



**Imagining the African Court of Justice and Human Rights along Implications
for Prosecution of International Crimes in Africa**

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International Law**

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Declaration

I, Addisu Allgaw Mengstie, declare this thesis is my original work. Sources used as references have been duly acknowledged. The research has not been submitted to any other institution and is conducted in accordance with the rules of Addis Ababa University. Likewise, I do not allow anyone to copy and use it as his/her work.

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Signature -----

Date September 23, 2022

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Abstract

The establishment of the African Court of Justice and Human and People's Rights (ACJHPR) was part of Africa's longstanding craving to establish continental institutions that demonstrate unique African aspects, facilitate African unity and prosperity, and contribute to solving African problems of prosecution of international crimes and human rights protection through an African way. However, whether the ACJHPR, with its present structure and tri-sectional jurisdiction, would answer Africa's aspirations has been contentions. This article analyzes the ACJHPR's implications for the prosecution of international crimes in Africa and the protection of human rights. It identifies positive and adverse implications and expounds on how the positive aspects outweigh the negative ones. It also argues that although the ACJHPR is far from being the ideal criminal court for Africa, its gaps can be fixed. The article provides some alternatives that could be suggested to ensure that justice is well served for international criminal and human rights violations in Africa.

CHAPTER ONE

INTRODUCTION

1.1. Background of the study

Judicial bodies are essential and integral parts of many international organizations established under the pact of states. In what resembles a state structure, international organizations are conventionally constituted with legislative, executive, and judiciary organs.¹ Regardless of their mandate, these branches of international organizations serve as a check and balance to each other.² This is also reflected in regional organizations.

Likewise, the African Union (AU), a successor to the Organization of African Unity (OAU), has established legislative, executive and judicial bodies.³ While the Assembly of the Heads of State and Government (Assembly) serves as AU's highest legislative and executive body, the Pan-African Parliament and the African Court of Justice (ACJ) were intended to serve as the significant legislative and judiciary functions of the Union.⁴ As the AU passes through reforms and transitions, these AU Organs have also been subjected to several changes and revisions to satisfy the evolving needs and expectations of the organization.

The ACJ was initially intended to be the principal judicial organ of the African Union, with authority to rule on a dispute over the interpretation of AU treaties. However, the Court never came into existence because the AU decided to merge it with the African Court on Human and People's Rights to form a new Merger Court called the African Court of Justice and Human Rights (ACJHR) in 2003.⁵ Underlying this decision was the concern at the growing number of

¹ Martin Lisa and Beth Simmons, "International organizations and institutions." *Handbook of international relations* 2 (2013), 326-351.

² Paul Kagame "The imperative to strengthen our Union." *Report on the Proposed Recommendations for the Institutional Reform of the African Union* 29 (2017) <https://www.tralac.org/images/docs/11191/report-on-the-proposed-recommendations-for-the-institutional-reform-of-the-au-kagame-29-january-2017.pdf> (accessed 18 September 2022).

³ Constitutive Act of the African Union, 2000. art.5.

⁴ Ibid, arts 6, 18.

⁵ Protocol of the Court of Justice of the African Union, July 2003.

AU institutions, which the AU could not afford to support.⁶ The Court was set, among other things, to fulfill the African Charter on Human and People's Rights mission to establish a judicial organ that supplements and strengthens the central African human rights mechanisms. The Protocol of the Court obtained the required ratification in 2009, but it has never been operationalized.

Before the ACJHR became operationalized, the AU decided to amend the Statute of the Court to extend its power by establishing a unique court with a mandate to adjudicate criminal, human rights, and general international law affairs called the African Court of Justice and Human and People's Rights (ACJHPR), which is the focus of this research.⁷ The ACJHPR is set to serve, among other things, as Africa's international criminal Court. It will adjudicate crimes of genocide, crimes against humanity, war crimes, unconstitutional change of the government, piracy, Terrorism, Mercantilism, corruption, money laundering, Trafficking in person, Trafficking in drugs, Trafficking in hazardous wastes, illicit exploitation of natural resources, and crime of aggregation.⁸

This tri-sectional Court has been a subject of fierce debate and controversy both within academia and among practitioners. A prominent distinctive feature of the Court that gave rise to the controversy has been its mandate to adjudicate international crimes.⁹ There are also several issues about its structure, operation, and relationship with other AU organs and international organizations. Particular problems have been raised on whether the Court could strengthen or hinder the protection of human rights in Africa.¹⁰ This has been submitted, particularly about the future of the African Court on Human and People's Rights. Its relations and modalities of operation vis a vis the International Criminal Court (ICC) on issues about international crimes of

⁶ Udombana Nsongurua, "An African human rights court and an African Union court: A needful duality or a needless duplication" *Brooklyn Journal of International Law*. 28 (2002), 811.

⁷ Protocol on Amendment to the Protocol on the Statute of African Court of Justice and Human Rights (Malabo Protocol), June 2014, art 20. <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (accessed 20 September 2022)

⁸ *Ibid.*

⁹ Abbas Ademola, "Prosecuting international crimes in Africa: Rationale, prospects, and challenges" *European Journal of International Law* 24.3 (2013), 933.

¹⁰ Carles Toto, "The Malabo Protocol: An Analysis of The Implications of the Merged and Expanded African Court" *Journal of Human Rights Law and Practice* 2.2 (2019),

genocide, crimes against humanity, and war crimes are also a subject of concern.¹¹ The concerns led some to cast doubt not only on the substantive mandates of the Court but also on its rational and potential feasibility and effectiveness.¹² Whether the ACJHPR will meet the expectations set up by African states is also a matter that requires further analysis.

The divergent views and imprecisions on the jurisdiction and possible modes of operation of the ACJHPR inform the need for additional research. Against this backdrop, the study analyzes the nature, jurisdiction, and structure of the ACJHPR vis a vis the ICC to evaluate its implications for the prosecution of international crimes in Africa.

1.2. Statement of the problem

The setting up and operationalization of international courts have often been a complex and controversial undertaking. This is more so when the international Court is mandated to adjudicate international crimes. Furthermore, establishing a permanent regional court with criminal jurisdiction is not shared.

As a continent where many of the cases of international crimes violations before the ICC was initiated, Africa has been craving to establish its Court to entertain international crimes and other offenses. After protracted debate among diplomats and practitioners, the AU decided in 2014 to establish the ACJHPR. This novel Court came with unique structures and mandates, arousing serious criticisms and concerns. While issues associated with the Court have not been sufficiently addressed and a consensus reached, there is a strong push by the AU to get the Protocol of the Court ratified by member states and to operationalize the Court.

Furthermore, while there are attempts to proffer opinions and criticisms about the Court, including by highlighting its tri-sectional nature and its complementarity with national and other international courts, there is no comprehensive study that gives a detailed account of the implications of the Court's establishment on Africa's international criminal justice championed by the ICC.

¹¹ Tilden J. "Africa's Conflict with the International Criminal Court: The African Court of Justice and Human and Peoples' Right as an Alternative to the ICC" *Journal of International and Comparative Law*. 27 (2018), 201.

¹² Ekori Hanson. "The AU Debacle with the ICC: The Creation of the African Criminal Court." *International Journal of Law and Society* 4.2 (2021), 67.

Whether the establishment of the ACJHPR at a regional level is consistent with established international law principles and norms is also an issue that requires further research. Among other things, it requires a thorough examination of ACJHPR's criminal mandate vis a vis other international courts and tribunals having similar mandates, thereby contributing to the existing discourse by making some unusual recommendations to serve better criminal justice in Africa.

Furthermore, the Court appears to have been a victim of politicization, and some observations from the AU and external observers lack the required impartial examination of the issues and concerns associated with the Court. For instance, the prevailing mistrust and antagonism between the AU and the proponents of the ICC have, in many ways, affected the discourse. Furthermore, while there are many opinions on Africa-ICC relations, there is limited research on how this relationship affects the establishment and operationalization of the Court. Whether the doctrines and concepts incorporated in the establishment instruments of the ICC and the ACJHPR are complementary or contradictory and how to narrow the gaps are also an issue that demands further research, which this research tries to provide some gap-filling suggestions. Although the territorial jurisdiction and levels of the two courts are different, whether the principle of subsidiarity could be invoked is an issue that requires research.

Besides, despite some generalizations, AU's substantive reasons and objectives for creating the ACJHPR have not been well examined. In particular, whether the ACJHPR will reinforce the AU's human rights exercises or not has been a central point of concern among scholars in the field. But the concerns have generally been limited to the fate of the African Court on Human and People's Rights rather than Africa's regional human rights and criminal justice system as a whole.

1.3. Objectives of the study

The general objective of the study is to analyze the implications of ACJHPR's establishment on international crime prosecution in Africa.

In addition to this general objective, the research has the following specific objectives:-

1. Analyze ACJHPR's criminal jurisdiction, its (in)compatibility with ICC's jurisdictions, and its implications for the prosecution of international crimes in Africa.

