THE RATIONALES AND CHALLENGES FOR THE CRIMINAL SECTION OF AFRICAN COURT OF JUSTICE FOR HUMAN AND PEOPLES' RIGHTS

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A Thesis Submitted to the School of Graduate Studies College of Law and Governance of AAU in Partial Fulfillment of the Requirement for the Masters of Law (LLM) in Public International Law

October 2015

Addis Ababa, Ethiopia

Addis Ababa University

Addis Ababa University

School of Graduate Studies

College of Law and Governance

TITLE: - THE RATIONALES AND CHALLENGES FOR THE CRIMINAL SECTION OF AFRICAN COURT OF JUSTICE FOR HUMAN AND PEOPLES' RIGHTS

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DECLARATION

I ________________, hereby declare that this research paper is original and has never been presented in any other institution. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

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ACRONYMS

• AAPC	All-African Peoples' Conference
• African Charter	African Charter of Human and Peoples' Right
• AHRLR	African Human Rights Law Report
• AComHPR	African Commission of Human and Peoples' Rights
• ACHPR	African Court on Human and Peoples' Rights
• ACJ	African Court of Justice
• ACJHPR	African Court of Justice on Human and Peoples' Right
• ACJHR	African Court of Justice and Human Right
• AU	African Union
• AUABC	African Union Advisory Board on Corruption
• DOC	Document
• ECA	United Nation Economic Commission for Africa
• ECCC	Extraordinary Chambers in the Courts of Cambodia
• EJIL	European Journal of International Law
• EU	European Union
• EX.CL.	African Union Executive Council
• GDP	Gross Domestic Product
• GPAD	Governance and Public Administration Division
• HARV. L. REV.	Harvard International Law Journal
• ICC	International Criminal Court
• ICCPR	International Covenant on Civil and Political Right
• ICTR	International Criminal Tribunal for Rwanda
• ICTY	International Criminal Tribunal for the Former Yugoslavia
• ICL	International Criminal Law
• ICJ	International Court of Justice
• IMB	International Maritime Bureau
• ISS	Institute of Security Studies
• MICH. J. INT'L. L	Michigan Journal of International law

- Minn. L. Rev. Minnesota Law Review
- NGOs Non Governmental Organizations
- OAU Organization of Africa Union
- Para Paragraph
- RECs Regional Economic Communities
- RES. Resolution
- SADC South Africa Development Country
- SCSL Special Court of Sierra Leone
- UCG Unconstitutional Change of Government
- UK United Kingdom
- UN United Nations
- UNGA United Nation General Assembly
- UNSC United Nations Security Council
- USA (US) United States of America
- USD Dollar of the United States of America
- Vol. Volume
- WW II World War Two

ACKNOWLEDGMENT

First, I would like to give my deepest gratitude to Dr. Yacob Haile-Mariam, who has accepted my late request for his advice and made swift responses of valuable feedback. Thank you sir!

I am highly thankful to my parents; Bekele Kidane and Mister Thilahun who had make available all of my necessities.

My greatest thanks also goes to my sister; Mariamsina Bekele, who has provided me with financial supports and shows me how to conduct myself.

I should also say thank you to my little sister; Solyana Bekele, who, during my enrollment and writing of this paper, has showed me her unlimited love and understanding.

Basher Abdulkader and Natnael Assefa, who gave me moral support and helped me on the editing of this thesis, deserve my acknowledgment.

All my families and friends who were at my side, you all worth to be thanked.

Thank you all!

ABSTRACT

From a period of antiquity, human kind has suffered with atrocities and massive human right violations. The Continent of African is one of the places that experiences individually orchestrated massive human rights violations. Before the establishment of the ICC, ad hoc and national tribunals have prosecuted individual-based gross human rights violations. Permanent regional criminal Court is a new phenomenon of international law. Since its establishment, the OAU (later AU) has organized institutional and legal frameworks that promote protections of human rights. After the UNSC failure to respond to the request of the AU to defer different ICC investigations in Africa, the AU Assembly decided to pursue the establishment of an African Regional Criminal Court. An indictment of African officials at the ICC and European National Courts are the immediate causes for speeding up the establishment of a Criminal Section at the African Court of Justice for Human and Peoples' Rights. On June 27, 2014, the AU Assembly adopted a Protocol that will empower an African Court with criminal jurisdiction. Noticeably, the quick adoption of the Protocol is a political reaction rather than genuine legal effort of prosecuting perpetrators of massive human right violations. Regionalizing international criminal tribunal is a reasonable and esteemed innovation of international law. However, the current AU effort towards establishing an effective African Criminal Court that works amid of jus conges has various limitations. Thus this paper, with the theme of empowering the African Court with criminal Jurisdiction, will indicate the justifications for regionalizing criminal Courts. Meanwhile, the paper will demonstrate the legal, political and practical constraints towards the ongoing effort of empowering ACJHPR with criminal jurisdiction and effective functionality of the Criminal Section thereof.

CHAPTER 1

INTRODUCTION

1.1. Background

1.1.1. Background of International Criminal Law: From Nuremberg Trial to the ICC

The establishment of an international-led criminal tribunal to prosecute individual-based human rights violations came after atrocities of the Second World War (hereafter, WW II). After WW II, *ad hoc* and hybrid tribunals have been established in several venues. The International Military Tribunal at Nuremberg (Nuremberg trial)[1] to prosecute the Nazi officials, the International Military Tribunal for the Far East (Tokyo trial)[2] to try the Japanese war criminals, the International Criminal Tribunal for former Yugoslavia (hereafter, ICTY)[3] to prosecute the autocracies of the Kosovo war, and the International Criminal Tribunal for Rwanda (hereafter, ICTR)[4] to avoid impunity against the crime of genocide committed in Rwanda were all *ad hoc* criminal tribunals established in the history of International Criminal Law (hereafter, ICL). Furthermore, treaty based semi-internationalized (hybrid) Courts, that incorporate both national and international law elements were made operational.[5] Multilateral and permanent international criminal tribunal took its foot held on July 1, 2002 after the establishing document of the International Criminal Court (hereafter, ICC) - the Rome Statute - came in to force.[6]

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[1] The tribunal has been established through an agreement entered in between the government of USA, France, United Kingdom and Soviet Union on August 8, 1945. Nineteen other UN members had joined the agreement subsequently. A Charter that constitutes the tribunals function, jurisdiction and other substantive parts was annexed with the agreement. The tribunal had jurisdiction on three crimes namely; crimes against peace, war crimes in the strict sense and crimes against humanity. See *Historical Survey of The Question of International Criminal Jurisdiction (Memorandum submitted by the Secretary General),* United Nations, General Assembly International Law Commission, Lake Success, New York; (1949)

[2] The tribunal has been established by General MacArthur, the Supreme Commander for the Allied Powers (the United States, China, the United Kingdom, the Soviet Union, Australia, Canada, France, Netherland and New Zealand), by a Special Proclamation on January 19, 1946. See *ibid*

[3] It was established through UN Security Council Resolution, *S.C. Res. 827, U.N. DOC. S/RES/827* (October 6, 1993)

[4] It was established through UN Security Council Resolution, *S.C. Res. 955, U.N. DOC. S/RES/955* (November 8, 1994)

[5] The most notable examples are; the Special Court for Sierra Leone, established through an agreement made between UN and the Sierra Leone government to try atrocities committed during the 11 years of civil war(S.C. Res. 1315, U.N. DOC. S/RES/1315 (August 14, 2000)) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), established through an agreement entered between the UN and Cambodia to try persons responsible for crimes committed during the Khmer Rouge regime from 1975 to 1979 (UN-Cambodia, for the Establishment of the Extraordinary Chamber in the Courts of Cambodia, attached to GA Res. 57/228B of May 13, 2003)

[6] *Rome Statute of the International Criminal Court*; adopted at Rome on July 17, 1998, in force on July 1, 2002, United Nations, Treaty Series, Vol. 2187, No. 38544, Depositary: Secretary-General of the United Nations (hereafter, the Rome Statute), available at http://treaties.un.org

1.1.2. The Emergence of International Criminal Law within Africa

Africa hosted both international and hybrid *ad hoc* criminal tribunals. These are; the ICTR, established by United Nations Security Council (hereafter, UNSC) Resolution and Special Court of Sierra Leone (hereafter, SCSL), a Court with mixed jurisdiction (national and international) established through an agreement made between the UN and Sierra Leone. Furthermore, until the recent conflict, most of African States had participated in the formation of ICC. African States had speedily annexed the Rome Statute[7] and referred situations to the ICC Prosecutor.[8]

Under the African Union (hereafter, AU) arrangement there were two separate Courts; the African Court on Human and Peoples' Rights (hereafter, ACHPR)[9] and the African Court of Justice (hereafter, ACJ).[10] The two Courts had jurisdictions on State-level human rights abuses and that of other general matters respectively. A Protocol for the merger of these two Courts (hereafter, Merger Protocol), to establish African Court of Justice and Human Rights (hereafter, ACJHR), a Court with two Sections (Human Rights and General Matters Sections), was adopted on July 1, 2008.[11] Since the required 15th ratification is not deposited, the Merger Protocol has not come into force.[12]

The inspiration to embrace criminal jurisdiction under the AU judicial framework is traced back to the late 1970s, at the time of the draft of African Charter of Human and People Right (hereafter, African Charter). Primarily, the apprehension was related to eradication of Apartheid. Under the debate on the preliminary draft of the African Charter that took place at the ministerial conference held in Banjul, Gambia from 9 to 15 June 1980, one of the points that were explained by the Chairman of the Committee of Experts as a discussion point was;

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[7] The first State which had ratified the Rome Statute was Senegal. To date among 54 African States 34 are State Parties to the Rome Statute. See http://www.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx (accessed on October 7, 2015)

[8] Uganda, Democratic Republic of Congo and Central African Republic referred cases to the ICC in accordance with Article 13(a) and 14 of the Rome Statute. Pursuant to article 14 of the Rome Statute, "[s]tate Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation..." *Supra* note 6

[9] *Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights*, Adopted on June 10, 1998 in Ouagadougou, Burkina Faso; entered into force on January 25, 2004

[10] *Protocol of the Court of Justice of the African Union,* adopted by the Second Ordinary Session of the Assembly of the Union in Maputo on July 11, 2003 and entered into force on February 11, 2009.

[11] *Protocol on the of the African Court of Justice and Human Rights*, Adopted on the Eleventh Ordinary Session of the Assembly, held in Sharm El-Sheikh, Egypt on July 1, 2008

[12] Of the required 15 ratifications, only 5 States (Benin, Burkina Faso, Congo, Libya and Mali) have ratified the protocol. *List of Countries which have Signed, Ratified/Acceded to the Protocol of the African Court of Justice and Human Rights* (February 3, 2014)

"[t]he establishment of an international penal Court already provided for by the Convention on the Elimination and Repression of the Crime of Apartheid of 30 November 1973, which empowers the national Courts to deal with the crime of apartheid which is a crime against mankind. On the other hand, the United Nations Organization is considering at the present time a project with a view to establishing an international Court to repress crime against mankind..."[13]

At the Second Session of the Ministerial Conference held in Banjul, Gambia, from January 9 to 15, 1981, an establishment of African Criminal Court was one of the issues being discussed. However, the Ministers concluded that, "...the participants took note of this amendment but [had] the opinion that it was untimely to discuss it."[14]

The recent procedural initiative of constituting additional jurisdiction of individual-based international human rights violations has had relatively short period of life span. The ongoing indictment of investigations against African officials under the ICC and European National Courts are the immediate causes for the AU Member States to speed up an empowerment of criminal jurisdiction to the African Court.[15]

In February 2009, AU Assembly passed a decision requesting the AU Commission in consultation with the African Court on Human and People Rights to examine the implications of empowering the African Court to try international crimes.[16] In July 2010, the Assembly further issued a decision that the Commission should actively peruse and complete the study on the implication of expanding the jurisdiction.[17] In 2012, AU Government Experts and Ministers of Justice Attorneys and General

[13] Kéba Mbay, *Draft African Charter on Human And Peoples Rights*, *Cab/Leg/67/1*, Annex II, Rapporteurs Report, *Cab/Leg/67/Draft Rapt. Rpt (Ii) Rev.4,* part one, para 13

[14] *Ibid*, para 119

[15] *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction – Doc. Assembly/AU/3 (XII)*, adopted at the Twelve Ordinary Session of Heads of State and Government, Addis Ababa, Ethiopia, (Feb. 1–3, 2009) See also The AU assembly officially asserted their oppositions towards the ICC and consequently decided to speed up the empowerment of criminal jurisdiction to the merged ACJHR; *Decision on Africas Relationship with the International Criminal Court (ICC)* (Oct.2013),

[16] *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction – Doc. Assembly/AU/3 (XII)*, adopted at the Twelve Ordinary Session of Heads of State and Government, Addis Ababa, Ethiopia (Feb. 1–3, 2009)

[17] *Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/606(XVII)*, Assembly Of The African Union, Fifteenth Ordinary Session, Kampala, Uganda (July 25 – 27, 2010)

on Legal matters adopted the AU-Final Court Protocol.[18] Under the decision passed on the 17th annual summit, AU encouraged implementation of the Assembly's decision towards empowering the AU Court with a criminal jurisdiction.[19] To this effect, the AU commission was ordered to study and submit the financial and structural implications on the next summit.[20] The *Amendment to the Protocol on the Statute of the African Court of Justice and Human rights* (hereafter, ACJHR amendment Protocol) was adopted on June 2014, during AU Assembly meeting held in Malabo, Equatorial Guinea.[21]

1.2. Research Problem

Theoretical and legal foundations of regionalization of ICL within the African continent require in-depth analysis. Given the structural and procedural complexities, comprehensible descriptive analysis on the institutional and legal framework of ACJHPR Criminal Section is a necessity. Mandating an African Court with a criminal jurisdiction has been criticized from different directions because of its alleged justification - as of a motive of African leaders to run away from accountability. The ongoing investigations, indictments and prosecutions of African officials under the European domestic Courts (on the bases of universal jurisdiction) and the ICC were basis for speeding up the establishment of African Criminal Court.[22] Despite such immediate causes, other practical, political and legal justifications on African Court empowerment of criminal jurisdiction are left unexplored, that this thesis will try to address. Setting aside the political motives, normative and practical understanding supports for a regional rather than that of multilateral criminal tribunals. Addressing practical and legal complexities, the Criminal Section of ACJHPR may become more legitimate, efficient and effective mechanism within the arena of ICL.

