICC or a tool of AU's best interest to ensure the court is not perceived as such, or African statutes that are signatories to the Rome Statute will be reluctant to ratify the Malabo Protocol for fear that it will conflict with their obligations to the ICC. The AU should engage in dialogue in good faith with the ICC and avoid the constant and manipulative use of inflammatory narratives or racism, colonialism, and imperialism. This is not to deny the existence of these ills, but to caution against the often essentially dishonest deployment of these narratives in the context of debates on the actions of the court. The ICC may not be perfect institution, but it is essential in the fight against impunity and for holding perpetrators of grievous crimes to account something clearly recognized by the numerous African states that have referred situations to the court. The experiences, expertise, and resources of the ICC will be invaluable to the ACJHR, which

would benefit hugely from a close partnership with the ICC and, equally, suffer greatly from an antagonistic relationship.

The AU should find new and inventive ways to dramatically increase its budget, and the budgets of its various institutions. Taxes on mobile phone use, for instance, could represent a promising source of funding. If the ACJHR is to function effectively and efficiently, its budget must be drastically larger than that of the current ACJHR. The ACJHR is, ultimately, for the benefit of the general public and, in particular, the victims of crimes on the continent. Unfortunately, public awareness about the various courts and resolution of the AU is pitifully low. The AU should undertake extensive public education around the proposed ACJHR and provide appropriate platforms and forums for victims and members of the general public to contribute to the discussions.

Thirdly, the interests of the thousands of victims across Africa must remain paramount, and their opinions must be sincerely taken into account. This is so because of all the stakeholders, the most important, and yet often the most ignored, are victims. Whichever route the AU ultimately takes, it must do so with a genuine commitment of victims and witnesses of the heart of its considerations. Thus, should the ACJHR come into being, important lessons can be learned from the ICC's experiences with victims and witness, particularly the weaknesses of their victims and witness unit and the consequences of an underfunded victims' trust fun. The ACJHR must strive to do better by ensuring that its equivalent bodies are better staffed and better funded, and that victims are properly represented throughout the various cases.

Fourthly, in the spirit of positive complementarity, the ICC should allow regional courts, such as the ACJHR -a place in the framework of institutions that are complementary to the ICC. This would of course be subject to such courts working genuinely alongside the

ICC, rather than shielding individuals from prosecution. Thus, should the Malabo Protocol come into force, the ICC should work closely with the ACJHR and embrace a close partnership with it. This would have the dual benefit of potentially reducing the ICC's caseload and countering the inaccurate narrative that the ICC is an enemy of Africa. Rejecting the court outright would only further alienate the ICC from the continent.

Finally, Civil Society Organizations, CSO have so far been conspicuously absent in the drafting of the Malabo Protocol. This partly can be attributed to the AU's failure to reach out and include other stakeholders, but also due to the fact that CSOs across the continent have generally been dismissive of the movement to expand the jurisdiction of the ACJHR. This might to change representatives of the Civil Society should request to be invited to all meetings of the AU regarding the setting up of the ACJHR or amendments to the protocol. CSOs should thus undertake through reviews and provide constructive criticism of the stakeholders, the most important, and yet often the most ignored, are victims. Whichever route the AU ultimately takes, it must do so with a genuine commitment of victims and witnesses of the heart of its considerations. Thus, should the ACJHR come into being, important lessons can be learned from the ICC's experiences with victims and witness, particularly the weaknesses of their victims and witness unit and the consequences of an underfunded victims' trust fun. The ACJHR must strive to do better by ensuring that its equivalent bodies are better staffed and better funded, and that victims are properly represented throughout the various cases.

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This might to change representatives of the Civil Society should request to be invited to all meetings of the AU regarding the setting up of the ACJHR or amendments to the protocol. CSOs should thus undertake through reviews and provide constructive criticism of the protocol. There may be extensive vulnerabilities in the ACJHR as currently conceptualized, but this can only be changed through actionable recommendations and pragmatic advocacy, rather than outright rejection. CSOs also have a role in ensuring that the general public and, most importantly, victims, are made aware of the movement to create an African court and that they are provided with the necessary forums and platforms to contribute to the discussion.

BIBLIOGRAPHY

Articles and Chapters in Book

Abass Ademola, Prosecuting International Crimes in Africa: Rationale, Prospects, and challenges, *EU. J INT'L* (2013)(24) 933, 933..

Ackerman J. E. and Sullivan E. O. "Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia (2000)

Aiyar P.R., Concise Law Dictionary: with Legal Maxims, Latin Terms and Words and Phrases (20I8)

Araujo Robert, 'The meaning of International Law', *Fordham Int'l L.J.* (2000) 1477, 1488

Bassioni M. C. 'The time has come for an International Criminal Court' *Indiana International and Comparative Law Review* 1(1991).

Bassiouni M. C., *Crimes against Humanity in International Law* (1992).

Benzing M. 'The complementarity regime of the International Criminal Court, International Criminal Justice between states Sovereignty and the Fight against impunity' *Max Planch Yearbook of United Nations Law,* (2003).

Bhohe C. 'The trial of Charles Taylor: Conflict Prevention, International Law and an Impunity – Free America' AV Menon (ed) *War Crimes and Law*, (2008).

Boehme Franziska, "We chose Africa" South Africa and the Regional Politics of Cooperation with the International Criminal Court"- *International Journal of Transitional Justice* (2016).

Burke-White W., "Implementing a Policy of Positive complementarity in the Rome System of Justice *Criminal Law Forum,* (2008) 19

Burns P., "An International Criminal Tribunal: The Difficult Union of Principle and Politics", Criminal Law Forums (1994)341-342.

Cagley, A.T 'The Prosecutor's Strategy in seeking the arrest of Sudanese President AI Bashir on charges of genocide' *Journal of international Criminal Justice* (2008) 6.