2. Analyze the human rights mandate of the ACJHPR and its implications on the fate of human rights on the Continent with a focus on the African human rights system;
3. Identify mechanisms by which the AU can strengthen its institutional capacity to better prosecute international crimes committed on the Continent;

1.4. Research Questions

The research will answer the following research questions,

1. How is the ACJHPR set to function vis a vis the ICC, and what are the implications of ACJHPR's establishment for the prosecution of international crimes in Africa?
2. What implications do the establishment and operationalization of the ACJHPR have for the protection and promotion of human rights on the Continent?
3. How can the AU strengthen its institutional capacity to better protect and promote human rights and adjudicate international crimes committed on the Continent?

1.5. Literature Review

The agenda of international courts in Africa has been a subject of several research. Several scholars have dealt with the nature, evolution, and operational challenges of the African Courts as part of their studies on the AU and the African human rights system.

More importantly, the idea of the establishment of an African criminal court and the eventual adoption of the Malabo Protocol that established the ACJHPR has been a dominant topic in the academic discourse. There is abundant literature on the matter. Particular differences notwithstanding, the existing literature can be clustered into two broader categories. The first category comprises the strong proponents of the establishment and operationalization of the ACJHPR.¹³ The second category contains ardent opponents of the ACJHPR.¹⁴

¹³ Mystris (2020) *An African Criminal Court* Leiden, The Netherlands: Brill | Nijhoff.
doi: <https://doi.org/10.1163/9789004444959>;

¹⁴ Omorogbe, Eki Yemisi. "The crisis of international criminal law in Africa: A regional regime in response?" *Netherlands International Law Review* 66, no. 2 (2019): 287-311; Odero, Steve, ChachaMurungu, and Japhet Biegon. "Politics of international criminal justice, the ICC's arrest warrant for Al Bashir and the African Union's neo-colonial conspirator thesis ." *Prosecuting international crimes in Africa* 145 (2011);

Africa's relations with the ICC have been a subject of enormous research, Getahun Kassa examined the relationship between the ICC and state sovereignty in Africa.¹⁵ He analyzed the concerns expressed by the African states, identified the complex nature of the relationship, and traced the complexity to the historical non-conformity of the European notion of sovereignty with that of the African understanding of sovereignty.¹⁶ In related work, examining the overall context of the Africa-ICC relations, Gino Naldi identified the roots of the Africa-ICC friction; and argued that AU's disenchantment with the ICC has led African leaders to find alternative justice systems under the principle of "African solution for African problems."¹⁷ This approach appears problem-driven critical analysis, but it focuses on the issues that preceded the Court's establishment and tends to see the ACJHPR predominantly as a protest court.

However, a dominant aspect of the existing literature that triggers this research is that although the literature is directly or indirectly connected to the implications of the ACJHPR on the prosecution of international crimes in Africa and beyond, a great deal of it follows a categorical, dogmatic, and pure legalistic, and at times politicized approaches instead of a pragmatic approach besides the

In what appears to be a strong critic of the ACJHPR, Mwangi Kemenvi argued that the ACJHPR is a failed court that cannot be credible, fair, competent, and independent.¹⁸ In a more substantive critical analysis, Abbas argued that the creation of the ACJHPR is a duplication of international criminal justice systems and the success of Africa's international criminal justice lies in making sure that "members of the AU take preventive and domestic prosecutions of international crimes more seriously and in the ICC improving its modus operandi."¹⁹ Erik de Wet also argued that "there is overlapping substantive, personal and temporal jurisdiction

¹⁵ Getahun Kassa, the relationship between international criminal law and state sovereignty in Africa" Ph.D. Thesis <https://law.ukzn.ac.za/news/phd-research-on-relationship-between-international-criminal-law-and-state-sovereignty-in-africa/> (accessed 25 August 2022).

¹⁶ Ibid.

¹⁷ Gino Naldi "The International Criminal Court and the African Union: A problematic relationship" In Charles Jalloh & Ilias Bantekas eds *The International Criminal Court and Africa* 2017.

¹⁸ Mwangi Kemenvi, "The International Criminal Court in Africa: a failed experiment?", *OpenGlobalRights*. <https://www.openglobalrights.org/international-criminal-court-in-africa-failed-experiment/> (accessed 20 September 2022).

¹⁹ Abbas, A. The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects. *Neth Int Law Rev* 60, 27–50 (2013). <https://doi.org/10.1017/S0165070X12001027>

between the ICC and the ACJHPR," requiring a strategy for a cooperative relationship between the two Courts.²⁰

On the other side, some scholars contend that there is much value in establishing the ACJHPR with its criminal jurisdiction, and its jurisdiction is consistent with the Principle of complementarity between the ICC and states.²¹ Ebor-Osuji argues that the ACJHPR serves as an intermediary court that can reinforce the complementarity principle by prosecuting cases that the ICC may not be able to do effectively due to several reasons.²² Van der Wilt suggested that if the ICC and the ACJHPR are to be operational at the same time, there shall be a division of labor where the ICC should take a hierarchically superior role.²³ Barigayomwe and Prevost optimistically argued that the ACJHPR has introduced innovative approaches in the prosecution of international crimes and can achieve these purposes.²⁴ The presence of contradictory research on the subject implies the need for additional study to further clarify the issue by bringing up more illustrations.

In his seminal book titled "the failure of the International Court in Africa: decolonizing global Justice," Bayner examined the genesis of the ICC's prosecution in Africa and observed that the ICC has degenerated from a promising institution to "an instrumentalized, politicized, weaponized institution that ended up with the victims being the great losers."²⁵ Ambos even suggested that the jurisdiction of the ACJHPR should expand "beyond the African continent to

²⁰ De Wet, E. (2019). Concurrent Jurisdiction of the International Criminal Court and the African Criminal Chamber in the Case of Concurrent Referrals. In C. Jalloh, K. Clarke, & V. Nmeielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (pp. 180-197). Cambridge: Cambridge University Press. doi:10.1017/9781108525343.007

²¹ Eboe-Osuji C. (2018) The ICC and the African Court and the Extended Notion of Complementarity of International Criminal Jurisdictions. In: Eboe-Osuji C., Emeseh E. (eds) *Nigerian Yearbook of International Law 2017*. Nigerian Yearbook of International Law, vol 2017. Springer, Cham. https://doi.org/10.1007/978-3-319-71476-9_

²² Ibid.

²³ Van der Wilt H. (2017) Complementary Jurisdiction (Article 46H). In: Werle G., Vormbaum M. (eds) *The African Criminal Court*. International Criminal Justice Series, vol 10. T.M.C. Asser Press, The Hague. https://doi.org/10.1007/978-94-6265-150-0_11

²⁴ Roger Barigayomwe, Gary Prevost, "The Malabo Protocol: A panacea for crime prevention in Africa?" *East African Journal of Law and Ethics*. Vol 5.1(2022), 25-34.

²⁵ Everisto Benyera (2022) *The failure of the International Court in Africa: decolonizing global Justice*, Routledge Contemporary Africa Series.

gain broader legitimacy and dispel existing African concerns."²⁶ Another proponent of the ACJHPR, Branch Adam observed that the ACJHPR is a transformation of African imaginations to show that there are legitimate alternatives to the issue of intentional justice hence a significant role in advancing emancipatory politics.²⁷ These and other similar academic works see the ACJHPR from a political perspective and imply that the creation of the ACJHPR is essentially motivated by political reasons than pure legal and pragmatic reasons. There is, however, a limited attempt to critically examine AU's expressed rationales from an impartial legal point of view departing from the Africa-ICC politics.²⁸

Although there is considerable literature on Africa's relations with the ICC and some literature on the AJCHPR, the bulk of the literature appears to be a victim of the existing dichotomy, the conventional African - West discourse, extreme legalistic and dogmatic approach hence failing to articulate pragmatic issues that affect the prosecution of international crimes in Africa. This study will attempt to fill this prevailing gap by identifying the issues and analyzing them on the basis of pragmatism and international law.

1.6. Significance of the study

The first sign of this research will be to contribute to the existing discourse on the prosecution of international crimes in Africa by pointing out the gaps in the existing literature and providing a slightly different perspective. It attempts to achieve this purpose not by bringing a completely novel idea into the discourse but by analyzing the existing discourse and making a thoughtful judgment on the workable approaches.

Pending the entry into force of the ACJHPR, different views have been expressed about its motives, mandates, and structures. Research undertaken and suggestions made about the Court at this stage could help AU member states, including Ethiopia, to make a carefully considered

²⁶ Ambos, Kai, Expanding Focus of the 'African Criminal Court' (2013). Schabas et al., Ashgate Research Companion to ICL, 2013, 499- 529, Available at SSRN: <https://ssrn.com/abstract=2292914> or <http://dx.doi.org/10.2139/ssrn.2292914>

²⁷ Branch, A. (2019). The African Criminal Court: Towards an Emancipatory Politics. In C. Jalloh, K. Clarke, & V. Nmeihelle (Eds.), *the African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (pp. 198-220), 217. Cambridge: Cambridge University Press. doi:10.1017/9781108525343.008

²⁸ Getahun Kassa, the relationship between international criminal law and state sovereignty in Africa" Ph.D. Thesis <https://law.ukzn.ac.za/news/phd-research-on-relationship-between-international-criminal-law-and-state-sovereignty-in-africa/> (accessed 25 August 2022).

decision on the AU platforms and individually, including on whether they should ratify the Malabo Protocol or not. While the analysis and recommendations made in this study will also contribute to member states, its bigger significance will be in delivering into the African discourse on human rights protection and international criminal justice in Africa.