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[18] *Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights,* Meeting of Government Experts and Ministers of Justice/Attorneys General on Legal Matters, Addis Ababa, Ethiopia (May 15, 2012),

[19] *African Union, Decisions Adopted During the 17th African Union Summit,* AU Heads of State and Government meeting at their 17th Ordinary Session in Malabo, Equatorial Guinea (July 1, 2011)

[20] *Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights - Doc. Assembly/AU/13(XIX)a*, Assembly of The Union Nineteenth Ordinary Session, Addis Ababa, Ethiopia (July 15–16, 2012)

[21] *Protocol on Amendments to the Protocol on the African Court of Justice and Human Rights*; Adopted by the twenty-third Ordinary Session Of the Assembly, held in Malabo, Equatorial Guinea (June 27, 2014)

[22] For instance, Dr. Murungu underlined that indictments of prosecutions by European courts is the long-term rational and ICC cases against African officials as an immediate factor for the decision of expanding the jurisdiction. Chacha Bhoke Murungu; *Towards a Criminal Chamber in the African Court of Justice and Human Rights*, Journal of International Criminal Justice, Oxford University Press (2011) pp 1067-1088

The realization of empowering criminal jurisdiction to the ACJHR and even after the successful establishment of ACJHPR Criminal Section, its functionality with customary principles of ICL has legal and practical hindrances, which need to be identified and addressed accordingly.

Identifying possible practical and legal constraints, proposals for the materialization of the ACJHPR Criminal Section on one hand and for effective functioning of the Chamber with international principles of fair trial on the other hand are areas eager of academic analysis. This thesis will analyze an approach towards the realization of the ACJHPR Criminal Section, which promotes justice and impedes impunity within the African continent.

Since the 2014 final ACJHR amending Protocol, with additional issues,[23] other than stipulated under the 2012 draft amendment, was adopted in less than a year before the writing of this thesis is started, new issues not yet addressed in any of previous writings will obtain broader scrutiny.

1.3. Significance of the Research

Since this paper describes the framework of ACJHPR Criminal Section, articulates the justification for an establishment of an African criminal tribunal and analyzes the challenges for its establishment and effective functioning; it will contribute for the ongoing effort of expanding ACJHPR with criminal jurisdiction. It will further add significant value for future studies to be undertaken on regionalization of criminal tribunal in general and the ACJHPR Criminal Section in particular. Provisions stipulated under ACJHR amending Protocol, necessitating adequate consideration of ICL analysis, will be dealt with sufficient scale. Recognizing the need for and in avert nature of the political effort of AU States towards the establishment of African Criminal Section, this thesis, for those who are pro-establishment of the ACJHPR Criminal Section, traces the justifiable approach of materializing the ACJHPR Criminal Section and its legitimate manner of functionality.

1.4. Research Questions

1. What is the legal and institutional framework of the Criminal Section of ACJHPR?

2. What are the practical and legal justifications for establishing regional criminal tribunal in general and the ACJHPR Criminal Section in particular?

[23] For instance a fourth organ, the Defense Office is added for the protection of the right of the accused (Article 2(4) and 22c of the ACJHR amendment protocol) and most noticeably Article 46Abis gives personal immunity for "...any serving AU Head of State of 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"

3. What are the challenges towards realizing the empowerment of ACJHPR with criminal jurisdiction?

4. After the Criminal Section of ACJHPR is established, what are the legal and practical constraints of the Chamber not to impede impunity and promote justice effectively?

5. Are the legal principles on the subject of the Criminal Section consistent with general principles of public international law and ICL?

6. In order to effectively established and function towards promoting justice and fight impunity, what proposals does the Criminal Chamber of ACJHPR require?

1.5. Methodology

The thesis is conducted by descriptive and analytical methods. Literature review will take the sole share of the thesis input. Hard documents, *intra ilea* the ACJHR amendment Protocol, treaties, decisions and declarations rendered by AU organs will constitute as primary source. Scholarly writings and judgments rendered by national and international tribunals will be considered as secondary sources.

1.6. Scope of the Research

This study primarily analyzes the substantive and institutional framework of the ACJHPR Criminal Section. It will be followed by addressing justifications towards the establishment of permanent international Criminal Chamber within the AU judiciary system. The practical and legal constraints facing the realization and effective functionality of the Criminal Chamber of ACJHPR will be critically analyzed. After contemporary conventional principles of ICL are figured out, recommendations unto the materialization and functionality of ACJHPR Criminal Section in consistent with *jus conges* of public international law and ICL are the major subject matters to be addressed in this thesis.

1.7. Organization of the Research

The thesis is comprised of five chapters. The second chapter will discuss the substantive and institutional framework of the Criminal Section of ACJHPR. Under the substantive part, the enactment course of action that took place en route for the adoption of the ACJHR amending Protocol on one hand and by comparing the Merger Protocol and the ACJHR amending Protocol,

the framework of the Statute are scutinized. Regarding the institutional framework, five ograns of the Criminal Chamber, the Presidant; the Registry; the Criminal Section of three Chambers; the Prosecutor Office and that of the Defence Office will be discussed. The third chapter will analyze practical and legal rationales behind an establishment of Regional Criminal Court and that of the Criminal Chamber of ACJHPR. The immediate cause of expanding the criminal jurisdiction, conflict of AU with ICC and Europian National Courts will be discussed under the firist sub chapter of chapter three. Common identities among Africa States, legal obligations AU and its Member States, pysical proximity, ligitimacy and minimization of judicial expense will, as of rationales for regionalizing Criminal Court will be elucidated. The fourth chapter on the other hand will, under five catagories analyze the challanges for an effective establishment and functionality of the Criminal Chamber of ACJHPR. Problems concerning complimentarity principle, stretched jurisdiction, availability of judicial resource, institutional design, political will, independence of Judges and Prosecutors and that of official immunity are the subject matters to be analyzed and discussed as of challenges for the establishment and effective functionality of the Criminal Section of ACJHPR. Chapter five will conclude and give recommendations.

CHAPTER 2. THE LEGAL AND INSTITUTIONAL FRAMEWORK OF THE CRIMINAL SECTION OF ACJHPR

2.1. The Legal Framework of the Criminal Section of ACJHPR: Enactment Procedure and Substantive Concerns in Focus

2.1.1. The Enactment Procedure of Empowering ACJHPR with Criminal Jurisdiction

The establishing and governing document of the ACJHPR Criminal Section is an amendment of the Merger Protocol. The amended Protocol was adopted for the purpose of merging two separate Courts, African Court for Human and Peoples' Right (ACHPR) and the African Court of Justice (ACJ), and consequently establishes a single Court named African Court of Justice and Human Rights (ACJHR). The merged Court was intended to be established with two Sections; with jurisdictions of human rights matters and other general matters. Even though the Protocol was adopted in 2008, since the required 15th ratification was not deposited, it has not come in to force.[24] Therefore, the establishment of ACJHPR's Criminal Section is intended to be established with an amendment of un-ratified or non-enforceable Protocol. Nevertheless, even if the Merger Protocol has not come in to force, the preamble of the ACJHR amending Protocol asserts that the Merger Protocol has come in to force and combined the two Courts.[25]

From law of treaty perspective, amending a treaty that does not come into force raises procedural concerns. In principle, amendment is permitted for treaties that came into force. Primarily an amendment of multilateral treaty is required to be notified to all State Parties.[26] In case of the Merger Protocol, notification does not take place for the five States that have ratified the Merger Protocol. Professor Abbas identified that, in addition to giving an opportunity to withdraw the three States (who ratified at the time he wrote his article) of their consents, these States are not consulted to give their attribution towards the empowerment of the criminal jurisdiction.[27]

[24] Article 9 of the Merger protocol stipulates, "[t]he present Protocol and the Protocol annexed to it shall enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen (15) Member States." Nevertheless, until this paper is finalized only 5 States ratified the protocol. See *Supra* note 13

[25] Under the preamble of ACJHR Amending Protocol, a Statement to that effect is stipulated. It reads, "[recognizing] that the Protocol on the of the African Court of Justice and Human Rights had merged the African Court on Human and Peoples Rights and the Court of Justice of the African Union into a single Court;"

[26] Article 40(2) of *Vienna Convention on the Law of Treaties*, adopted at Vienna on May 23, 1969, Entered into force on January 27, 1980, (hereafter, the Vienna Convention on Law of Treaties)

[27] Ademola Abass*, The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects*, Netherlands International Law Review (2013), pp 37-46

With such procedural complexities, the ACJHR amending Protocol - to incorporate an individual-based criminal liability - was adopted in 2015 at the AU General Assembly meeting held in Malabo, Equatorial Guinea.[28] Until this paper is finalized, no State has either signed or acceded the ACJHR amending Protocol. The fact that the ACJHR amending Protocol is adopted in a rush timing and its lack of extensive professional consultations, left different legal and practical shortcomings for the future ACJHPR Criminal Section unaddressed. The process towards the adoption of the ACJHR Protocol was not available for the public that discussions from non-state actors were immature.

2.1.2. The Substantive Framework of the Statute of ACJHPR

The ACJHR amending Protocol does not change the name of the Court towards implying an individual-based criminal jurisdiction of the Court. However, the name intended for the merged Court, African Court of Justice and Human Rights is changed with an inclusion of *'Peoples'* - 'African Court of Justice and Human and *Peoples* Rights' (hereafter, ACJHPR).[29] The ACJHR amending Protocol, with an objective of empowering criminal jurisdiction amend, replace, and incorporate new chapters and provisions in to the Merger Protocol. The amended Merger Protocol incorporated seven chapters and sixty articles. The Merger Protocol, being amended by the ACJHR amending Protocol will be referred as the *"STATUTE"* in which after the required number of ACJHR amending Protocol ratifications, it will be the founding and governing document of the entire AU judiciary system, ACJHPR.