Cohen David, Hybrid" Justice in East Timnor, Sierra Leone, and Cambodia, "Lesson learned" and Prospects for the future. *STANJ. INT'L-LI6* (2007),43.

Cryer R., et al "An Introduction to International Criminal Law and Procedure" (2007).

Ei-Zeidy M, "The Principle of complementarity: A new machinery to implement international Criminal Law" *Michigan Journal of International Law,* (2003) 23

Gosnell C., "The request for an arrest warrant in "AI Bashir" *Journal of International Criminal Justice* (2008) 6

Hansungule M.K., “The African Charter on human and People's Right: A Critical Review" *African Yearbook of international Law*, (2000), at 269-270.

Jalloh Charles C, “Reflections on the Indictment of sitting Heads of State and government and its consequences for peace and stability and reconciliation in Africa,” 7 *Afr. J. L. Stud*. (2014) 43(48)

Jutta F. Bertram-Nothnagel, "A Seed for World Peace Growing in Africa: The Kampala Amendments on the crime of Aggression and the Monsoon of Malabo", "In the International Criminal Court of Africa: One Decade on, Evelyn A, Ankumah (ed), (Intersentia; 2016), 369.

Kittichaisaree K, *International Criminal Law* (2001), 209.

Kwakwa E.– "The International Law of Armed Conflict; Personal and Material Fields of application (1992) 30; T. Maluwa, International Law in Post-colonial Africa (1995).

Maogoto Jackson, N, "The International Tribunal for Rwanda: A poor umbrella in the Rain" Initial Pitfalls and Brighter Prospects'". *NORDICJ INT'L L*. (2004)73

Max Du Plessis, Shambolic, Shamefol and Symbolic: Implication of the African Union's Immunity for African Leaders, institute for Soc. Studies, paper 278 U (Nov. 2014)

Megret F. and Samson M., "Holding the line on complementarity in Libya: the case for Tolerated flawed Domestic Trials", *Journal of International Criminal Justice* (2013)11.

Moghalu Kingsley, ‘Reconciling Fractured Societies: An African Perspectives on the Role of Judicial Prosecutions’, From Sovereign Impunity to International Accountability. The Search for Justice in A World of States (Ramesh Thakur & Peter Malcon tents eds. 2004).

Murungu, C. "Towards a Criminal Chamber in the African Court of Justice and Human Rights" *JICL* (2011)11.

Newton M., “Comparative Complementarity: Domestic Jurisdiction consistent with the Rome Statute of the International Criminal Court” *Military Law Review*, (2001)20(26)

Oko Okechukwu, "Partition or Perish: Restoring Social Equilibrium in Nigeria through Reconfiguration,” *IND. INT'L & COM. L. Rev.* (1998)8.

Schaack B. Va. and Slye R. C., "International Criminal Law and its enforcement: Cases and materials" (2007)

Schaba W. A., "An Introduction to the International Criminal Court (2007)

Schabas W. A., "Genocide in International Law (2000) 3 16; Attorney-General of Israel v. Adolf Eichman (1968) 36 ILR 227 (Supreme Court of Israel).

Scharf M.P. , Balkan Justice: The Story behind the first international crimes trial since Nuremberg (1997).

Selessie Alemante G., “Ethnic Identity and Constitutional Design for Africa, 29 *STAN. J. Int' L. J.* (1992),12.

Simbeye Y., "Immunity and International Criminal Law” (2004).

Smith Adam, Transitional Justice in Iraqi: The Iraqi Special Tribunal and the Future of a Nation, 14 *Int'l AFF*. (2005)5(6).

Stahn C., Complementarity: A Tale of two nations *Criminal Law Forum,* (2008),19

Stern B., "Immunities for Head of States where do we stand?" in M. Lattimer and P. Sands, "Justice for Crimes against Humanity" (2003) 73-106.

Viljoen, F. "Promising Profiles: An Interview with four new members of the African Commission on Human and Peoples' Rights” *African Human Rights Law Journal*, (2006),6

Willis J. F., Proloque to Nuremberg- The Politics and Diplomacy of Punishing War Criminals of the First World War (1982) 98.

Online Sources

Abraham G. "Africa's Evolving Continental Court Structures: At the Crossroads?" pages 12, <http://www,saiia.org,za/occassional-papers/669-africa-evolving-continental-court-structures-at-the-croassroad>

Maru M.T., The Future of the ICC and Africa: The Good, the Bad and the Ugly, Al-Jazeera Net, 11 October 2013, 15:03- <http://www.aljazeera.com/indepth/opinion /2013/io/future.icc.africa good bad ugly_>.

Ochieng Lillian, "African Court No substitute for ICC" INST, For War & Peace Reporting (May 14, 2014) <http:/inpr.nst/global-voices/african-court-n0-substitute-ice>

Otien Ong'ayo Antony, "Political Instability in Africa: Where the Problem lies and Alternative Perspectives'" African Diasporg Policy et (Sept.9 2008), <http://www.diaspora- centre.org/docs/politicalinstabili.pdf.>

Plessis D. U., M. Implications of the AU decision to give the African Court Jurisdiction over International crimespage <https://issafricas3-amazonaws. com.site/uploads/paper-235 Africacourtpdf>

Waitherero Betty, "Immunities Clause at the African Court of Justice and Human Rights is outrageous", Daily Nation (Feb. 7 2014) <http://mobile.nation.co.he/blogs/-Heads-of-state-immunities-clause/-1949942/23696/-/format/xhtm/-/7/ahgiz/-/index.html>

Wangui J. J., “African Court comes with Built in Impunity" Inst for War and Peace Reporting (July 26, 2015), <https://wpr.not/global-voices/african-court-comes-built-impunity>