Furthermore, the study will also serve as a major source of information for further prospective research on similar or related Issues.

1.7. Research Methodology

Desk research is primarily employed in the study. Primary analysis is undertaken on key structural elements in the relevant enabling Protocol on the statutes of ACJHPR, and the proposed amendments to it, to conform to or dispel the promise of the ACJHPR to protect human rights and to prosecute international crimes.

The research applied primary sources, including relevant treaties, statutes, and protocols have been applied as core instruments and the basis of the analysis with a particular focus on international criminal law. The analysis of the research largely relies on secondary sources such as books, journal articles, blog articles, commentaries, expert opinions, and other relevant internet sources as a means to analyze the existing literature, identify gaps and make contributions to the existing literature.

In terms of approach, the research follows both a descriptive, analytical and slightly comparative approach. First, it presents the jurisdictions and structures of the ACJHPR as it appears in the laws, as well as the applicable standards to analyze the implications of the ACJHPR. Then it went on to analyze the details of the jurisdiction of the Court and its implications. In terms of comparison, a modest attempt is made to look into the ACJHPR *vis a vis* the ICC.

1.8. Scope of the study

This study deals with subject matters related to the legal framework and institutional arrangement pertaining to the ACJHPR. The study primarily focuses on the criminal mandate of the Court and makes an overview of its human rights mandate as the prosecution of international crimes has human rights connotations. As such, It may not cover all issues and concerns about the Court unless it is relevant to the criminal mandate.

As to the legal framework, the AU Constitutive Act and relevant treaties, charters, and protocols, as well as International treaties, including the Rome Statute, will be consulted as core instruments. In analyzing the institutional and legal aspects, exploration will be made of AU's institutional arrangement with a focus on the AU human rights mechanisms.

1.9. Limitation of the study

In doing research, limitation and challenges are unavoidable, though they can be minimized. Likewise, the researcher anticipated some challenges that limited the study. Firstly, the lack of relevant materials in hard copy and the absence of international financial transaction mechanisms in Ethiopia to buy relevant soft copy materials were major constraints. Nevertheless, this has been minimized by using open-access materials and the available materials from different sources. Secondly, bureaucratic bottlenecks in interviewing relevant personalities and collecting necessary documents were a major challenge.

1.10. Overview of Chapters

This study has four chapters. The introductory part, which encompasses the background, statement of the problem, research questions, objectives, research methodology, limitations, delimitations, and literature review, constitutes Chapter One. Chapter Two presents the structure and jurisdiction of the ACJHPR tracing the major triggering factors for the creation process of the ACJHPR. Chapter Three is the analysis of the implications of the ACJHPR on the prosecution of international crimes in Africa. Chapter Five will conclude the research and provide recommendations that can help to strengthen the prosecution of international crimes in Africa.

CHAPTER TWO

THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLE'S RIGHTS: KEY ISSUES IN ITS STRUCTURE AND JURISDICTION

2.1. Introduction

The African Court of Justice and Human and People's Rights is an outcome of the long effort of the African leaders to establish an African criminal court that could serve as the principal regional judicial body of the Continent, replacing all existing regional courts. As its initiators and drafters wanted to achieve manifold objectives in a single judicial body, the Court has been made to have a complex organizational structure and jurisdiction.

This Chapter deals with the structure and jurisdiction of the Court. It gives an overview of major contentious jurisdictional and structural issues generated from its conception and adoption process. For it starts by discussing key issues preceding and triggering the creation of the AfCHPR.

2.2. The march towards the creation of the African Court of Justice and Human and People's Rights

The creation of an African criminal court was not an isolated occurrence, but it was part of Africa's longstanding craving to establish continental institutions that demonstrate unique African aspects, facilitate African unity and prosperity, and contribute to solving African problems in an African way. As widely pronounced throughout the evolution and reform initiatives of the AU, considerable effort has been made to make sure that African continental laws and institutions reflect African values and imagine African problems. As such, many legal instruments adopted and institutions created within the AU have some unique aspects that deviate from the conventional approach.

Likewise, the ACJHPR was purposely designed in a way that reflects some unique aspects in its structure and jurisdiction and departure from the existing international criminal prosecution as championed by the ICC. The uniqueness was demonstrated both in its tripartite jurisdiction on international law, human rights, and international criminal law but also in its establishment as the first permanent regional international criminal Court.

The creation of the ACJHPR was an extension of the continuous efforts and initiatives to create effective African courts that can address the major problems of the Continent. Prior to the adoption of the Malabo Protocol, there were some successful and aborted initiatives and exercises to the concept of an African continental court, albeit with their non-inclusion of criminal matters. Prior efforts include the adoption of laws establishing the African Court of Justice (ACJ), the African Court on Human and Peoples Rights (AfCHPR), and the African Court of Justice and Human Rights (merger Court). However, except for the AfCHPR, both the ACJ and the Merged Court did not materialize. Nevertheless, they were important exercises from which important lessons were drawn to create the ACJHPR, which can be taken as a consolidation of the prior ideas with the addition of criminal jurisdiction.

The failures of the prior initiatives are worth mentioning here. In July 2003, the Protocol on the ACJ was adopted in Maputo, where the ACJ was declared as the AU'S principal judicial organ.²⁹ The ACJ was the only Court that the AU Constitutive Act established on the model of the International Court of Justice (ICJ). The establishment of the ACJ was considered a major amendment to the OAU's inability to act against rogue African states that work against the interest of their people and the region.³⁰ It also created a hope that the AU would be more effective in settling disputes than its predecessor. Before the ACJ, the AfCHPR was established in 1998 after a series of resistance that came out of the time's socio-political, historical, and institutional context.³¹ The AfCHPR is the only operational permanent continental judicial body that gives binding decisions. The AfCHPR is a human rights court with no jurisdiction over criminal matters. As such, it could not meet the aspiration of African leaders to establish an African criminal court. The yet unattained aspirations of AU policymakers, coupled with the concerns on whether the Continent needs to have multiple regional courts with varying jurisdictions, lead to the multiplication of efforts toward finding a single continental court that merges all the human rights, international law, and criminal law issues.

²⁹ Protocol to the African Court of Justice, July 2003.

³⁰ Corinne P & Rukare, D, "The New African Union and Its Constitutive Act." (2002 *The American Journal of International Law*, 96(2), 374.

³¹ Daly Tom, 'The African Court on Human and Peoples' Rights: Mapping resistance against a young court' (2018). *International Journal of Law in Context* 14(02):294-313

Furthermore, questions of funding and related administrative matter triggered questions as to whether there is a need to have separate courts or a consolidated African court. Udombana observed that the adoption of the parallel operationalization of the ACJ protocol and the AfCHPR Protocol was “a needless duplication” that may result in overlap of jurisdiction and damage to coherent and consistent decision-making on thorny continental problems.³² Viljoen also noted that the creation of two separate courts also created concerns such as duplication of persons and split resources, the proliferation of institutions, and diffusion of focus.³³ Therefore, the AU contemplated a single African Court that merges the two courts.

Furthermore, practical exigencies triggered by the ICC’s indictment of some African leaders, including Omar Al Bashir and Uhuru Kenyatta, catalyzed the quest for an alternative African criminal court.³⁴ The indictments of the ICC at the time were in Africa.³⁵ On the contrary, many said the ICC did not take tangible measures on grave international crimes committed by nationals of powerful states. African leaders started to think that the ICC has brought more harm than benefit to Africa as its prosecution process affects peace initiatives in conflict and post-conflict situations.³⁶

Although the mainstream discourse, especially in the international human rights field, largely criticized African states’ position on the ICC prosecution process, the ICC’s prosecution was not free from problems, and Africa’s position was not totally baseless. The ICC work has tangible implications for the peace and security situation in Africa as it was dominated by judicial dogmatism that prioritizes justice over peace without any regard for pragmatism and balancing the two concepts. Some scholars argue that legal dogmatism cannot solve the biggest world

³² Frans Viljoen & Evarist Baium, “Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples’ Rights and the African Court of Justice”(2004), Vol 22(2).

³³ Udombana Nsongurua, "An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?" (2003) Brooklyn Journal of International Law (2003), 28.

³⁴ John Campbell, “The African Quest for an Alternative to the International Criminal Court at The Hague” Council on Foreign Relations, January 2013. <https://www.cfr.org/blog/african-quest-alternative-international-criminal-court-hague> (accessed 20 September 2022).

³⁵ International Criminal Court “ https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx(accessed 20 September 2022).