The ACJHR Amending Protocol is comprised of four Chapters.[30] The Chapters stipulate;

1) General and Transitional Provisions,[31]

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[28] *Protocol on Amendments to the Protocol on the African Court of Justice and Human Rights*, Adopted by the twenty-third Ordinary Session of the Assembly, held in Malabo, Equatorial Guinea, (June 27, 2014)
[29] Please see Article 8 of ACJHR amending Protocol, *Supra* note 21
[30] Putting side by side the ACJHR amending Protocol and the Merger Protocol, the next four foot notes, will examine the legal frame work of the Statute of ACJHPR.
[31] The ACJHR amending Protocol deleted the three provisions related to the Merger of the two courts into a single court- that were stipulated under Chapter 1 of the Merger Protocol and replaced it with a new chapter that constitutes four new provisions which discuss on definitions of terminologies, tribunals' organizational framework, the tribunals jurisdiction and relation of the Court with the human rights commission. Chapter 2 of the ACJHR amending Protocol denotes transitional provisions. The provision regarding office term of Judges replaced a single paragraph with two, yet no additional idea is incorporated i.e. office term of ACHPR Judges will terminate upon appointment of new Judges to ACJHPR. Unlike the Merger Protocol, Article 6 of the ACJHR amending Protocol has recognized the non-existence of the Court of Justice, that it only stipulates regarding pending cases under African Court of Human and Peoples to be automatically transferred to the Human Rights Section of the newly ACJHPR. Article 5 ACJHR amending Protocol asserts that the Registrar of ACHPR will continue its duty until new Registrar is appointed. The ACJHR amending

2) Organization of the Full Court[32],

3) The Competence of the Court[33], and

Protocol is silent regarding that of other staffs of the Registrar, deleting the provision which was addressed under Article 7 para 2 the Merger Protocol. For the process of transition, Article 7 of ACJHR amending Protocol grant 1 year period (subject to extension by the Assembly) so that necessary measures for the transfer of prerogatives, assets, rights and obligations took place. After the Statute of the Court become enforceable, those parties who had ratified Protocols of the ACHPR and ACJ, irrespective of ratifying the ACJHR amending Protocol, will automatically be parties to the human rights and general matters Section of ACJHPR. The ACJHR amending Protocol stipulates on signature, ratification, accession processes and depository requirement that are similar with that of the Merger Protocol. After ratifications took place with respective national legislative processes, it is required to be deposited in the chairperson of the commission of the African Union. Fifteen depositories are required so that the Protocol becomes effective and the Court constituting three jurisdiction, the ACJHPR be established. Article 10 para 1 of the ACJHR amending Protocol, unlike the Merger Protocol incorporates four languages, Arabic, English, French and Portuguese in which the document will be drawn. In pursuant to article 10 of ACJHR amending Protocol, the depository, the chairperson of the commission of the African Union is obliged to notify Member States and register to the UN secretariat any accession or ratification of the ACJHR amending Protocol. Under the definitions part, the ACJHR amending Protocol adds other terminologies that are not included under the Merger Protocol. These are definitions of Chairperson, Child, Court, Full Court, Person, President, Section, Statute, and Vice President. See *Supra* note 11 and *Supra* note 21

[32] In addition to the requirement of considering geographical representation for the appointment sixteen Judges indicated under the Merger Protocol, the ACJHR amending Protocol incorporates an obligation of the Assembly to consider an equitable gender representation (Article 2 of ACJHR Amending Protocol). Maintaining the higher moral character and competence of International Law and International Human Rights Law qualifications incorporated under the Merger Protocol, the ACJHR amending Protocol includes additional professionalism of international Humanitarian Law or International Criminal Law for the posts of Judges (Article 3 0f ACJHR Amending Protocol). The list of candidates categorized under three categories of competence; International Law, International Human Rights Law, and Humanitarian Law and International Criminal Law in which five Judges for each of the first two candidates and five Judges for the third category, Criminal Section is prearranged (Article 4 of ACJHR Amending Protocol). The six years term of office for Judges subjected to reelection stipulated under the Merger Protocol is replaced by nine years of non renewable term (Article 5 of ACJHR Amending Protocol). Under the provision concerning Sections of the Court, Article 6 of the ACJHR amending Protocol replaces article 16 of the Merger Protocol, Section of the Court, additional Section - Criminal Chamber - to hear cases regarding the list of crimes under the Protocol is included in addition to the two Chambers; human rights and general matters Sections (Article 8 of ACJHR Amending Protocol). Revision of judgments rendered by human rights or general affairs Section to be considered under the full Court is excluded by the ACJHR amending Protocol that unsatisfied Party against the decisions rendered by the two Courts could only require revision by the same Court that rendered the judgment in accordance with article 48 of the Merger Protocol (Article 18 of the Merger protocol and Article 8 of ACJHR Amending Protocol). Nevertheless, the ACJHR amending Protocol constitutes three hierarchies of tribunals for the Criminal Section that orders and/or decisions rendered by the Pre-Trial and Trial Chambers are subject to an appeal in which the Appellate Chamber is empowered to give the final decision (Article 8 of the ACJHR Amending Protocol). The ACJHR amending Protocol added new provision regarding the power of the new Criminal Section to be included immediately after the powers of the two Sections that was stipulated under the Merger Protocol. Article 10 of the ACJHR amending Protocol minimized the number of Judges allocated for the two Courts, five for each of the tribunals which were stipulated under Article 21 of the Merger Protocol. Accordingly, three Judges are allocated for the two Sections while the rest of nine Judges are allocated for the Criminal Section (Article 10 of ACJHR Amending Protocol). The ACJHR amending Protocol limits the terms of office of the President and vice President from 3 years to 2 years. The President unlike the Merger Protocol is not required to preside all of the Sections he belongs to - yet full Court is required to be presided by the President and in his absence by the Vice President (Article 11 of ACJHR Amending Protocol). Newly provisions, detailed descriptions on Registrar, Office of Prosecutor and Defense Office is incorporated under the ACJHR amending Protocol. Article 12 the ACJHR Amending Protocol incorporates new provisions, Articles 22A(Office of Prosecutor), 22B(The Registry), and 22C(The Defense office). The new articulation on Registry results the deletion of Article 24 of the Merger protocol (Conditions of Service of the Registrar and Members of the Registry). See *Supra* note 11 and *Supra* note 21

[33] The ACJHR amending Protocol, after including a new sub article towards an effect that criminal cases are subject to appeal, lists those crimes which are under the jurisdiction of ACJHPR Criminal Section (Article 13 of ACJHR Amending

4) Procedural Matters.[34]

2.2. The Institutional Framework of ACJHPR Criminal Section

The Criminal Section of ACJHR is comprised of five organs; the Registrar and the President to be shared with the other two Sections and, a tribunal of three Chambers, Prosecutor and the Defense Office that are exclusively functional for the Criminal Section.[35]

A. The President and the Vice President[36]

The entire members of the Court elect the President and Vice Presidents for two years term that is subject to an addition term of re-election. In consultation with the members of the Court and in accordance with the rules of the Court, they are empowered to appoint Judges for the three Sections

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Protocol). Pursuant to Article 14 of ACJHR Amending Protocol, the Criminal Section is empowered to entertain 14 lists of international crimes; 1. Genocide, 2.Crimes against humanity, 3. War crimes, 4. The Crime of Unconstitutional Change of Government, 5. Piracy 6.Terrorism, 7. Mercenaries, 8. Corruption, 9. Money Laundering, 10. Trafficking in Persons, 11. Trafficking in Drugs, 12. Trafficking in Hazardous Wastes, 13. Illicit Exploitation of Natural Resources, and 14. The Crime of Aggression. After listing the crimes under article 28A, subsequent provisions define the crimes sequentially. Article 14 of the ACJHR Amending Protocol indicates modes of responsibility in which an individual could participate under the specified crimes. In addition to other eligible parties (the Assembly, the Parliament, other organs of the Union authorized by the Assembly, and a staff member of the African Union in limited circumstances) stipulated under the Merger Protocol, the ACJHR amending Protocol gave the Peace and Security Council and the Prosecutor right to refer situations (Article 15 of ACJHR Amending Protocol). Individuals and NGO "accredited" to the AU and its organs who were eligible to submit cases to the Court under the Merger Protocol is amended in the ACJHR amending Protocol that requirement of an observer status and that of State declaration to that effect is included (Article 16 of ACJHR Amending Protocol). See *Supra* note 11 and *Supra* note 21

[34] Article 14 of the ACJHR amending Protocol incorporated new provisions, Article 34A and 34B regarding institution of proceeding under the Criminal Section. Cases will be initiated in the name of the Prosecutor in which the Registrar is responsible to notify concerned parties and the chairman of the commission. The appellate procedure under the Criminal Section is to be defined by the rule of the court. Article 18 of the ACJHR amending Protocol gave an accused a right to either represent himself or by an agent. A new provision regarding sentencing and penalty is incorporated in general terms that the Court considering the gravity of the crime and individual circumstances of the accused will render penalty of imprisonment and/or pecuniary measures in addition to an order of forfeiture of property, or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner (Article 19 of ACJHR Amending Protocol). While the Merger protocol gave the court a power to decide on compensation in general terms - equivalent with damage sustained, the ACJHR Amending Protocol replaces the provision giving the court a power to enact new rules considering situations of the convict, victims and other interested individuals. The provision underlines the compensation to be granted under the protocol shall not prejudice victims right under other national or international laws(Article 20 of ACJHR Amending Protocol). The final judgment of the Criminal Section is that of Appellate Chambers. Failure of State Party to execute the judgment within a specified period of time will be referred to the AU Assembly who will consider sanction in accordance with Article 23 of AU Constitutive Act (Article 21 of ACJHR Amending Protocol). Article 22 of ACJHR amending Protocol incorporates a new Chapter, Chapter IVA, which will be incorporated immediately after Article 46(Binding Force and Execution of Judgments) of the Merger Protocol and will exclusively works to the Criminal Section. The chapter will include sixteen procedural provisions, (Article 22 of ACJHR Amending Protocol). The final provision of ACJHR amending Protocol replaces article 56 of the Merger Protocol in which the duty of the tribunal to submit annual report to the Assembly is denoted in detail. See *Supra* note 11 and *Supra* note 21

[35] Article 2 of ACJHR Amending Protocol,

[36] Article 11 of ACJHR Amending Protocol stipulates a new provision, which will replace Article 22 of the Merger protocol.

of the Court. The President and, in his absence, the Vice President is expected to preside all sessions of full Court.

B. The Registry[37]

The Office of Registry is an administrative organ of the Court. In addition to its responsibility on the administrative and financial works of the Court, it is in charge of setting up *Victim and Witness Unit*, which will provide security, consultation or other necessary assistances and *Detention Management Unit* that will manage detentions of an accused and suspect. The Registry is comprised of a Registrar (head of the Registry) and three Assistant Registrars who are appointed by the Court for a period of non-renewable 7 years and 4 years that is subject to one term of renewal respectively. They are expected to be of high moral character, highly competent and have extensive experience on management. For the purpose of an effective and efficient functioning of the office, additional staffs could be appointed by the Court in accordance with staff rules and regulations of the African Union. The salary and conditions of services are decided by the AU Assembly upon recommendation of the Court through the AU Executive Council.

C. The Court- Criminal Section of ACJHPR

The Criminal Section of ACJHPR consist three Chambers, the Pre-Trial Chamber, Trial Chamber and the Appellate Chamber.[38] The Pre-Trial Chamber consists of only one Judge.[39] The Pre-Trial Chamber upon the request of the Prosecutor is empowered to issue order and warrant for the purpose of investigation and prosecution.[40] The Pre-Trial Chamber further may issue an order for the "... protection and privacy of witnesses and victims, the presentation of evidence and the protection of arrested persons."[41] The Trial Chamber comprises of three Judges.[42] The Trial Chamber has a power to entertain cases submitted by the name of the Prosecutor and on an appeal submitted against an order of the Pre-Trial Chamber.[43] The Appellate Chamber has five Judges who

[37] Article 12 of ACJHR Amending Protocol stipulates a provision, Article 22B para 1-10 to be incorporates immediately after Article 22 of the Merger protocol, i.e. Article 22B of the Statute of ACJHPR.
[38] Article 6 of ACJHR Amending Protocol stipulates new provision that replaces 16 of the Merger protocol in which paragraph 2 underlines the structural outline of the criminal Section.
[39] Article 10 of ACJHR Amending Protocol stipulates new provision to replace Article 21 of the Merger protocol, Article 21 para 3 of the Statute of ACJHPR.
[40] Article 9 of ACJHR Amending Protocol stipulates new provision to be incorporated immediately after Article 19 of the Merger protocol, Article 19Bis para 2 of the Statute of ACJHPR
[41] Article 19Bis para 3 of the Statute of ACJHPR
[42] Article 21 para 4 of the Statute of ACJHPR
[43] Article 19Bis para 4 and 5 of the Statute of ACJHPR

are empowered to try and to render final judgment on appeals submitted against the decisions delivered by the Trial Chamber.[44] Appeals against an order of Pre-Trial Chamber and decisions of the Trial Chamber on jurisdiction, an acquittal or a conviction could be lodged either by the Prosecutor or by the accused to the Appellate Chamber.[45] The grounds for an appeal could be procedural error, error of law and error of fact.[46] The Appellate Chamber may affirm, reverse, or revise the orders or decisions in which an appeal is lodged from.[47]

D. The Office of Prosecutor [48]

A Prosecutor and two Deputy Prosecutors with high moral character, professional competence and extensive experience in criminal law who are elected by the AU Assembly upon nominations of State Parties for an office term of non renewable of seven and renewable of four years respectively constitutes the Office of the Prosecutor. The Assembly upon recommendations of the Court made through the second highest organ of the African Union, the Executive Council, determines the remuneration and conditions of service of the Prosecutor and Deputy Prosecutors. So that the Office will effectively and efficiently perform its functions, the Prosecutor could assign other staffs in accordance with staff rule and regulation of the African Union.