³⁶ Alex De Waal “Africa’s Position on ICC” (2008) African Arguments. <https://africanarguments.org/2008/09/africas-position-on-the-icc/>

problems.³⁷ Similarly, the issues of bias were not to be thrown as trash while all prosecutions are in a single continent and while historical records show that more grave crimes are committed on other continents, such as the Middle East.³⁸ As Mahmud Mamdani rightly observed, if the ICC's ultimate purpose is to bring about justice, desisting from indictment and prosecution of leaders of powerful states and targeting African leaders would be unjust.³⁹ Mamdani further explicated the matter, saying that "the test of Rule of Law is that it should apply to everybody, particularly the most powerful."⁴⁰ Robert has also noted the selectivity in international criminal law and practice as spearheaded by the ICC.⁴¹ Furthermore, as the prosecution of international crimes relies on state cooperation, any process that fails to give balanced weight to fundamental norms in Africa, such as peace and sovereignty, is doomed to fail. The African perspective has important pragmatic implications on the ground.⁴² The concerns raised as ICC targeting of incumbent leaders is also a topical matter that some argue is against the dictating international law principle of immunity. Sovereignty, especially when the state is not a party to the Rome Statute.

In all these controversies, African states tried to find a solution. The first solution they sought was collective withdrawal from the Rome Statute. But this could not provide a lasting solution as serious international crimes that require prosecution exist and could happen in many African countries. As a result, the African states decided to create a regional criminal court. In doing so, they wanted to address the aforementioned challenges associated with institutional proliferation, funding gaps, and administrative challenges. Then, they determined that a single court that has

³⁷ Drumbl Mark, "Law, Cannot Solve the Biggest Problems We Face" *Justice Info.net*. July 2019. <https://www.justiceinfo.net/en/41932-mark-drumbl-law-cannot-solve-the-biggest-problems-we-face.html> (accessed 20 September 2022).

³⁸ See, generally, Chalk Robert and Kurt Jonassohn (1990) *The history and sociology of genocide: Analyses and case studies*. Yale University Press. Vol. 23.

³⁹ Aljazeera "UpFront - Arena: Is the ICC biased against African countries?" <https://www.youtube.com/watch?v=1XHjYJOYZDk> (accessed 20 September 2022).

⁴⁰ *Ibid.*

⁴¹ Cryer Robert (2005) *Prosecuting International Crimes: Selectivity in International Criminal Law*. Cambridge: Cambridge University Press

⁴² Ritu Boopathy "The ICC contestation: the African Perspective" (2021) George Washington International Law and Policy Brief. November 2021. <https://studentbriefs.law.gwu.edu/ilpb/2021/11/09/the-icc-contestation-the-african-perspective/#:~:text=African%20states%20have%20often%20preferred%20many%20fundamental%20norms,Western%20judicial%20perspective%20on%20solving%20and%20addressing%20justice>. (accessed 20 September 2022).

jurisdiction over human rights, criminal and general international affairs should be established. After protracted debates, the ACJHPR was established in Malabo in 2014.

2.3. Jurisdiction of the ACJHPR

2.3.1. Nature of the Court and its jurisdiction

The Protocol on Amendments to the Statute of the African Court of Justice and Human Rights provides that the ACJHPR has jurisdiction over human rights issues, international criminal matters, and general international law issues. Therefore, as a tri-sectional court with broad content, the ACJHPR could be considered a broadly comprehensive court that has come as a novel African initiative. The Court not only merges the existing two continental Courts, the ACJHPR and the ACJ, but also adds another third unit on international crimes.

The ACJHPR has both a first instant and an appellate jurisdiction. Therefore, complaints can be directly submitted to the Court without awaiting anything but the exhaustion of available national remedies. This puts the Court in equal status with any other international court on matters in which it has jurisdiction.

2.3.2. Jurisdiction on General International Law Affairs

The Malabo Protocol provides that the ACJHPR has jurisdiction on ‘Any question of international law’ without giving any explanation on what this could include.⁴³ As such, the scope of this clause, especially whether it “encompasses all international law matters that are not excluded by either the Human and Peoples’ Rights or the International Criminal Law sections of the Court” in relation raised scholarly debate.⁴⁴ In the absence of any clearly stated provision, the General Affairs section of the Court includes all international law matters but human rights and international criminal law, which are covered by the other two areas. This means boundary disputes, the law of the sea, climate change, and all other issues involving state responsibility can be submitted to the General Affairs Section of the Court. Matters on which the International Court of Justice and other international tribunals exercise jurisdiction can also be entertained by the ACJHPR, provided that the issues involve an African country and the African Continent.

⁴³ Malabo protocol article 17

⁴⁴ Charles Jalloh et al. “The General Jurisdiction of the African Court” (2019). In C. Jalloh, K. Clarke, & V. Nmehielle (Eds.), *The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges* (pp. 1021-1054). Cambridge: Cambridge University Press.

As the extension of the ACJ, the General Affairs Section of the ACJHPR is anticipated to entertain matters that were envisioned during the creation of the AU and the ACJ. During the transition from the OAU to the AU, one of the major shifts was the introduction of the ACJ. It was anticipated that the ACJ could be a platform to correct the OAU's inability to act against rogue African states that work against the interest of their people and the region.⁴⁵ Up on the adoption of the Malabo Protocol, this mission has been transferred to the ACJHPR. Whether the ACJHPR will achieve this vision is yet to be tested, but the challenges that emanate from its structure and jurisdictional scope are expected to be big hindrances. Let alone achieving the mission of bringing African states to justice, ACJHPR's very feasibility to fully operate is called to question since its inception.⁴⁶

Furthermore, the General section is anticipated to deal with issues concerning unconstitutional change of government in Africa. While some sought this as the great African response to prevailing challenges⁴⁷ Some identified the possible challenges that the ACJHPR could face because of the criminalization of unconstitutional changes of government.⁴⁸ This is a pragmatic observation because even before the operationalization of the ACJHPR, the definition of unconstitutional government has always been challenging within the African Union debates. The African Union has not taken a consistent position on issues of unconstitutional change of government, and its policies may require revision.⁴⁹

In a nutshell, the general affairs section of the ACJHPR is arguably the most unclear, albeit not as controversial as its criminal jurisdiction. The fact that the Malabo Protocol incorporated 14

⁴⁵ Corinne P & Rukare, D, "The New African Union and Its Constitutive Act." (2002 *The American Journal of International Law*, 96(2), 374.

⁴⁶ Amnesty International, "Africa: Malabo Protocol: Legal and institutional implications of the merged and expanded African Court" May 2017. <https://www.amnesty.org/en/documents/afr01/6137/2017/en/> (accessed 20 September 2022)

⁴⁷ Kemp Kinyunyu, "The Crime of Unconstitutional Change of Government (Article 28E). In: Werle, G., Vormbaum, M. (eds) *The African Criminal Court* (2017) International Criminal Justice Series, vol 10.

⁴⁸ Van der Wilt, "Unconstitutional Change of Government: A New Crime within the Jurisdiction of the African Criminal Court. In C. Jalloh, K. Clarke, & V. Nmeielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (2019). (619-642).

⁴⁹ Said Djinnit, "The Case for updating the African Union Policy on Unconstitutional Changes of Government" (2021) <https://www.accord.org.za/publication/case-for-updating-au-policy-unconstitutional-changes-government/> (accessed 20 September 2022).

crimes, most of which are uncommon in international criminal prosecutions, could encumber the ACJHPR as there is no similar prior international precedent.

2.3.3. Jurisdiction on Human and People's Rights

Similarly, in its human rights section, the ACJHPR can entertain “all cases relating to human and people's rights.”⁵⁰ Issues on which the AfCHPR has been exercising jurisdiction will be within the domain of the jurisdiction of the ACJHPR. Therefore, therefore, in this section of the ACJHPR that the AfCHPR will be absorbed. This raised questions as to the need for the AfCHPR without a major substantive difference from the ACHPR.⁵¹

However, the ACJHPR has introduced some improved ideas which are arguably substantial. Unlike the African Court of Human and People's Rights, the ACJHPRs will be directly accessible to individuals and NGOs. This is worth noting aspect of the ACJHPR. Furthermore, the ACJHPR has more autonomy in budget allocation than the ACHPR.⁵² The Malabo Protocol also requires gender representation on the ACJHPR bench.⁵³ These are major departures that have serious implications for human rights.

The Human Rights jurisdiction of ACJHPR will be protective, and its working relationship with the existing quasi-helical human rights bodies such as the African Commission on Human and People's Rights will have to be sorted out. This means ACJHPR will form a key institution constituting the African human rights system. As rationalization and mainstreaming of the works of the institutions that form the African human rights system have been major issues, the functions of the ACJHPR will have to be harmonized with the other AU human rights bodies.⁵⁴

Furthermore, the ACJHPR is mandated to interpret the African Charter, the African Charter on the Rights and Welfare of the Child (ACRWC), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women Protocol).⁵⁵

⁵⁰ Malabo Protocol, art 28.

⁵¹ Murray Rachel, The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples' Rights. In C. Jalloh, K. Clarke, & V. Nmehielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, (2019 (965-988).