Independent from the Court, State Parties or any other outsider, the Office of Prosecutor is responsible for investigation and prosecution of crimes stipulated under the ACJHR amending Protocol. An investigation may be initiated on the bases of information that the Prosecutor will check the seriousness of the information from additional sources, intergovernmental organizations, NGOs or any other sources that it considers necessary. Upon preliminary examination, if the Office of Prosecutor does not consider that there is no reasonable base of the information provided, it will notify for those who brought the information and restrained from initiating an investigation, that other information based on new fact or evidence is not precluded from being considered. On the

[44] Article 19Bis para 6 and 21 para 5 of the Statute of ACJHPR
[45] Article 8 of ACJHR Amending Protocol stipulates a provision to replace Article 18 of the Merger protocol(Referral of matters to full court), Article 18 para 3 of the Statute of ACJHPR
[46] Article 18 para 2 of Statute of ACJHPR
[47] Article 18 para 4 of the Statute of ACJHPR
[48] Article 12 of ACJHR Amending Protocol stipulates new provision regarding employments and structural conditions of the Office of Prosecutor to be incorporated immediately after article 22 of the Merger protocol, Article 22A para 1-10 of the Statute of ACJHPR. Meanwhile, Article 22 of ACJHR Amending Protocol incorporates new Section, Chapter IVA. The new chapter includes provision on procedural manners in which the Prosecutor will discharge its duty (Article 46G), to be incorporated immediately after Article 46 of the merging protocol, Chapter IVA Article 46G para 1-6 of the Statute of ACJHPR.

other hand, if the Office of Prosecutor considers the information as serious and found reasonable bases to continue the investigation, it, annexing supporting documents will apply to the Pre-Trial Chamber requesting for an authorization of investigation. The Pre-Trial Chamber, considering the evidences adduced to justify the reasonableness of the information and after verifying the specific subject matter is under the jurisdiction of the Court, may authorize or refuse the investigation. The refusal of the Pre-Trial Chamber does not preclude the Prosecutor to present the same situation bases on new facts or evidences. For the purpose of investigation and/or prosecution, the Office of Prosecutor is empowered to question suspects, victims and witnesses and collect evidence, including on-site investigations.

E. The Defense Office[49]

The organizational framework of ACJHPR Criminal Section constitutes a Defense Office that is liable for preserving the best interest of a suspect or an accused. The Defense Office in addition to providing legal assistances i.e. collection of evidences and that of appearances at trials, should provide adequate facilities to the Defense Councilor or any other assistance ordered by either a Judge or a Chamber. The office is headed by Principal Defender, who is appointed by the AU Assembly and has equal status with that of the Prosecutor in any of the proceedings being held at any of the three Chambers. He should be with high moral character, professionally competent and with extensive work experiences. The Principal Defender, for an effective functioning of the Office, will appoint other staffs as well as enact rules and regulation.

[49] Article 12 of ACJHR Amending Protocol stipulates new provisions including Article 22C(The Defense Office) to be incorporated immediately after Article 22 of the Merger protocol, Article 22C of the Statute of ACJHPR.

CHAPTER 3. THE RATIONALES FOR THE ESTABLISHMENT OF THE CRIMINAL SECTION OF ACJHPR

For the purpose of maintaining international peace and security, the necessity and legality of regional organizations, including judicial organs has blessing from the UN Charter.[50] International crimes are the most heinous and serious crimes in which these acts most of the time are considered to be threat to international and regional peace and security. Given perceived outcomes of international criminal proceedings,[51] one of the approach of maintaining international peace and security is through investigating, prosecuting and punishing perpetrators of international crimes.

Previous experiences of international criminal adjucations were carried out under supranational and national judicial mechanisms. The supranational proceedings were carried out through *ad hoc* tribunals established by UNSC Resolutions[52] and the ICC, a permanent Court established by multilateral treaty.[53] Under national level, adjucations of international crimes were carried out on the basis of universal jurisdiction and semi-internationalized (hybrid) tribunal.[54] Proceeding under both supranational and national contexts constitutes their own drawbacks. A regional criminal tribunal - settling in between the national and supranational tribunals - will find solutions for these drawbacks. Costly trials and physically and psychologically distant tribunals in the case of supranational Courts in one hand and lack of resource and risk of political bias in case of national Courts on the other hand are the most notable drawbacks of previous international and national criminal proceedings.[55] Under the theme of empowering ACJHPR with criminal jurisdiction, this chapter will examine the practical, normative and legal rationales of regionalizing criminal tribunals.

3.1. Allegation of Neocolonialism as an Immediate Rationale

One of the reasons for speeding up an empowerment of international criminal jurisdiction to the AU Court is the conflict between the ICC and the AU on one hand that of *'abuse of universal*

[50] Article 52 para 1 of the UN Charter stipulates, "[n]othing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action..."

[51] In addition to retributive justice, deterrence, restorative justice and distributive justice are the outcome of international criminal proceeding that to bring perpetrators of international crimes will surely maintain an international and regional peace.

[52] See *Supra* note 3(on ICTY) and *Supra* note 4(on ICTR)

[53] See *Supra* note 7 on ICC establishment

[54] See *Supra* note 5 on hybrid or specialized International Criminal Courts

[55] William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration,* Texas International Law Journal, Volume 38 (2003)

jurisdiction' said to be committed at European national Courts on the other. The conflict between the AU and ICC came after indictment of an investigation followed by an issuance of arrest warrant against officials of non-Party State to the Rome Statute; including sitting President, Hassan Omar Al Bashir.[56] The AU Assembly, asserting the indictment of investigation against Sudanese officials will disrupt the peace process in Darfur, had requested UNSC to defer the investigation in accordance with article 16 of the Rome Statute.[57] However, the UNSC did not respond to the request. UNSC's failure to respond for the request of AU, results to AU Assembly's decision that AU Member States should no more cooperate with the ICC.[58] In the meantime, the AU Assembly call for the AU Commission to pursue on empowerment of the African Court to try individual-based international crimes.[59] In addition to the dilemma between justice and peace, AU's concern is related to ICC as being neocolonial agent of powerful States.

The notion of neocolonialism traced back to the 1950s and 60s when most of African States were gaining independence from European political dominations. The term neocolonialism has primarily been used by French existentialist philosopher Jean-Paul Satre, in his book that argued for the dismissal of an alleged neocolonialism agenda of France against its former colony, Algeria.[60] However, the notion has further been described and popularized in the African context through the effort of Kwame Nkrumah, the then leader of the first African independent country, Ghana.[61] As a political science scholar and a Pan-African advocate, he articulated the theoretical foundations of neocolonialism. For Nkrumah neocolonialism has three essential characteristics; 1) an extension of Marxist-Leninist critique of capitalism, 2) as a doctrine to serve as a political program and 3) as rationalization of complex interconnections and dynamic nature of the multiple agencies of imperial

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[56] The alleged crimes were crime against humanity, war crime and genocide said to be committed in the Darfur region. The investigation was referred by the UNSC Resolution (SC Res. 1593, March 31, 2005) in accordance with its power granted under article 13(b) of the Rome Statute. The UNSC is empowered to refer and defer investigations to insure the maintenance of international peace and security as per chapter 5 of the UN Charter. *Supra* note 6

[57] *Decision on the Application by the International Criminal Court (ICC)* Prosecutor *for the Indictment of the President of the Republic of Sudan*, Decision Assembly/AU/Dec.221 (XII), Adopted by the Assembly of the AU at Sirte, Libya, on 3 July 2009. Article 16 of the Rome Statute denotes, "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a Resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions." Article 16 of the Rome Statute, *Supra* note 7

[58] *Ibid,* (Assembly/AU/Dec.221 (XII))

[59] *Supra* note 17, (Assembly/AU/Dec. 213(XII))

[60] Jean-Paul Sartre, *Colonialism and Neo Colonialism,* Routledge, France (1964)

[61] Kwame Nkrumah, *Neo-Colonialism, the Last Stage of Imperialism,* Thomas Nelson & Sons, Ltd., London, (1965)

domination.[62] The critic of ICC as a neocolonial institution is related to the third characteristic of neocolonialism.

An official definition of neocolonialism was adduced on the All-African People's Conference[63] in the 1961 Resolution on Neocolonialism. The definition reads;

> "[t]he survival of the colonial system in spite of formal recognition of political independence in emerging countries which become the victims of an indirect and subtle form of domination by political, economic, social, military or technical..."[64]

Contentions of ICC as being a neocolonialist agent of great powers to prosecute only powerless States had been raised after the establishment of the tribunal - lately after the Court started to practice its jurisdictions. According to the allegations, it has been observed that the most powerful States are privileged from possible prosecutions under ICC and the tribunal is being exploited for the best interest of the most powerful States - who support prosecutions of their adversaries but not allies. In his paper,[65] strong critic of what he has called *'anti ICC sentiment',* Max du Plessis indicated that the assertion of ICC being the creation of the west is proved to be illogical for two reasons; that Africa States were historically major participants in the process of establishing ICC[66] and are high contributors for the composition of the Court.[67] However, Odero argued that either the strong commitment of Africa for the establishment of the tribunal, or their contribution for the tribunals'

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[62] *Ibid*, see also Ibrahin J. Gassama, *Africa and the politics of Destruction: A Re-examination of Neocolonialism and its Consequences*, Oregon Review of International Law, Volume 10, Number 2 (2008), pp 338-347

[63] All-African Peoples Conference (AAPC) was a conference of political parties and other groups in the late 1950s and early 1960s in Africa. The Conference was attended by delegates from independence movements in areas still under European colonial rule, as well as by delegates from the independent African countries, including representatives of the governing parties of some of those countries. The Conference met three times: December 1958, January 1960, and March 1961; and had a permanent secretariat with headquarters in Accra. Its primary objectives were independence for the colonies; and strengthening of the independent States and resistance to neocolonialism. See https://en.wikipedia.org/wiki/Neocolonialism?oldid=667214788 (accessed on June 8, 2015)

[64] All-African Peoples Conference (AAPC), Egypt, Cairo, *Resolution on Neocolonialism All- African Peoples Conference* (March, 23 – 31, 1961)

[65] Max du Plessis, *The International Criminal Court and Its Work in Africa; Confronting the Myths*, ISS Paper 173 (November, 2008), pp 2-5

[66] *Ibid*, Plessis relied his assertion in the process of the tribunals' establishment that most African organizations joined NGO coalition for International Criminal Court to lobby their respective countries to join the Rome Statute. Furthermore, ICC related negotiations has big support of African intergovernmental organization among others SADC(South Africa Development Country) which come up with the Dakar Declaration. African State, Senegal was also the first State to ratify the Rome Statute. Moreover, of 180 States who ratified the Rome Statute, 30 States are from the African continent.

[67] Max du Plessis, *Supra* note 65, the staffs of ICC are from around the world including Africa. Plessis indicated that "... of the 18 Judges, four are from Africa, and the Deputy President of the Court is an African, Akua Kuenyehia...[also the Prosecutor] is Fatou Bensouda, a highly respected Gambian who was formerly attorney-general and then minister of justice in her home country."

composition and referrals of investigations made by the three African States was evident for their genuine concern "...about how international criminal prosecutions fit into the AU's broader peacemaking and peace-building objectives...".[68]

This contention that most powerful States are privileged from prosecution and are using the ICC judicial system to prosecute their adversaries gained support from renowned African scholars and leaders of African nations. Mahmood Mamdani, a renowned anti-neocolonial African scholar asserts the basic shift of international law from colonial period where the international order is divided between the privileged (sovereign States) of the Western Hemisphere and the subjugated (colonials) in most part of Africa, Asia and the Middle East to post colonial specifically to the end of the cold war where standard of responsibility to protect has shifted from *'law'* to *'rights'*.[69] According of Mamdani's '*new humanitarian order*', the big powers at the Western Hemisphere have shifted from *'protector'* to *'enforcer'* of international justice, where the problem of contention relies.[70] Accordingly, the sovereignty of powerful States and their companions sovereignty against international criminal justice keep on being absolute, while the sovereignty of those who are in a position of lesser political and economic positions remains to be suspended. Mamadani's assertion has gained support from African leaders.[71]

Mamdani's complaint against the ICC is based on three arguments; 1) the fact that ICC Prosecutor intentionally ignored the contribution of colonial powers towards genocides committed in Sudan[72]

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[68] Steve Odero, *Politics of International Criminal Justice: The ICCs Arrest Warrant for Al Bashir and the African Unions Neo-Colonial Conspirator Thesis*, compiled in Steve Odero, Chacha Murungu & Japhet Biegon (editors); *Prosecuting International Crimes in Africa*, Pretoria University Law Press (2011), pp 159

[69] Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror*, excerpt, published on The Nation (September 10, 2008) http://www.thenation.com (accessed on June 7, 2015)

[70] *Ibid,* pp 2-3

[71] For instance, the Rwandan President Paul Kagame referred the ICC as a tribunal which "...has been put in place only for African countries, only for poor countries....[and] Rwanda cannot be part of that colonialism, slavery and imperialism." http://www.sudantribune.com/spip.php?article28103 (accessed on June 8, 2015)

[72] Regarding the Sudan case, Mamdani indicated that the ICC Prosecutor, Moreno Ocamp has intentionally failed to identify the causes of the two consequences of the Darfur conflict, ethnic cleansing through land grabbing and autocracies in the camps. The Prosecutor, justifying his assertion that what happen in Darfur is consequence of Bashirs will, concentrates the cause of the land grabbing only on one of the three causes, "[t]he brutal counters surgency unleashed by the Bashir regime in 2003-2004 in response to an insurgency backed up by peasant tribe". However, the colonial system that recognized Darfur as a series fully nomadic tribes and environmental degradation are also the main causes for the land grabbing which had took place at the time of the Darfur conflict. Accordingly, the Prosecutor not only failed to raise the accountability of the British but also failed the effort of finding "...workable solution to the conflict [that] requires all its caused be understood in their fully complexity." Mamdani, *Supra* note 69, pp 6

and Rwanda,[73] 2) the non-exhaustive nature of definition of genocide not to constitute aggressions of the west, and 3) the *exceptionalist* and double standard policy of USA towards the ICC. According to Mamdani's critical observation, US policy towards the ICC had shifted in three stages; 1) weakening the process of tribunal's establishment, 2) to bilateral non-extradition agreements, and 3) supporting investigations of adversaries but not allies.[74] Furthermore, as Odero analyzed, the US *exceptionalist* policy is manifested through its legislation, *Hague Invasion Act* that is enacted to penalize those who extradite US citizen to the ICC and that of its bilateral non-extradition agreements made in accordance with article 98 of the Rome Statute.[75]

The other compliant against ICC as the neocolonial agent of the most powerful States emanates from the power and composition of UNSC. The UNSC, in discharging its mandate stipulated under chapter 5 of the UN Charter is empowered to refer and defer investigations to the ICC.[76] The UNSC is composed of fifteen members, ten temporary and five permanent members with veto powers.[77] The composition of UNSC is subject of controversy - mainly based on power politics[78]

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[73] The case of Rwanda genocide was also another incident where colonial power, Belgium had institutionalized radicalization of two ethnic groups that has latter on claimed to be one of the causes for the most heinous genocidal conflict in the history of the world. The words of Mamdani are worth to be extracted here;

> "[Belgium] hardened Hutu and Tutsi into radicalized identities, using the force of law to institutionalize an official system of discrimination between them. Thereby, Belgian colonialism laid the institutional groundwork for the Genocide that followed half a century later. The Western powers that constituted the League of Nations could not hold Belgium accountable for the way it exercised an international trust, for one simple reason: to do so would have been to hold a mirror up to their own colonial record. Belgian rule in Rwanda was but a harder version of the indirect rule practiced to one degree or another by all Western powers in Africa. This system did not simply deny sovereignty to its colonies; it redesigned the administrative and political life of colonies by bringing each under a regime of group identity and rights. Belgian rule in Rwanda may have been an extreme version of colonialism, but it certainly was not exceptional." Mamdani, *Supra* note 69, pp 4

[74] First, at the time of the establishment the US approach was to weaken the establishment of ICC and create US exemption from an emerging regime of an international justice. Latter while the Rome Statute was adopted and the signing process began, the US recognizing the tribunals establishment was inevitable, had shifted towards making bilateral agreements with other State so that each other nationals couldnt be extradited to the Hague (By mid 2003 USA has had signed bilateral agreement with thirty seven States). Third, the US policy has shifted to supporting investigations of its adversaries while its companions with possible investigations of international crimes left in heaven- privileged from prosecution of ICC. Mamdani, *Supra* note 69, pp 7

[75] Steve Odero, *Supra* note 68 , pp 158

[76] See Article 13(b)(on UNSC referral power) and Article 16(on UN deferral power of UNSC) of Rome Statute, *Supra* note 6

[77] While article 23 of the UN Charter stipulate that, "...[t]he Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America..." should have permanent membership, Article 27 para 3 indirectly embodies the veto power by denoting that decisions regarding any substantive matters require "...the concurring votes of the permanent members."

[78] Those on the side of power politics argued with factual rather than legal understanding that because powerful States contributes the biggest share for the organization and that enforcement of Resolutions requires stronger economic and military position the 5 States need to have the permanent membership with higher power. Cox noted;

> "...[first] in order to succeed, any act by the UN must be unanimous to enlist the resources and, more importantly, the will of all the Great Powers...[and] second, limiting the veto would put the power of decision

and equality of law.[79] Of the five permanent members of the UNSC, Russia, USA and UK are not members of the Rome Statute, [80] but are empowered with concurrent vote on referring and deferring investigations to the ICC. Furthermore, the UNSC referral power constitutes non-member States of the Rome Statute. The fact that non-member States of a treaty have rights to refer and defer cases on one hand and that States are subject to an obligation emanating from a treaty they are not party on the other hand violates the well established treaty principle of *pacta tertiis nec nocent nec prosunt; res inter alios acta nec prodest nec nocet.* [81] US *exceptionalist* policy also manifested on the composition of UNSC in which US, not being Party to the Rome Statute and has permanent seat in UNSC with its two companions; France and United Kingdom - makes difficult for the ICC to claim jurisdiction against possible gross human rights violations committed by US nationals.[82]

In general, one of - if not the major - rationale for the establishment of an African Court with criminal jurisdiction is perceived to be that of ethnocentric nature of ICC against Africa, its inclination to the interest of the most powerful States and that of abuse of universal jurisdiction practiced specially by European Courts.

3.2. Distinguishing Nature of Crimes, Cultures and Political Backgrounds of Africa

Strengthened with history of colonialism, African States acquire common culture, political backgrounds and interests more than any other continent. Manyua indicated that;

> "...the common [c]ultural and spiritual affinity among Africans is an age-old phenomenon that is exhibited worldwide in their poetry and music. In the nineteenth

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> in the hands of the majority of smaller nations on the Security Council - nations that do not have the resources required for enforcement."

Brian Cox; *United Nations Security Council Reform: Collected Proposals and Possible Consequences*, South Carolina Journal of International Law and Business, Volume 6 (2009), pp 103

[79] Article 2 para 1 of the UN Charter stipulates that the "organization is based on the principle of the sovereign equality of all its Members". In critic of the P-5 veto power Cox wrote;

> "...[first] if a Great Power can veto any action against itself, then the United Nations would have no more effect than the League of Nations. If only the lesser powers are subject to action, then the whole organization becomes nothing more than an alliance of the Great Powers to maintain the status quo. Second, a limit on the veto would create for the United Nations the wide-spread moral authority among the smaller nations that would be vital to many of its functions. Third, if no action could be enforced against a Great Power regardless, then it had little to lose by being outvoted." See *Ibid*, Brian Cox, pp 123

[80] See the United Nations Treaty Collection, https://treaties.un.org/ (accessed on August 10, 2015)

[81] Article 34 of Vienna Convention on Law of Treaties, The provision reads "...[a] treaty does not create either obligations or rights for a third State without its consent." *Supra* note 26

[82] Steve Odero, *Supra* note 68, pp 159

> century, this affinity evolved into fraternal solidarity and eventually a formidable movement in the common struggle against racial discrimination."[83]

The fact that African States "...possess common history, traditions and cultures and characteristics ...[gives] rise to greater levels of cooperation and interaction, something that is clearly lacking at the global level" could be enhanced under regional Tribunals.[84] These common values of Africa are reflected in the legal proceedings that took place in regional Court but not supranational ones.[85]

The common features of African States leads the continent to have peculiar and common threats of wrong doings that exclusively endanger interests of Africa. The Statute of the ACJHPR incorporates ten crimes in addition to those stipulated under the Rome Statute.[86] The reason that ICC does not entertain other crimes other than the three could be due to "...either to a perception among a great majority of ICC States Parties that such acts do not constitute international crimes *at all*, or to a perception that these international crimes are not 'serious' enough for the purposes of the ICC."[87]

Of the crimes that are articulated under the ACJHPR Statute, emphasis on the peculiar nature and common concerns of Africa on one hand and previous efforts of AU to prosecute perpetrators of such crimes on the other hand is worth mentioning. With this theme, next paragraphs will scrutinize the most notable seven African-specific crimes namely unconstitutional change of government (hereafter, UCG), piracy, terrorism, mercenary, corruption, money laundering, and illicit exploitation of natural resources.

UCG[88] particularly through *coups d'états* is the most notable source of conflict in Africa. The apprehension of OAU against UCG is traced back to the late 1990s, that after official condemnations of Harare attempt *coups d'état,*[89] the Lome Declaration was adopted in year 2000.[90]

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[83] P. Mweti Munya, *The Organization of African Unity and its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Evaluation,* Boston College Third World Law Journal*,* Volume 19 (1999), pp 540
[84] Richard Burchill, *Dealing with International Crime at the Regional Level* , N Boister and A Costi (eds) *Regionalising International Criminal Law in the Pacific,* NZACL/ALCPP, Wellington (2006), pp 34
[85] William W. Burke-White, *Supra* note 55, pp 737
[86] See article 28 of the Statute of ACJHPR, in addition to genocide, crimes against humanity, war crimes and the crime of aggression, the Statute of ACJHPR incorporates the crime of unconstitutional change of government, piracy, terrorism, mercenaris, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit exploitation of natural resources.
[87] Ademola Abass*, Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,* European Journal of International Law (2013), pp 939
[88] See article 28E of the Statute of ACJHPR
[89] *Decision on Unconstitutional Changes of Government,* AHG/Dec.142 (XXXV) (1999)
[90] *Declaration on the Framework For an OAU Response to Unconstitutional Changes Of Government* (AHG/Decl.5 (XXXVI) 2000), adopted on Thirty-sixth Ordinary Session of OAU Assembly assemble meeting in Lomé, Togo (10-12 July 2000). The

With the desire of enhancing the commitment underlined under the Lome Declaration, AU adopted the Declaration on the Principle Governing Democratic Elections in Africa.[91] The successor of OAU, AU Assembly "...[i]n despair over the pervasiveness of the crime of UCG in Africa and in recognition of the ineffectiveness of OAU/AU responses...",[92] adopted the African Charter on Democracy, Election, and Governance in 2003.[93]

In addition to UCG, piracy[94], terrorism[95] and mercenary[96] have also greater impact on the peace and security of the African Continent. Under OAU Convention on the Prevention and Combating of Terrorism (hereafter, Terrorism Convention),[97] the Member States recognizing the real threat of terrorism to the peace and stability of continent, entails obligation against Member States to incriminate an act of terrorism under their national laws and subsequently to prosecute[98] or extradite[99] perpetrators of terrorism.

Multiple mercenary conducts in Africa[100] "... have featured in African coups (and coup attempts), which have in turn violated a plethora of human rights, including the right to self-

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Declaration condemning *coups détats* that took place in Sierra Leone and Zimbabwe, come up with the definitions of what constitutes unconstitutional change of government, calls for Member States to enact local constitutions based of democratic values, obliges Member States to pressure perpetrators to restore constitutional order and in cases of failure to put sanctions thereon. Under the Declaration, Member States further agreed to establish Central Organ Sanctions Sub-Committee of 5 members who will regularly monitor compliance with decisions taken on situations of unconstitutional changes and recommend appropriate review measures to the Policy Organs of the OAU.

[91] *Declaration on the Principles Governing Democratic Elections,* adopted in Africa Assembly of Heads of State and Government Thirty-Eighth Ordinary Session of the OAU, Durban, South Africa (July 8, 2002)

[92] Ademola Abass, *Supra* note 87, pp 940

[93] *African Charter on Democracy, Elections and Governance*, adopted by the Eighth Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia, (adopted in October 2011). It is ratified by 10 States. Assembly/AU/Dec. 147 (VIII) (2007). Article 44(1) of the Charter obliges Member States to establish conducive legal and institutional mechanisms to prosecute perpetrators of UCG through their national laws. In addition, Article of 23 the Charter incriminates means of holding powers that constitute to UCG in which such acts will be followed by sanctions of the AU. Furthermore, Article 25(5) of the Charter denotes "[p]erpetrators of unconstitutional change of government may also be tried before the competent court of the Union."