⁵² Malabo Protocol, art 26.

⁵³ Malabo Protocol, art 3.

⁵⁴ Mbondeyi Moris, (2014) "Mainstreaming and Rationalizing the African Human Rights System," 448.

⁵⁵ Malabo Protocol, Art 28 (c).

While within its protective mandate, the ACJHPR should interpret and apply these instruments, it has to be noted that the ACRWC, a specialized committee called the Committee on the Rights and Welfare of the Child, should continue with its promotional and practically growing protection functions. Yet, this may require a harmonization mechanism.

2.3.4. International Criminal jurisdiction

The criminal judication of the ACJHPR is the most examined, controversial, and, arguably, the most important driving factor for establishing the Court. Unlike other international criminal courts, including the ICC, the ACJHPR has extensive jurisdiction over 14 international crimes. The crimes on which the ACJHPR can exercise jurisdiction are corruption, the crime of aggression, crime of unconstitutional change of government, crimes against humanity, genocide, illicit exploitation of natural resources, mercenary, money laundering, piracy, terrorism, trafficking in drugs, trafficking in hazardous wastes, trafficking in persons, and war crimes. This means the Court will exercise jurisdiction on well-established international crimes in international law, such as genocide and crimes against humanity. It is also set to play an icebreaker role in established and controversial crimes of complex nature, such as terrorism and mercenaryism. Therefore, the ACJHPR will have overlapping jurisdiction with the ICC and exclusive jurisdiction on crimes not incorporated in the Rome Statute.

Moreover, the Court's jurisdiction is not limited to the 14 crimes provided in its Protocol. The Court's jurisdiction is expandable based on the decision of the Assembly. This means that the offenses listed in the Protocol are only a starting, and it has a progressive mandate. In principle, the purpose of this progressivity is to accommodate international law developments. It implies that crimes currently not in the purview of the AU or less relevant to the African Continent have the possibility of inclusion in the Court's jurisdiction. However, the endeavor also shows the Court's susceptibility to the Assembly's influence and the AU leaders' intention to maintain some leverage.

Some of the crimes on which the ACH is expected to exercise jurisdiction lack the necessary clarity and specificity to make decisions based on the standard required by criminal adjudication. Crimes such as terrorism are not only vague but also broad and controversial. There is no universally agreed definition of these terms; for example, "one man's terrorist is another man's freedom fighter." These issues may add more challenges to the function of the Court.

2.3.5. Sources of the Jurisdiction of the ACJHPR

The Protocol gives the Court the mandate to receive and adjudicate cases that emanate from any other agreements that the African Union Member States or the Regional Economic Communities, or other international organizations recognized by the African Union may conclude. This means that, unlike the existing operational regional judicial and quasi-judicial bodies, the ACJHPR can base its judgments on treaties outside the AU system.

2.4. Conclusion

The ACJHPR has an extended jurisdiction that encompasses human rights, criminal matters, and general international law affairs. It also has jurisdiction over 14 crimes, as such. It can be considered an African court of general jurisdiction. Measured against its jurisdiction, it has many unique features. It is the first regional criminal Court with such an extended jurisdiction structure. The structure is designed following its jurisdictions with three benches. The unique structure and extended jurisdiction of the ACJHPR can have immense implications for the prosecution of international crimes.

CHAPTER THREE

IMPLICATIONS OF THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLE'S RIGHTS ON THE PROSECUTION OF INTERNATIONAL CRIMES IN AFRICA

3.1. Introduction

As highlighted in the previous chapters, the establishment of the ACJHPR was motivated by several reasons. Africa's dissatisfaction with the global criminal justice system and desire to make African regional criminal justice and human rights more effective are among the main reasons that triggered the idea of an African permanent criminal court.⁵⁶ Whether the ACJHPR, in its present form and mandate, could achieve these objectives is the most critical question that remains to be tested.

This chapter analyzes the implications of the ACJHPR on the prosecution of international crimes in Africa. In so doing, it examines ACJHPR's implications on the global and regional criminal justice and human rights systems. It evaluates whether it has the means to achieve its envisioned purposes. It starts by highlighting the motives behind the establishment of the ACJHPR.

3.2. The *raison d'être* of the African Court of Justice and Human and people's Rights

3.2.1. Dissatisfaction with the international justice system

Africa's attitude towards international criminal justice has changed from time to time. The perception of African countries has been influenced by factors that emanate from particular political realities in Africa and the methods employed by the international criminal justice mechanisms in prosecuting grave international crimes in Africa. African countries have, on many occasions, pronounced their views on the International Criminal Court (ICC) prosecution process. These have been expressed through individual state and collective reactions through the African Union.

⁵⁶ Ibrahim Kane & Ahmed Motala, "The Creation of a New African Court of Justice and Human Rights" In M. Evans & R. Murray (Eds.), *The African Charter on Human and Peoples' Rights: The System in Practice 1986–2006*, (2008) (406-440).

In the initial stage of the institutionalization of the idea of international criminal justice, Africa gave strong support.⁵⁷ This has been manifested through support for the creation of the ICC and the adoption of the Rome Statute. Furthermore, out of the 55 African countries, 43 have signed the Statute, and 33 are still parties to the Statute.⁵⁸ Several reasons have been attributed to African support for international criminal justice. One of these reasons was Africa's desire to stop powerful global actors from putting unfair pressure and wrongdoings on the weaker states.⁵⁹ This was the extension of the anti-imperialism sentiment that expanded across African countries in the aftermath of the independence of many African countries. Why the African states were excessively optimistic that they did not decline their support on account of possible instrumentalization of the ICC by powerful Western states despite their general suspicions of the west, some argued that Africa's initial imagination was a different kind of Court than the ICC, a court which has a "horizontal relationship to national courts and an appreciation of the challenges of statehood."⁶⁰ This line of argument leads one to conclude that the ICC was not the ideal Court for Africa and but they supported it while knowing the defects as there was no feasible alternative.

The second factor that motivated African countries to support the establishment of the ICC was the 1994 Rwanda Genocide and global inaction.⁶¹ The Rwanda Genocide was a global shock that needed to be investigated and prosecuted by an appropriate body. As such, African countries wanted to make the international system prosecute the problem in a way that could leave important precedents for other violations on the Continent. Additionally, African countries'

⁵⁷ Sanji Monageng, "Africa and the International Criminal Court: Then and Now" In Fernandez & Vormbaum (eds) *Africa and the International Criminal Court* (2014) International Criminal Justice Series, vol. https://link.springer.com/chapter/10.1007/978-94-6265-029-9_2 (accessed 20 September 2022)

⁵⁸ International Criminal Court, the States Parties to the Rome Statute. <https://asp.icc-cpi.int/states-parties> (accessed 29 August 2022).

⁵⁹ 'Africa's Relationship with the International Criminal Court (ICC)' (Lawteacher.net, September 2022) <<https://www.lawteacher.net/free-law-essays/international-law/africa-international-criminal-court-0298.php?vref=1>> accessed 5 September 2022

⁶⁰ Line Engbo Gissel, A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003, *European Journal of International Law* 29 (2018), 725–748.

⁶¹ 'Africa's Relationship with the International Criminal Court (ICC)' (Lawteacher.net, September 2022) <<https://www.lawteacher.net/free-law-essays/international-law/africa-international-criminal-court-0298.php?vref=1>> accessed 5 September 2022.

initial support was partly motivated by their desire to bring rebel and insurgent leaders to justice, as many African countries were puzzled by armed insurgency.⁶²

However, the initial African enthusiasm for the ICC started declining for several reasons. African countries believed that the ICC had shown blatant bias against Africa by selective prosecution of African leaders. Many countries also thought that the ICC prosecution process had adversely contributed to the peace efforts in conflict-affected countries and post-war situations.⁶³ These states argued that the international justice system must be reconciled with the peace efforts so that peace should be given precedence in some instances. Furthermore, many African states alleged that the ICC has intruded on the sovereignty of African countries by intervening and threatening to intervene under the guise of criminal prosecution.⁶⁴ Furthermore, many African countries and the African Union believed that the ICC had become the instrument of Western countries to promote their unjust political agenda in Africa.⁶⁵

The prosecution of Omar Al Bashir, Sudan's former president, was taken by African leaders as a crucial opportunity to rally against the ICC. Bashir's indictment had a threatening dividing effect on Africa and the ICC.⁶⁶ The AU openly refused to cooperate with Bashir's arrest.⁶⁷ The Heads of State and Government of the AU passed a resolution condemning the ICC's prosecution of

⁶² Line Engbo Gissel, A Different Kind of Court: Africa's Support for the International Criminal Court, 1993–2003, *European Journal of International Law* 29 (2018), 725–748.

⁶³ Assembly of the African Union, "DECISION ON INTERNATIONAL JURISDICTION, JUSTICE AND THE INTERNATIONAL CRIMINAL COURT" (ICC) 2 Doc. Assembly/AU/13(XXI) chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://portal.africa-union.org/DVD/Documents/DOC-AU-DEC/Assembly%20AU%20Dec%20482%20(XXI)%20_E.pdf (accessed 20 September 2022).