[94] See article 28F of the Statute of ACJHPR. According to the International Maritime Bureau (IMB), at least 219 attacks occurred in the horn of Africa region in 2010, with 49 successful hijackings. Stated in *Piracy off the Horn of Africa*, CRS Report for Congress, Congressional Research Service (April 24, 2011), pp 2

[95] See article 28G of the Statute of ACJHPR.

[96] See article 28H of the Statute of ACJHPR

[97] *OAU Convention on the Prevention and Combating of Terrorism,* adopted by the 35th Ordinary Session of the OAU Summit held in Algiers, Algeria, adopted on July, 1999, come in to force on December, 2002

[98] See Part III(article 6 and 7) of Terrorism Convention

[99] See Part IV(articles 8-13) of Terrorism Convention

[100] Mpako Foaleng has indicated the recent examples that President Ange Félix Patassé of Central African Republic to fight an internal rebellion led by François Bozizé between 2001 and 2003, hired merceneraies that has affected more than 2 million individuals. Chad government also hired Sudanese mercenaries and, in accordance to Human Rights Watch, serious crimes against civilians in Chad that may amount to war crimes and crimes against humanity were committed. Furthermore in conflicts "... that has ravaged West Africa ... especially Liberia, Sierra Leone, and to a certain extent Guinea, since the 1990s, many combatants participated in clashes in neighboring countries, to which they were

determination...".[101] The AU adopted the 1977 OAU Convention on the Elimination of Mercenarism in Africa[102] but has "...failed to develop an instrument creating a treaty organ to monitor and enforce the implementation of the Convention, thus rendering the treaty powerless..."[103] Under the Convention, OAU Member States incorporates State Parties duty to enact necessary national legislations to prosecute those who commit an act of mercenary[104] or extradite the offender to the requesting State.[105]

Several reports have signified that Africa has high record of corruption[106] and money laundering.[107] With high record, undoubtedly corruption and money laundering are challenges to the development as well as peace and stability of Africa. Regional efforts to prosecute perpetrators of corruption and money laundering - via obliging Member States to incriminate the acts under national laws and prosecute or extradite perpetrators - is codified under the African Corruption Convention.[108]

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rarely sent by their own governments on official duties." See Mpako Foaleng, *African Mercenarism*, compiled in *Elimination of Mercenarism in Africa, A Need For a New Continental Approach*, Edited By Sabelo Gumedze, ISS Monograph Series, No 147, (July 2008), pp 64-67. The United Nation also confirms the fact that Mercenary is a serious problem for the African continent in which under its 62nd session held in 2007, it has adopted Resolution number 62/145 on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination. The Resolution indicated that the UN is "...alarmed and concerned at the danger that mercenaries constitute to peace and security in developing countries, in particular in Africa and in small States."

[101] Sabelo Gumedze*, The Elimination of Mercenarism and Regulation of the Private Security Industry in Africa*, compiled in *Elimination of Mercenarism in Africa, A Need for a New Continental Approach*, Edited By Sabelo Gumedze, ISS Monograph Series, No 147 (July, 2008) pp 4

[102] *Convention of the OAU for the Elimination of Mercenarism in Africa*(hereafter, Mercenary Convention), adopted in Libreville on July 3, 1977 and entered into force April 22, 1985

[103] Sabelo Gumedze, *Supra* note 101, pp 5

[104] Article 6 para f of Mercenary Convention

[105] Article 9 of Mercenary Convention

[106] Article 28I of the Statute of ACJHPR, the 2014 Corruption Perceptions Index measures on the perceived levels of public sector corruption indicates that while the average score of North Africa is 24/100, average score of Sub Sharan Africa is 33/100. The scoring took from 0(highly corrupt) to 100(very clean), Transparency International Report, www.transparency.org/cpi, (accessed on April 8, 2015). Furthermore, the Anti-corruption program prepared by the cooperation of intergovernmental institutions asserted that "...[t]he socio-economic and political cost of corruption is myriad in Africa. For instance, it was estimated in 2004 that corruption costs the continent over US $ 148 billion per annum. Moreover, 50 % of tax revenue, 25% of the continents GDP and US $ 30 billion dollars in aid for Africa was eaten up by Corruption." Governance and Public Administration Division (GPAD) of the Economic Commission for Africa (ECA) in Collaboration with the African Union Advisory Board on Corruption (AUABC). *Combating Corruption, Improving Governance in Africa: Regional Anti-Corruption Programme for Africa,* program document (2011 – 2016), pp 4

[107] Article 28I of the Statute of ACJHPR, the financial leakages from Africa through- "...money that is illegally earned, illegally transferred or illegally utilized – and limited capacity for collecting revenues from multinational companies, particularly those engaged in natural-resource extraction...have amounted to roughly US$528.9 billion over the decade ending in 2012", The World Bank Group, *Financing for Development Post-2015, (*2013), Stated in Fanwell Kenala Bokosi and Tafadzwa Chikumbu, *Tackling Illicit Financial Flows From and Within Africa,* African Civil Society, (March 2015)

[108] *African Union Convention on Preventing and Combating Corruption*, Adopted by the second Ordinary Session of the Assembly of the Union, Maputo, July 11, 2003, came into force on August 5, 2006. See Article 5 on obligation to incriminate corruption under national laws, Article 13 on jurisdiction of States parties and Article 15 on extradition.

The Continent of Africa is known for its rich natural resources. Stakeholders, especially multilateral corporations taking the socio-political situations of the continent in advantage have participated in illicit exploitation of natural resources.[109]

As it illustrated above, there are serious and trans-boundary crimes that are exclusive concerns of Africa. AU recognizing the regional concern of these crimes has had made efforts to prosecute those who perpetrate the crimes through entailing an obligation of criminalizing the act under national laws of Member States. However, since there is lack of resource and political will, national judicial mechanisms failed to effectively prosecute perpetrators of such crimes. Fair trials under national judicial arrangements are also subject of critics. Local judiciaries further fail to respond towards the common problem of the continent uniformly. With such failure of national judiciaries and because other international tribunals - mainly ICC - do not consider jurisdiction over such crimes, the perpetrators could be left unpunished. Therefore, Regional Criminal Court, the Criminal Chamber of ACJHPR needs to be established to fill this gap.

3.3. Legal Obligation of the AU and its Member States to Investigate, Prosecute and Punish Perpetrators of International Crimes

The AU under its institutional capacity and its Member States in their individual capacity have duty to investigate and prosecute perpetrators of international crimes. The duty emanates from different sources; Constitutive Instruments of International Organization, Multilateral Conventions, customary international law, national and international judicial decisions and that of writings of respected scholars.

3.3.1. Obligation under AU Constitutive Act[110]

Of the objectives of the AU, promoting peace, security and stability[111] and promoting and protecting human and people's rights[112] are milestones of the organization. As of principle, the organization is

[109] Article 28LBis of the Statute of ACJHPR. After the Africa Progress Panel published an Africa Progress Report (Africa Progress Report 2013—Equity In Extractives: Stewarding Africas Natural Resources For All), "...which showed that between 2008 and 2010, Africa lost US$63.4 billion from illegally earned, transferred, and unrecorded private financial outflows more than it received from foreign investment and aid combined (US$62.2 billion)..., the African Development Bank chief, Donald Kaberuka, emphasized that Africa is being ripped off by foreign resource corporations that are extracting Africas mineral resources at huge profit for shareholders with scant reward for local populations." Stated in James Tsabora, *Illicit Natural Resource Exploitation by Private Corporate Interests in Africa's Maritime Zones During Armed Conflict,* Natural Resources Journal, Volume 54 (2014) pp 183

[110] *Constitutive Act of the African Union*; Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, Lome, Togo (July 11, 2000) (hereafter, AU Constitutive Act)

empowered "...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."[113] If the Member States intend to empower AU to intervene in occasions of these heinous crimes, there is no way that the Constitutive Act intends for prosecuting perpetrators of such crimes. Abbas has indicated that "such [right to intervention] proscription of the foregoing international crimes by the AU Act necessarily implies the obligation to take measures to redress violations." [114] The power and obligation of AU to establish regional criminal tribunal could be inferred from article 4(h) of AU Constitutive Act and other regional commitments on international crimes. Thus, the AU Assembly with its power granted under article 9 paragraph 2 of the Constitutive Act, should delegate its power for the Criminal Chamber of ACJHPR. AU without ICC or other optional criminal judicial arrangements should have a regional criminal tribunal, the Criminal Chamber of ACJHPR so that the above-mentioned heinous crimes are not left unprosecuted and unpunished.

3.3.2. Obligations under Multilateral Treaties

In addition to the AU Constitutive Act, other substantive multilateral treaties in which AU Member States are parties entails obligations to investigate, prosecute and punish perpetrators of gross human rights violations. These multilateral treaties include Geneva Conventions with its Additional Protocols, Convention on the Prevention and Punishment of Genocide, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Rome Statute and other human rights instruments. African States who are member of the above mentioned treaties are required to abide by those obligations stipulated under these Conventions, that the very principle of *pacta sunt servanda* is applicable.[115]

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[111] See article 2 para f of AU Constitutive Act
[112] See article 2 para h of AU Constitutive Act
[113] See article 4 para h of AU Constitutive Act
[114] Ademola Abass, *Supra* note 87, pp 938
[115] Article 26 of the Vienna Convention on the Law of Treaties, *Supra* note 26

A) The 1949 Geneva Conventions[116] with Additional Protocol I and II[117]

The Geneva Conventions and its Additional Protocols entail absolute obligation on Member States to investigate, prosecute and punish *'grave breaches'*[118] i.e. war crimes that took place in cases of international armed conflicts. While all African States other than Somalia are parties to the Geneva Conventions, fifty and forty African States had ratified the Additional Protocol I and II respectively.[119] The obligations of State Parties to the Geneva Conventions includes "...to search for, prosecute, and punish perpetrators of these 'grave breaches' unless they opt to hand over such persons for prosecution by another State Party."[120]

B) The 1952 Convention on Crimes of Genocide[121]

The 1952 Convention on Crimes of Genocide (hereafter, Genocide Convention) is another multilateral treaty which imposes obligation on Member States to investigate, prosecute and punish perpetrators of one of the conventional international crime namely genocide.[122] The Genocide Convention was designed to prevent the occurrence of genocide by punishing those who perpetrate the crime. The Convention clearly stipulates that, despite individual's official capacity, one should be responsible and punished for committing the crime of genocide.[123] Accordingly, State Parties are under obligation to investigate, prosecute and punish those who perpetrate genocide as defined

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[116] *The Geneva Conventions*, entered in to force in 1949. It is constituted of 4 different Conventions; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (Geneva Convention I); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, (Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War, (Geneva Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva Convention IV)

[117] It is additional to the Geneva Conventions of August 12, 1949, There are two Protocols; 1) *Relating to the Protection of Victims of International Armed Conflicts (Protocol II)* (December 12, 1977) and 2) *Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, (June 8, 1977)

[118] *Grave Breaches* are stipulated under art 50 Geneva Convention I, art 51 Geneva Convention II, article 130 Geneva Convention III, art 147 Geneva Convention IV and article 4 Protocol 1 Additional. These are willful killing; torture or inhuman treatment, including biological experiments; willfully causing great suffering or serious injury to body or health; extensive destruction of property not justified by military necessity; willfully depriving a civilian of the rights of a fair and regular trial; and the unlawful confinement of a civilian.

[119] https://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp (accessed on June 30, 2015)

[120] Ken Obura, *Duty to Prosecute International Crimes Under International Law*, Compiled in Chacha Murungu & Japhet Biegon (editors), *Prosecuting International Crimes in Africa*, Pretoria University Law Press (2011), PP 16

[121] *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted by the General Assembly of the United Nations on 9 December 1948, hereinafter referred as the Genocide Convention

[122] Genocide is defined under article 2 of the Genocide Convention as, "...any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."

[123] Article 4 of Genocide Convention

under the Convention.[124] In 1951, the ICJ, giving its advisory opinion that obligations of the Genocide Convention, declares that "[the obligations]...are recognized by civilized nations as binding on States, even without any Conventional obligation"[125] Therefore, African States, even without being a Party to the Genocide Convention, are obliged to prosecute perpetrators of genocide.

C) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[126]

The Torture Convention incorporates duty to prosecute acts of Torture. The Convention gave primary jurisdiction to State Parties where the crime of torture is committed and the suspect or victim is national of.[127] However, any Member State under whose territory the suspect has presence has universal jurisdiction over the crime of torture.[128] While forty-eight African States have ratified, five annexed their signatures on the Torture Convention.[129]

D) The Rome Statute

The founding document of the ICC, the Rome Statute[130] also demands State Parties either to prosecute and punish perpetrators of 'core international crimes'[131] or hand over the suspect to the ICC.[132] Of the 54 African States, 34 are State Parties to the Rome Statute.[133]

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[124] Article 5 of Genocide Convention states, "[t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of Genocide or of any of the other acts enumerated in article III."

[125] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide* (1951) Stated in Ken Obura, *Supra* note 120, pp 17

[126] *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by the General Assembly of the United Nations on December 10, 1984 (hereafter, Torture Convention)

[127] Article 5(1) of Torture Convention

[128] Article 5(2) of Torture Convention

[129] http://www.achpr.org/instruments/uncat/ratification, (accessed on August 17, 2015)

[130] The Rome Statute, *Supra* note 6

[131] Article 5 of the Rome Statute lists the core crimes namely war crime, crime against humanity, genocide, and the crime of aggression, *supra* note 6

[132] The duty of Member States to prosecute and punish perpetrators of international crimes underlined in the Rome Statute could be asserted from the preamble and the complimentary principle it incorporates. Paragraph 6 of the preamble of the Rome Statute states "... that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes". The complimentary principle is stipulated under article 17(1)(a) that the ICC has jurisdiction when Member States are unable and unwilling to prosecute those crimes. Such principles entails indirect obligations on State parties to prosecute and punish perpetrators of international crimes, if not extradite them to the ICC. See *Supra* note 6

[133] See *Supra* note 6

E) Human Rights Treaties: ICCPR and the African Charter on Human and Peoples' Rights

Express implication of State Parties duty to investigate, prosecute and punish individual-based grave human rights violations could not be found under human rights treaties. However, the obligation is impliedly incorporated and interpreted by authoritative bodies. For instance, International Covenant on Civil, Political Rights (hereafter, ICCPR)[134] entails obligations on member States to respect, protect, promote and fulfill those human rights duties incorporated under the treaty. Fifty African States are State Parties to the ICCPR.[135] Some scholars argue that *duty to protect* incorporates the duty to investigate, prosecute and punish grave violations of those human rights norms incorporated in the ICCPR.[136] The Human Rights Committee[137] also gave its authoritative interpretation in different occasions to this effect that States parties are duty bound to investigate, prosecute and punish individual violators of some of the human rights norms incorporated under the ICCPR namely Summary Executions, Torture and Unresolved Disappearances.[138]

The African Human Rights Committee,[139] also in interpreting the African Charter[140] emphasized that State Parties are duty bound to investigate, prosecute and punish individual-based human rights violations. The Committee among other things asserts that Member States have duties to prosecute crimes of Extrajudicial Executions, Torture, Slavery, and Disappearances.[141]

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[134] *International Covenant on Civil, Political Rights*, adopted on December 19, 1966 and entered into force in March 23, 1976

[135] see https://upload.wikimedia.org/wikipedia/commons/f/f1/ICCPR-members2.PNG (accessed on August 17, 2015)

[136] See N Roht-Arriaza *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law,* California Law Review, (1998), pp 78, 451, 467, Stated in Ken Obura, *Supra* note 120 pp 20

[137] The Committee is empowered to receive and consider communications from individuals who are subject to the jurisdiction of States that have ratified an Optional Protocol and who claim to have suffered a violation of any of the rights protected by ICCPR. See art 1 Optional Protocol to the International Covenant on Civil and Political Rights, GA Res 2200A, UN Doc A/6316 (1966). Stated in Ken Obura, *Supra* note 120, pp 21

[138] On the case of *Baoboeram v Surinam,* article 6 of ICCPR(Rights to life); on the case of *Muteba v Zaire* article 7 of ICCPR (torture and cruel, inhuman or degrading treatment or punishment), *Report of the Human Rights Committee* para 3, (1982); Stated in Ken Obura, *Supra* note 120, pp 21

[139] The African Commission is an eleven-member independent Commission, whose mandate includes a communication procedure, which examines complaints from States, individuals, NGOs, and others (see arts 47-59 of the *The African Charter on Human and Peoples Rights*, OAU Doc CAB/LEG/67/3 Rev 5, adopted in 26 June 1981, entered into force October 21, 1986)

[140] African Charter, *ibid*

[141] The interpretations regarding the above mentions four crimes were undertaken in; 1) *Amnesty International and Others v Sudan* (2000) AHRLR 296 (ACHPR) para 56; 2) *Commission Nationale des Droits de lHomme et des Libertes v Chad* (2000) AHRLR 66 (ACHPR) para 22. 3) *Amnesty International and Others v Sudan* para 52. 4) *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000) para 134, 5) *Commission Nationale des Droits de lHomme et des Libertes v Chad* (2000) AHRLR 66, (ACHPR); and 6) *Malawi African Association and Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000). Stated in Ken Obura, *Supra* note 120, pp 22

3.3.3. Obligation under Customary International Law

Pursuant to article 38 of the ICJ Statute, customary international law, next to treaties, is the second authoritative source of international law. An act to be considered as an international customary law should fulfill two requirements; *State practice*, that a certain act is conducted by the international community for a long period of time and *psychological elements* or *opinio juris*, that a certain act is practiced by States with belief that it is legally obligatory.[142] The international communities in general and individual States in particular have investigated, prosecuted and punished grave human rights violations. After WWII, the international community agreed to protect the world from the most heinous crimes of human kind, in which one of the means to do this is to prosecute those individuals who are responsible of perpetrating the most heinous crimes. Obura has indicated, the fact that an *ad hoc* and hybrid tribunals to prosecute international crimes are previously established,[143] that various international documents incorporate the duty to prosecute,[144] that number of activities of UN and other intergovernmental institutions promote for this effect are evidences to States' duty to investigate, prosecute and punish international crimes are an emergent principle customary law.[145]

3.3.4. Obligations under Subsidiary Sources of International Law

The subsidiary sources of international law, international and national judicial decisions and writings of highly respected scholars support an *erga omnes* status of States duty to investigate, prosecute and punish individual perpetrators of gross human rights violations. Obura recalls the decisions of *Lockerbie Case* at the ICJ, the case between *Prosecutor Vs Gbao* at the Appellate Chamber of the Special Court for Sierra Leone, *State Vs Wouter Basson* at South African Constitutional Court for his assertion that duty to investigate, prosecute and punish international crimes are supported by national and international tribunals.[146]

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[142] Generally See Malcolm N. Shaw Qc, *International Law,* Sixth edition; Cambridge University Press; (2008), pp 76-93

[143] See *Supra* note 3(on ICTY), *Supra* note 4(on ICTR), *Supra* note 6 on ICC establishment and *Supra* note 5 on hybrid or specialized international criminal courts.

[144] See among other documents; *The Declaration on the Protection of All Persons from Enforced Disappearances*, GA Res 47/133 UN Doc A/47/49 (1992); *Principle 18 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, (GA Res 60/147), (2005); *Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* Security Council Res 1674 (2006); Resolution *on War Criminals*, GA Res 2840(XXVI) UNDoc A/8429 (1971); *Principles of International Cooperation in the Detention, Arrest, Extradition, and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, GA Res 3074 (XXVIII) UN Doc A/9030 (1973). Stated in Ken Obura, *Supra* note 120 pp 25 - 26

[145] Ken Obura, *Supra* note 120 pp 25-27

[146] Ken Obura, *Supra* note 120 pp 27

In searching for respected scholarly writings on duty of States to prosecute international crimes, Obura indicated two writings of prominent International Criminal Lawyers; MC Bassiouni (Searching for peace and achieving justice: The need for accountability) and Antonio Cassese (International criminal law).[147]

3.4. Proximity of Alleged Crimes

Physical proximity of criminal tribunal to the place where an alleged crime is said to be committed has direct implication towards the due process and an effective outcome of a criminal proceedings. The period of time in which a proceeding could take and amount of expenses to be incurred for a trial is highly relied on the physical closeness of a tribunal to the place and society where an alleged crime is committed. Physical proximity of a criminal tribunal further has an implication towards achieving objectives of criminal proceedings. It is apparent that, the Criminal Chamber of ACJHPR, which will be intended to be situated at one of African States, will be closer to situations of Africa than Supranational tribunal, mainly ICC whose permanent seat is at The Hague, the Netherlands.

Burke-White has identified the fact that a criminal tribunals is far from the place and victims where an alleged crime is committed is problematic for the achievement of the most important two goals of criminal prosecutions; *Judicial Reconstruction* and *Restorative Justice.*[148] While the success of the first is related to the closeness of an international tribunal to local judiciaries, the latter is implicated by the closeness of the tribunal to the specific society who are victims of an alleged international crime.

Judicial reconstruction could be defined as "catalyz[ing] future prosecutions domestically by restoring the rule of law and the efficacy of national institution".[149] One of the outcomes of international criminal prosecutions is to enhance the capacity of domestic judicial systems towards post conflict reconstruction. In doing so, supranational tribunals are too far from the place where an alleged international crime is said to be committed that it fails to directly be engage with the local judiciary systems. Semi-internationalized tribunals like Serra Leone and East Timor tribunals have contributed much for judicial reconstruction than the supranational tribunals like ICTR and ICTY.[150] The Criminal Chamber of ACJHPR will hire Prosecutors, Judges and other staffs of African

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[147] Ken Obura, *Supra* note 120 pp 27
[148] William W. Burke-White, *Supra* note 55, pp 734-736
[149] William W. Burke-White, *The Promises of International Prosecution*, Harvard Law Review (2001) pp 114, Stated in ibid, pp 734
[150] William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Justice*, MICH. J. INT.L L. (2002), pp 61-71, stated in William W. Burke-White, *Supra* note 55, pp 755

nationals,[151] "...thereby [will] provide training and experience for those likely to return to domestic judicial systems."[152] Furthermore, the ACJHPR by "engaging with and training national courts, [it] could offer a powerful tool for post-conflict reconstruction."[153]

According to Elizabeth Kiss, restorative justice is three-fold commitment; "(1) to affirm and restore the dignity of those whose human rights have been violated; (2) to hold perpetrators accountable, emphasizing the harm that they have done to individual human beings; and (3) to create social conditions in which human rights will be respected."[154] Unlike retributive justice, restorative justice gives its greater emphasis on restoring victims' dignity and reconciliation of the perpetrator with the community than punishing the perpetrators. It is certain that punishing perpetrators of grave human rights violations furnish relief for the victims. However, restorative justice is an additional alternative, which exclusively is concerned with restoring victims' dignity and setting up future harmonies living environment for the perpetrator and affected community. Assessing for the approaches that restorative justice could be achieved, Kiss wrote;

> "[victims could have]...an opportunity to tell their story, to confront their tormenters and hold them accountable, to receive reparations for the harms they have suffered, and to join in pursuing a project of transforming institutions and relationships so that they uphold human dignity."[155]

The only place where the victims will tell their stories, confront their tormenters, held them accountable and claim for reparations is the judiciary where the specific case is entertained. If the tribunal in question is proximate to the living places of victims, their attendance will be inexpensive and simplistic. Furthermore, the ACJHPR upon its establishment will, through the Registrar set up Victims and Witnesses Unit.[156] This unit, supporting the victims and witnesses in their trial attendances will provide for restorative justice. The unit, to achieve its mandate effectively needs to contact concerned individuals easily, that the unit needs to be situated in a proximate place with the

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[151] Article 3 cum Article 2 of ACJHR Amending Protocol or Article 3 of the Statute of ACJHPR
[152] William W. Burke-White, *Supra* note 55 , pp 735
[153] *Ibid*
[154] Elizabeth Kiss, *Moral Ambition Within And Beyond Political Constraints: Reflections on Restorative Justice*, Compiled in *Truth V. Justice: The Morality of Truth Commissions,* edited By Robert I. Rotberg And Dennis Thompson, Preston University Press (2000) pp 79
[155] *ibid*, pp 83
[156] Article 22B para 9(a) of the Statute of ACJHPR, The unit will provide "...protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses...[in which the unit will] include experts in the management of trauma."

community in question. In addition to victims and witnesses, attendance of ordinary citizens to open trials would further enhance restorative justice, which is highly implicated by the closeness of the trial to the society.[157] Restorative justice could also be enhanced by providing information of a legal proceeding for the ordinary citizen and affected community. Providing information could better be achieved with local media outlets in which it is simplistic when the tribunal in question is closer to the community.[158]

3.5. Legitimacy of the Tribunal

Rather than physical proximity, legitimacy of tribunal is related to psychological proximity of the tribunal with the society and/or State. As Nienke Grossman has asserted "legitimate" criminal Courts are simply those "whose authority is perceived as justified."[159] Legitimacy referred to the belief of society and State in which a tribunal is capable of and working independently and impartially for the merits of a case. As aforementioned above, one of the basic reasons of incorporating the Criminal Chamber under the ACJHPR is the belief of African States that ICC is an agent of the powerful States, and thus is not legitimate. Wayne Sandholtz indicated that there are two types of legitimacy of an international institution; *Procedural* and *Purposive*.[160] The complaint of African States against the ICC legitimacy is of purposive than procedural.[161] Cooperation of the society and most of all Member States is required for effective functionality of criminal proceeding.[162] Cooperation could be enhanced if the tribunal is perceived as legitimate.