⁶⁴ Alex De Waal "Africa's Position on ICC" (2008) African Arguments. <https://africanarguments.org/2008/09/africas-position-on-the-icc/> (accessed 20 September 2022).

⁶⁵ Ibid.

⁶⁶ Mills K. " Bashir is Dividing Us": Africa and the International Criminal Court. (2012) *Human Rights Quarterly*.

⁶⁷ Amnesty International, "African Union refuses to cooperate with Bashir arrest warrant" <https://www.amnesty.org/en/latest/news/2009/07/african-union-refuses-cooperate-bashir-arrest-warrant-20090706/#:~:text=The%20African%20Union%20%28AU%29%20has%20refused%20to%20cooperate,to%20victim%20of%20human%20rights%20violations%20in%20Darfur.>

Omar Al Bashir.⁶⁸ States, including those parties to the Rome Statute, failed to cooperate with the arrest warrant and enabled Bashir to escape from their country.⁶⁹

As a supreme attestation of their dissatisfaction with the international criminal justice system, African countries threatened to withdraw from the Rome Statute collectively.⁷⁰ The African Union had also backed the mass withdrawal.⁷¹ The African Union had established an Inter-Ministerial Committee to deal with issues with the ICC and implement the mass departure of African state parties to the Rome Statute. The AU has also approached the UN to seek an advisory opinion on the prosecution of seating African Heads of state.⁷² Finally, the issues have been settled through diplomatic means.

The dissatisfaction with the ICC inspired African governments to contemplate an African criminal Court based on the idea of African solution solutions for African Problems. The process eventually culminated in the adoption of the Protocol establishing the ACJHPR, causing some to call it “a protest court.”

3.2.2. An aspiration towards a single, more effective African human rights body?

Although the ACJHPR may be a wrong alternative to make the African human rights system more effective, African countries within the AU have incorporated the creation of the ACJHPR as a key reform area within the in African Union institutional reform initiatives.⁷³ Paul

⁶⁸ Assembly of the African Union, “Decision On International Jurisdiction, Justice And The International Criminal Court” Doc. Assembly/AU/13(Xxi); Assembly/AU/Dec.482(XXI) .

⁶⁹ International Federation for Human Rights, “Al Bashir’s escape: South African government should be held accountable for flouting court orders” 2015. <https://www.fidh.org/en/region/Africa/south-africa/al-bashir-s-escape-south-african-government-should-be-held> (accessed 10 August 2022).

⁷⁰ The Guardian, “African leaders plan mass withdrawal from international criminal court.” January 2017. <https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court>

⁷¹ BBC, “African Union backs mass withdrawal from ICC.” February 2017. <https://www.bbc.com/news/world-africa-38826073>

⁷² Priya Pillai, “the African Union, International Criminal Court and the International Court of Justice: At the Faultline of international accountability.” *American Society of International Law* (2018) Vol.22.10.

⁷³ Paul Kagame, “The imperative to strengthen our Union.” *Report on the Proposed Recommendations for the Institutional Reform of the African Union* 29 (2017) <https://www.tralac.org/images/docs/11191/report-on-the-proposed-recommendations-for-the-institutional-reform-of-the-au-kagame-29-january-2017.pdf> (accessed 18 September 2022).

Kagame's report presented the ACJHPR as an ideal solution to address the gaps associated with the judiciary organs of the AU.⁷⁴ At present, the only permanent operational judicial organ of the AU is the African Court of Human and People's Rights. Therefore, Kagame's report implies that the ACJHPR could address gaps seen in the African Court on Human and People's Rights.

The African human rights system has been criticized as weak and ineffective, requiring reform.⁷⁵ Existing regional human rights mechanisms could not manage to ensure the protection and promotion of human rights in the Continent due to several factors. While the lack of cooperation from states and the African Union accounted for a major reason for their lack of effectiveness, the fragmented nature of the system has also raised questions such as harmonization and rationalization.⁷⁶ As Mbondeni observed, institutional proliferation should be checked against the effectiveness of the regional human rights system as “emerging institutions tend to overlap and duplicate each other's functions.”⁷⁷ This means there is a need to have a harmonized human rights mechanism.

The African Union has continuously evolved, and so has its human rights system. However, African scholars have observed that the system has not been effectively mainstreamed, and the efforts have been mainly sporadic and ad hoc.⁷⁸

Similar voices have also reverberated within the African Union. Discussions streamlining the AU working method and restructuring its institutions have been part of the African Union Reforms agendas that evolved over the years and gained tremendous momentum in recent years.

The African Union human rights mechanisms, have also been the subject of discussions. There was a consensus that the human rights system needed reform, but there was no agreement regarding the reform methods. Merging the existing human rights bodies was one of the methods that obtained tremendous support. For example, Assembly adopted the Draft Protocol on the

⁷⁴ Ibid, 14.

⁷⁵ Tilahun Zewudie 'Towards an effective African human rights system: The nature and implications of the relationship between the African Union Policy Organs and Human Rights Bodies' in Michael Adeney, Michael Gyan Nyarko and Elsabe Boshuf (eds) *Governance, Human Rights, and Political Transformation in Africa* Palgrave MacMillan (2019)

⁷⁶ Morris Mbondeni (2014) *International Human Rights and their enforcement in Africa's* 447

⁷⁷ Ibid.

⁷⁸ Frans Viljoen (2012) *International Human Rights Law in Africa*, 6th ed. 169.

Statute of the African Court of Justice and Human Rights on July 2008.⁷⁹ Yet, this was found to be insufficient to achieve the desired objectives. As a result, in 2014, the African states adopted the Protocol that created the ACJHPR in Malabo, Equatorial Guinea.

3.2.3. The ACJHPR as a mechanism to accommodate African “unique” realities?

Africa has experienced unimaginable human suffering due to conflicts and human rights abuses by governments. In some situations, the international community has failed to prevent wars and protect human safety and rights. For example, during the Rwanda Genocide, the UN and the big powers could not take concrete measures to save lives. This created dissatisfaction with the international system. Accordingly, Africa sought the need to strengthen its maxims.

Furthermore, the perception of African uniqueness had hugely echoed in the AU meetings and at state levels. Africa was seen as a continent with unique values and traditions. This perception has been reflected in the AU treaties, such as the African Charter on Human and People's Rights, an instrument that incorporated some rights.⁸⁰ That was not explicitly provided in the international human rights treaties.⁸¹ Furthermore, the issue of preserving African values and traditions against contamination by Western values was a big agenda that rocked the African Union. This was particularly heard in rejecting the rights of LGBTI people, as manifested in the AU Executive Council Decision withdrawing the observer status of Lesbians for African Coalition from the African Commission on Human and People's Rights.⁸²

In this way, perceptions of African Uniqueness have affected the creation and operation of the AU organs. It is, therefore, essential to underscore that the perception of African uniqueness has also influenced the creation of the ACJHPR.

⁷⁹ ASSEMBLY OF THE AFRICAN UNION, Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the African Court of Justice Doc.Assembly/AU/13 (XI), Assembly/AU/Dec.196 (XI) .

⁸⁰ These include the right to peace, people's rights, and the right to development.

⁸¹ African Charter on Human and Peoples Rights, arts 18, 20,22

⁸² African Union, Decision on The Report On The Joint Retreat Of The Permanent Representatives Committee (Prc) And African Commission On Human And Peoples' Rights (ACHPR) DOC.EX.CL/1089(XXXIII) EX.CL/Dec.1015(XXXIII) . July2015. <https://au.int/en/decisions/council>

3.3. Implications of the ACJHPR on the prosecution of international crimes in Africa

As overviewed in the previous sections, the creation of the ACJHPR has been partly motivated by its own African realities and the works of the International Criminal Court. Accordingly, the operationalization of the ACJHPR will have implications on the global international criminal justice, the African regional human rights system, and the service of criminal justice in Africa.

This section deals with the significant implications of creating and operationalizing the ACJHPR.

3.3.1. Implications for the International Criminal Justice

The ACJHPR is a major, if not the biggest, institutional manifestation of Africa's objection to the international criminal justice system championed by the ICC. It is an attempt to replace the ICC. The Malabo Protocol empowers the Court "to hear all cases relating to the crimes specified in this Statute."⁸³ As discussed in the previous chapter, it covers a range of crimes, including those on which the ICC has jurisdiction, namely war crimes, crimes against humanity, and genocide. This apparent overlap of jurisdiction raises serious legal questions, including how the ACJHR works in the areas covered by the ICC. Which Court should prevail over the shared crimes committed in Africa? The complementarity between the ICC and the ACJHPR? And whether it will undermine or reinforce international criminal justice.

These are essential considerations that need a critical examination of the jurisdiction, structure, and working methods of the ACJHPR. Since the ACJHPR does not have a working process because it is not yet operationalized, the design and jurisdiction need to be examined against the international criminal system. In terms of its structure, the Court contains three benches; human rights, criminal, and general international law bench. Of these benches, the criminal jurisdiction has a profound implication for the ICC.

The most contentious issue relates to the principle of complementarity. Both the ICC and ACJHPR are international courts. Several scholars have noted that the exclusion of the complementarity principle in the Malabo Protocol, as the Rome Statute, is a major gap that could

⁸³ Malabo Protocol, Art.17

give rise to potential tension between the AU and the ICC.⁸⁴ This is a correct observation because, in the absence of complementarity or hierarchy between the two courts, the duplications and overlap of mandates could give rise to unnecessary competition between the two bodies. Furthermore, in a situation where the ACJHPR becomes operational, devising a mechanism of cooperation between the ICC, and the ACJHPR could be another alternative despite the potential challenges in achieving it.

The tensions between the ICC and ACJHPR are believed to be inevitable. Scholars suggested two alternatives. One of the proposals has been to make ICC hierarchically superior to the ACJHPR, while the other proposal is to create a cooperation mechanism between the two courts as equal partners.⁸⁵ However, it is argued that creating a hierarchy between the two courts by making the ACJHPR would be difficult to achieve and contradict the purpose sought by the African leaders during the creation of the ACJHPR. The second alternative, however, can and shall be the only viable mechanism if the ACJHPR is to be operationalized.

Critics also raise that the Rome Statute does not allow the creation of a regional criminal court. However, as Abbas rightly observed, are fallacious because, as a stand-alone treaty, the Rome Statute does not have an outlawing effect on other treaties and does not give the ICC supervisory status over any other institution.⁸⁶

In the absence of hierarchy or complementarity, the principle of pendency and res judicata would prohibit the ICC from seizing matters that are seized or decided by the ACJHPR. This means that if the ACJHPR will not be effective enough to prosecute grave crimes; those crimes will remain unprosecuted, giving room for impunity to prevail.

⁸⁴ Clarke, K., Jalloh, C., & Nmehielle, V. (2019). Introduction: Origins and Issues of the African Court of Justice and Human and Peoples' Rights. In C. Jalloh, K. Clarke, & V. Nmehielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (pp. 1-54). Cambridge: Cambridge University Press. doi:10.1017/9781108525343.002

⁸⁵ Van der Wilt, H. (2017). Complementary Jurisdiction (Article 46H). In: Werle, G., Vormbaum, M. (eds) *The African Criminal Court*. International Criminal Justice Series, vol 10.

⁸⁶ Abbas, Ademola. "The proposed international criminal jurisdiction for the African Court: some problematical aspects." *Netherlands International Law Review* 60.1 (2013): 49

While the interest in prosecuting international crimes is welcome, the creation of the ACJHPR will create serious challenges for African state parties to the Rome Statute.⁸⁷ If they ratify the Malabo Protocol, these states will have dual obligations. In situations where the tension between the ICC and the ACJHPR, states will be challenged to manage competing interests and obligations.⁸⁸ In this situation, there is no clear rule regarding which one prevails. But the Court that starts an indictment process first will make it impossible for indictment or prosecution by the other Court. In case of competing interests, states would have to weigh their interests and decide. But this may create a situation analogous to forum shopping, where some dictatorial African governments avoid the ICC by showing modest but unsatisfactory cooperation with the AfCHPR and escape proportional punishment. Therefore, the creation of the ACJHPR will create not only overlapping jurisdictions but also overlapping obligations that affect the service of criminal justice.

While the explicit idea for the creation of the ACJHPR was to find an African court to adjudicate African crimes as embedded in the idea of an African solution for African problems, the hidden motive behind this novel endeavor was the leaders' attempt to escape criminal prosecution. This is notwithstanding the fact that the ICC may also be influenced by the powerful states and directly or indirectly serve as their foreign policy instrument. Therefore, whether it is the ICC or an African court, the African states are unlikely to ensure the effective prosecution of grave crimes in Africa. Therefore, the ACJHPR will only serve as an escape mechanism. This is also confirmed by the deliberate affirmation of Officials' absolute immunity in the Malabo Protocol.

Given the poor trend in the prosecution of grave violations in Africa, it would be fair to predict that the functions of the ACJHPR will be adversely affected by state interference and lack of cooperation. As an organ of the AU, the ACJHPR will be as strong as its member states. This means if the states show the strong political will to make it effective, it can serve its purpose, but if states do not demonstrate real political will, the AfCHPR will be ineffective. Let alone its

⁸⁷ Amnesty International, "Malabo Protocol: LEGAL AND INSTITUTIONAL IMPLICATIONS OF THE MERGED AND EXPANDED AFRICAN COURT" 2016 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0130632016ENGLISH.pdf (accessed 28 August 2022).

⁸⁸ *Ibid.*

effectiveness, even its survival is dependent on states' will. Therefore, the mere lack of cooperation by African states will hinder its effective operation.

However, many have sought innovative aspects in the creation of the ACJHPR. One aspect that has been raised in support of the creation of the ACHJPR is the incorporation of a range of crimes in addition to genocide, crimes against humanity, and war crimes. This created a perception that major problems in Africa that have never been entertained by the international criminal bodies could get resolution by the ACJHPR. This is true in the ideal condition where the ACJHPR becomes feasible through robust support from states. The wide jurisdiction of the AfCHPR will increase its challenges and feasibility. But, since the ultimate fate is on states, one may not conclusively tell that the AfCHPR is unfeasible, for there is no absolute impossibility to make it work. The other argument raised is the possible relative advantage of ACJHPR over the ICC because it is closer to Africa and has African experts, and is, therefore, better positioned to address African problems by employing African means.⁸⁹ The comparative advantage of the AfCHPR over the ICC is immense, but it does not guarantee better prosecution. For example, the AfCHPR would get more eyewitnesses at a cheaper cost than the ICC. AfCHPR prosecution could also be conducted with less administrative and financial expenditure compared to the ICC. The fact that the AfCHPR will have African judges who could have a stronger attachment to the Continent than the ICC. If effectively utilized, these leverages could put the ACJHPR in a better position.

Furthermore, proponents of the ACJHPR raise that the ICC, as seen in its operation, is stretched to prosecute grave international crimes committed across the globe. Therefore, regional mechanisms like the ACJHPR would fill this gap.

In general, the tensions between the ACJHPR and the ICC will be inevitable, and creating a cooperation mechanism would be essential. While the ACJHPR, if operationalized, may have promising potentials to address, its implications for the function of the ICC will be largely

⁸⁹ Teferra Addis, "Some reflections on current Africa's project on the establishment of African Court of Justice and Human Right (ACJHR)" 2015 AfricLaw <https://africlaw.com/2015/06/29/some-reflections-on-the-current-africas-project-on-the-establishment-of-african-court-of-justice-and-human-right-acjhr/> (accessed 25 August 2022).

adverse. In the view of this author, both the proponents and opponents of the ACJHPR have valid points because the ACJHPR will have both advantages and disadvantages. In the end, the answer lies in weighing the potential advantages and disadvantages of the ACJHPR to international criminal justice. It is apparent that the advantages outweigh the disadvantages because the risk that may happen because of the complementarity, hierarchy, and overlaps of jurisdiction could be addressed through a joint cooperation mechanism. As the motivating factors for the establishment of the ACJHPR were to find an alternative to the ICC and respond to the alleged ICC bias in Africa, the cooperation mechanism requires further constructive engagement to address gaps and accept that the ACJHPR can complement the work of the ICC. This means as far as the ultimate objective is concerned, the African states will have to recognize that the purpose of the ACJHPR is not just to protest against the ICC but to achieve practical challenges of impunity on the Continent. At present, there seems to exist a relatively positive atmosphere between the ICC and African states as they abandoned their mass withdrawal plan after constructive diplomatic engagements with the ICC. When the ACJHPR is functional, it can build on this improving condition.

3.3.2. Implications for the African Human Rights System

The major implication of the establishment of the ACJHPR on the African human rights system emanates from the merging of human rights with other international law matters and the plan to terminate the African Court on Human and People's Rights. The expanded jurisdiction of the ACJHPR means human rights will not be handled by an exclusively specialized human rights court. In its present form and function, the African Court on Human and People's Rights is the only operational regional permanent Court dedicated to the protection of human and people's rights.⁹⁰ The replacement of this specialized Court with a court of broader jurisdiction will reduce the regional emphasis on human rights in Africa.⁹¹ For example, the human rights section of the ACJHPR will have five judges as opposed to the 11 judges that the African Court of

⁹⁰ F Viljoen "AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol" (2016) <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-African-court-protocol/> (accessed 20August 2022).

⁹¹ *Ibid.*

Human and Peoples Rights has hence significantly affected the capacity of the human rights bench.⁹²

The African human rights system is championed by specialized human rights mechanisms. One of these specialized bodies is the African Court on Human and People's Rights which has made notable contributions in laying human rights standards and precedents in Africa. Terminating this Court creates a break in the entire system.

The Malabo Protocol also has restrictions on entities that could institute cases before the ACJHPR to Africa that did not exist in the African Court on Human and Peoples Rights. Only “African organizations recognized by the AU” can request an advisory opinion of the ACJHPR.⁹³ This excludes NGOs that are not recognized by the AU. It also excludes non-African nationals and NGOs from bringing cases before the Court. This will narrow and weaken the African human rights system. Perhaps the motive of the African countries is to resist western interference in African Affairs as part of their agenda of African solutions for African problems. However, this will have an adverse impact on the human rights and criminal prosecution process because it will stop the relevant expertise and technical support from big non-African NGOs which have established experience in the field in addition to funding.

In general, the creation of the ACJHPR will have an adverse impact on the African human rights system if the ACJHPR becomes operational upon ratification by the required number of the Malabo Protocol states. The replacement of the African Court on Human and People’s Rights with a more sophisticated and broadly mandated court will decrease the prioritization of human rights at the regional level. Human Rights can be better served by making the African human rights system more effective and not by terminating the operationalization of the specialized African human rights court.

⁹² Amnesty International, “Malabo Protocol: LEGAL AND INSTITUTIONAL IMPLICATIONS OF THE MERGED AND EXPANDED AFRICAN COURT” 2016 chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.amnesty.org/en/wp-content/uploads/2021/05/AFR0130632016ENGLISH.pdf (accessed 28 August 2022).

⁹³ Malabo Protocol, Art 53.

3.3.3. Implications for criminal justice in Africa

As highlighted above, ACJHPR may have a relative advantage over the ICC in prosecuting criminal justice in Africa, but it creates a competing obligation among state parties to the Rome Statute. This and many other competing interests will persist, and judgment can only be made by balancing the tensions. In any way, the ACJHPR could widen alternatives for international criminal justice in Africa without substituting the ICC. As Adams observed, the ACJHPR can be taken as a "transformation in the imagination" and a pointer to the possibility of bringing a legitimate alternative to global justice.⁹⁴

It has been observed that the ACJHPR "could tailor criminal accountability to the context, needs, and aspirations of the (African) continent."⁹⁵ This is a probable prediction and a reminder that international courts operate in certain contexts. In this regard, it has been suggested that the ACJHPR should recognize the plurality of the African popular struggle for justice.⁹⁶ In doing so, the ACJHPR can serve justice well across the Continent if operationalized.

The ACJHPR undertakes trials in the areas that are closer to the place where the crimes were committed. This means it can carry out its activities with lesser cost and creates easier access to evidence and witness. It is also argued that such proximity would give victims a huge sense of belongingness to the trial and participation.

Furthermore, the ACJHPR could render justice for a range of transnational crimes that do not fall under the jurisdiction of any other international criminal tribunal. These crimes include terrorism, corruption, money, human trafficking, piracy, and unconstitutional change of government. However, the feasibility of delivering effective justice on this broad list of crimes casts doubt. In the main, it requires huge financial resources and experts. Whether the African Union will deploy the necessary resource is hard to answer positively despite the enthusiasm within the union.

⁹⁴ Adam Branch, the African Criminal Court: Towards an Emancipatory Politics. In C. Jalloh, K. Clarke, & V. Nmeihelle (Eds.), *the African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*. Cambridge: Cambridge University 219.

⁹⁵ Matangi Sirleaf, The African Justice Cascade, and the Malabo Protocol, *International Journal of Transitional Justice*, Volume 11, Issue 1, March 2017, Pages 71–91, <https://doi.org/10.1093/ijtj/ijx002>

⁹⁶ Adam Branch, the African Criminal Court: Towards an Emancipatory Politics. In C. Jalloh, K. Clarke, & V. Nmeihelle (Eds.), *the African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*. Cambridge: Cambridge University 219.

Furthermore, the operationalization of the ACJHPR will be a daunting task as it requires huge funding and political commitment by the African Union as a collective of states. The AU will be responsible for ensuring the effective functioning of the ACJHPR. Whether the AU will deploy the necessary finance for the ACJHPR is uncertain because even the existing human rights projects of the AU are funded by external partners such as the European Union. The AU is clear about the financial implications of the Court and has made decisions toward finding sustainable and predictable funding.⁹⁷ If sufficiently and predictably funded, the ACJHPR can be an important mechanism to serve criminal justice in Africa.

The effectiveness of the ACJHPR to serve criminal justice in Africa lies in the cooperation states show to its prosecution process. Given the existing enthusiasm to support the Court, the African countries may establish better cooperation with the ACJHPR than with the ICC. But the general trend of African attitude toward international courts has been generally gloomy. Apart from presumptions that could be generated from past practices, it would be imprudent to make a conclusive statement about whether African states will certainly enable the ACJHPR to deliver on its mandate effectively.

In general, the ACJHPR can serve justice in Africa, but it is not an ideal court for the task. This is because its structure, composition, and jurisdiction make its task more complex and daunting. The fact that it is a tri-sectional court means it will not only be seeing criminal matters but also human rights and general international law matters. This will unreasonably stretch the Court and make it ineffective. Rather, a specialized criminal court with no other overlaying mandate and with clear specifications on its relations with the ICC could have been an ideal court to serve criminal justice in Africa.

⁹⁷ African Union Executive Council Decision on The Progress Report Of The Commission On The Implementation Of Previous Decisions On The International Criminal Court (ICC) Doc. EX.CL/894(XXVI) chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://portal.africa-union.org/DVD/Documents/DOC-AU-DEC/EX%20CL%20DEC%20868%20(XXVI)%20_E.pdf (accessed 15 August 2022).

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

This research analyzed the implications of the ACJHPR. In doing so, it highlighted the major efforts toward an international court in Africa. It has also made an overview of the structure and mandates of the ACJHPR as pillars to analyze its implications.

Based on the analysis, it can be concluded that the ACJHPR is a court with far-reaching implications for the international and African regional criminal justice and human rights systems. Its implications have both positive and negative aspects. However, the positive aspects outweigh the negative aspects because the negative aspects can be managed through an effective cooperation mechanism and a pragmatic working method.

However, the ACJHP is far from being the ideal African criminal Court that can achieve the goals envisioned by African countries. Its extensive jurisdiction and the absence of clarity on its relations with other international courts could be major impediments for the ACJHPR to render justice. These gaps suggest a remedial action before the Court becomes operationalized.

While the criminal section of the ACJHPR, as a novel attempt to prosecute grave international crimes in Africa, is good to be tested, its human rights jurisdiction has considerable adverse implications on the African human rights system. In the main, the substitution of the operation of the African Court on Human and People's Rights, specialized human rights court, with the ACJHPR, a court with extended and controversial jurisdiction, would be a counterproductive endeavor.

The ACJHPR Is unlikely to be a viable and fully operational court in its present structure. Even if it becomes viable, it will be ineffective in delivering on its mandates. As a result, it could not achieve much of the expectations to prosecute international crimes in Africa

4.2. Recommendations

As noted from the analysis and conclusion, the ACJHPR is not an ideal African criminal and human rights court. As such, two alternatives can be suggested to ensure that justice is well served for international criminal and human rights violations in Africa: one, to make the

ACJHRPR more effective through gap-filling/corrective measures or to create another new criminal court.

The corrective measures require an amendment of the Protocol to make additional clauses and eliminate some of its provisions. The first corrective measure should specify ACJHPR's working relationships with the ICC. This requires the AU member states and the ICC to build on the current improving relationship that followed the abandonment of the collective withdrawal plan of African state parties to the Rome Statute. It will require the African countries to re-envision the purpose of the ACJHPR from a court that helps to resist ICC's interference in Africa to a court that is focused on addressing Africa's practical challenges alongside the ICC. Secondly, the mechanism should be designed to avoid the competing obligations of state parties to the Rome Statute and the Malabo Protocol.

Another corrective measure could be made by giving a General Comment on selected provisions of the Malabo Protocol to give an interpretation that avoids existing gaps, including the Court's relation with other international, regional and sub-regional courts and tribunals. This General Comment should adopt a positive and pragmatic interpretation that could address overlapping jurisdictions and overlapping obligations. For its effectiveness, the General Comment can be drafted by the African Union Commission in collaboration with the AU human Rights bodies, mainly the African Commission and Court on Human and People's Rights, and adopted by the Assembly of Heads of State and Government of the AU for better enforcement.

Among the corrective measures, the jurisdiction of the ACJHPR should exclude human and people's rights. This means the ACHPR, which is based in Arusha, will continue. As the ACJHPR has some additions to the ACHPR, the AU policy organs can consider enhancing the accessibility of the ACHPR for individuals and ensuring equitable gender representation as part of the AU reforms initiative. Although the existing African human rights system has numerous defects, it can be more effective in other ways, including reviewed commitment to ensure the independence and autonomy of the human rights bodies and support and cooperate with them. Substitutive the African Court on Human and People's Rights with the ACJHPR would be an unwise decision that brings severe adverse effects on the protection of human rights on the Continent.

The other possible but more difficult measure would be to pause the campaign for the ratification process of the Malabo Protocol and enact a new refined treaty. If this is selected, the new treaty must be limited to creating a court with jurisdiction over international crimes only. In doing so, making it operational and more suitable to prosecute international crimes in Africa would be easier.

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