Regional Criminal Courts could be more legitimate than supranational tribunals. Burke has identified three reasons behind this assertion. Primarily the fact that Judges, Prosecutors and other staffs of the ACJHPR Criminal Chamber are African nationals in which the tribunal "...will be seen as having

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[157] William W. Burke-White, *Supra* note 55, pp 735

[158] William W. Burke-White, *Supra* note 55, pp 736, Burke has recalled the effort of providing an information of the ICTR proceeding to the local communities "...have been expedited by this[between Tanzania and Rwanda] proximity."

[159] Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, Washington International Law Review (2009) pp 107-110, stated in Laurence R. Helfer and Karen J. Alter*, Legitimacy and Lawmaking: A Tale of Three International Courts*, Theoretical Inquiries in Law, Vol. 14 (2013) pp 485

[160] Sandholtz wrote "...*procedural legitimacy* when they come into existence by means (procedures) that are accepted as consistent with prevailing norms and standards...[and] *Purposive legitimacy* implies that the purposes served by an institution are seen as consistent with the broader norms and values of international society." Wayne Sandholtz, *International Criminal Tribunals: Authority and Legitimacy*, University of California, Irvine, (Undated) pp 3-4

[161] African States were the major participants of the process of ICC establishment. The complaint started after the tribunal starts is work.

[162] Starting from arrest, detention and extradition of an accused to the collection of evidences and execution of judgments require the cooperation of Member States. See articles 46L(cooperation and judicial assistance), 46J(enforcement of sentence) and 46Jbis(Enforcement of fines and forfeiture measures) of the Statute of ACJHPR

ideally a greater participation by locals and greater understanding of the local conditions, thereby ensuring the needs and wants of the society are effectively accounted for."[163] Second, though Africans have shared common identity, culture and political ties, in which "...those values [would] be better reflected in [regional] adjudicative tribunals...",[164] like that of ACJHPR Criminal Chamber. Third, legitimacy could be also enhanced through public participation that the ACJHPR "...with fewer Member States, may be perceived as more responsive to local customs, values, and preferences...[and will]...contribute to the democratization of International law."[165]

3.6. Minimization of Judicial Expense

Proceedings of International Criminal Law under supranational tribunals are highly costly. Subject with immense critics from Judges, the UN and contributor States, surprisingly the judicial cost of ICTR and ICTY together was almost 10 percent of the entire UN budget.[166] Between 1995 and 2003, UNSC paid about 1.6 billion US dollars to operate the ICTY and ICTR.[167] In the year 2011, ICC is running with an average annual budget of 150 million USD,[168] which is close to fifteen fold of the 2016 annual budget of ACJHR, USD 10,286,401.[169] Regional arrangement could minimize such maximum cost of criminal proceedings for different reasons. Burke has identified that regionalization of Criminal Court in general minimizes the financial expenses of criminal proceedings at least for four reasons. Burke wrote;

> "[f]irst, regional Courts by definition would have a limited territorial jurisdiction...they could specialize, focusing their attention on a particular region and not expending limited resources attempting to investigate and prosecute crimes committed elsewhere. Second, a Regional Criminal Court could pay staff salaries

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[163] William W. Burke-White, *Supra* note 55, pp 47

[164] *Ibid*

[165] *Ibid*

[166] Patricia M. Wald, *To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, Harvard International Law Journal, Vol. 42 (2001) pp 535 - 536, Stated in William W. Burke-White, *Supra* note 55, pp 738

[167] David Cohen, *Seeking Justice on the Cheap: Is the East Timor Tribunal Really a Model for the Future?*, Asia Pacific Issues, No. 61 (August 2002), Stated in William W. Burke-White, *Supra* note 55, pp 739

[168] The ICCs' approved budget for 2011 was US$130 million. ICC, *Registry Facts and Figures* (April 8, 2011) *at* http://www.icc-cpi.int/NR/rdonlyres/9B984A20-08A9-4127-87F9-2FDF7A4F0E53/83201/RegistryFactsandFiguresEN2.pdf; See also Alexandra Huneeus*, International Criminal Law By Other Means: The Quasi-Criminal Jurisdiction of The human Rights Courts,* The American Journal of International Law, volume 107 (2011) pp 2

[169] *Assembly Decision on the Budget of the African Union for the 2016 Financial Year*, assembly/AU/DEC.577(XXV), at twenty-fifth ordinary session, Johannesburg, South Africa (14-15 June 2015)

> calculated to reflect costs of living within the region, thus reducing what is usually a Court's largest single cost.... Third, particularly where linguistic patterns correspond to a Court's jurisdiction, significant savings could be attained by minimizing the working languages of the Court...[and] Fourth, the collection and production of evidence in regional Courts would be significantly reduced, through lower travel costs, ease of scheduling, and potentially greater cooperation with national authorities."[170]

The Criminal Chamber of ACJHPR is intended to entertain acts that only took place within the territories of Africa and against those African States who have ratified the ACJHPR amending Protocol. Therefore, the territorial jurisdiction of ACJHPR Criminal Chamber is restricted and thus the limited financial resource is disposed only for small areas. Moreover, the main expense of a tribunal, the salary of ACJHPR Judges, Prosecutors and other staffs will be minimum than that of ICC or other *ad hoc* international tribunals established earlier. For instance, the salary of ICC Judges is pricey i.e. a Judge of ICC in full time service receives 180,000 euro (199,800 USD) per annum.[171]

Since the working languages of the ACJHPR are "...if possible, African languages, Arabic, English, French and Portuguese",[172] which are center of communications of most of African States, translation costs of the tribunal will be minimized in considerable manner.

Furthermore, since the seat of ACJHPR is proximate to the territory where an alleged crime is said to be committed, the possibility for potential cooperation with national authorities for collection and production of evidence is enhanced. The closeness of the Criminal Chamber of ACJHPR to the place of crime will minimize the cost of travels of the Prosecutors' investigators when evidences are collected. The cost of travel of an accused and witnesses for attendance of trial is also minimized in case of regional Courts compared to that of supranational tribunals.

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[170] William W. Burke-White, *Supra* note 55, pp 738

[171] International Criminal Court, Assembly of States Parties, *Report on the relevant components of common costs calculation for the judges of the International Criminal Court*, Tenth session, New York (December 12-21, 2011)

[172] See article 32 of the Statute of ACJHPR and article 25 of AU Constitutive Act

CHAPTER 4. CHALLENGES FOR THE CRIMINAL SECTION OF ACJHPR

Successful expansion of individual-based grave human rights violations jurisdiction to the African court has barriers. After the Criminal Section is effectively established, the fact that the Criminal Chamber of ACJHPR will perform its duties in pursuant with international standards of fair trial is suspicious. This chapter will examine the practical and legal challenges towards an effective establishment and functioning of the Criminal Chamber of ACJHPR.

4.1. Drawback Regarding Complimentary Jurisdiction

Principle of complementarity implies subsidiary nature of international criminal tribunal to national and/or regional judiciaries who have primary jurisdiction over a case. Before the establishment of ICC, previous *ad hoc* tribunals, ICTY and ICTR were established on the basis of primacy (concurrent jurisdiction) rather than that of complementarity.[173] However, the first permanent international tribunal, the ICC is established based on complementarity principle in which the tribunal assume jurisdiction if a "[s]tate is unwilling or unable genuinely to carry out the investigation or prosecution."[174] The reasons for the direction of complementarity than concurrence jurisdiction could be the fact that ICC could not deal with too many cases, respect for Member States sovereignty and that of protection of integrity of national Courts. The complementarity provision of the Rome Statute clearly indicate that ICC is only compliment to national Courts while the Criminal Chamber of ACJHPR gives primacy jurisdiction to other tribunals other than that of national Courts, i.e. tribunals of Regional Economic Communities (hereafter, RECs). Article 44H paragraph 1 of the Statute of ACJHPR stipulates;

> The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.

The challenge for the Criminal Chamber of ACJHPR with regard to the principle of complementarity could be categorized under three; 1) overlapping jurisdiction with the ICC, 2) concurrency jurisdiction of RECs), and 3) omission of the *genuine* requirement.

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[173] See article 9(2) of Statute of ICTY, *supra* note 3, and Article 8(2) Statute of ICTR, *Supra* note 4. While the Statute of ICTY declares that it has “primacy over national Courts”, the Statute of ICTR states that it has “primacy over the national Courts of all States”.

[174] See para 10 of the preamble, Article 1, article 17(1)(a) of the Rome Statute, *Supra* note 6

4.1.1. Overlapping Jurisdiction with the ICC

Neither the Rome nor the ACJHPR Statute addresses the overlapping jurisdiction in between the two tribunals. Both ICC and the Criminal Chamber of ACJHPR have jurisdiction over same crimes[175] and State Parties.[176] The complementarity principle under Rome Statute is limited to national Courts. Scholars[177] and the ILC commentary[178] indicated that the drafters of the Rome Statute had intentionally omit the complementarity of Regional Tribunals to the ICC. However, Murungu argued, "...progressive interpretation of positive complementarity might, for the purposes of closing all impunity gaps, infer that even Regional Criminal Courts could have jurisdiction."[179]

The drafter of ACJHPR Statute failed to address the relation in between the Criminal Chamber of ACJHPR and the ICC, in which ACJHPR anti criminal jurisdiction expansion scholars considered it as an intention of AU to undermine the power ICC. For instance, Max du Plessis, a strong critic of ACJHPR criminal expansion referred the failure of the Statute of ACJHPR as "[e]ither...clear sign that the AU is intent on snubbing the ICC, or it is a case of irresponsible treaty making – expecting signatories to become Party to an instrument that ignores the complicated relationship that will exist for States parties to the Rome Statute."[180] In his conclusion, Plessis referred such silence of Statute of ACJHPR as *'negative complementarity'* in which for Plessis it is "...an attempt to secure a regional exceptionalism in the face of the ICC's currently directed investigations on the continent."[181] The overlapping jurisdiction on the common crimes stipulated under both Statutes may not include the crime of genocide in which the Genocide Convention gives power to Regional Criminal Tribunal like the Criminal Chamber of ACJHPR.[182]

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[175] Both Statute of ACJHPR and the Rome Statute incorporate war crimes, genocide, crime against humanity and the crime of aggression, See Article 5 of the Rome Statute and Article 28A of the Statute of ACJHPR

[176] Of 54 AU Member States, 43 have signed and acceded and 34 parties have ratified the Rome Statute.

[177] Sharon A. Williams & William A. Schabas, *Article 17: Issues of Admissibility*, *in Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article By Article,* Otto Triffterer, Second edition (2008) pp 605 and 613, Stated in Kristen Rau; *Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights,* Minnesota Law Review (2012)

[178] *Report of the International Law Commission on the Work of Its Forty-sixth Session,* U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), reprinted in [1997] Y.B. Intl L. Commn 27, U.N. Doc. A/CN.4/SER.A/ 1994/Add.1(Part 2)

[179] Chacha Bhoke Murungu, *Supra note* 22, pp 1081

[180] Max du Plessis, *A case of Negative Regional Complementarity? Giving the African Court of Justice and Human Rights Jurisdiction over International Crimes*, EJIL *(*August 27, 2012) available at http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-Court-of-justice-and-human-rights-jurisdiction-over-international-crimes/ (accessed on June 1, 2014)

[181] *Ibid*

[182] Article VI of the Genocide Convention, see also Chacha Bhoke Murungu, *Supra* note 22, pp 1081

Both Statutes of ICC and ACJHPR are treaties and thus, hierarchically, are in equal footings.[183] With this silence of both Statutes, it is difficult to identify the power of the Criminal Chamber of ACJHPR upon ICC pending cases and future investigations in which Member States of both Statutes are involved. The obligation of ICC Member States is absolute.[184] Therefore, while Member States of ICC are also signatories of the ACJHPR Statute, the Member States will be put on conflicting obligations of and be in difficulty of contributing their financial obligations for two criminal tribunals. Concerning their right of referral, African States who are members of both Statutes will be in dilemma for whom to refer criminal situations.

The stipulation of the Vienna Convention on successive treaties indicates that, there applicability towards Member States of both treaties will be "...the earlier treaty[Rome Statute] applies only to the extent that its provisions are compatible with those of the later treaty[ACJHPR Statute]." [185] However, since African States are only part but not entire members to the Rome Statute, this provision could not solve the overlapping jurisdiction once the Statute of ACJHPR came in to force.

Generally, the fact that the overlapping jurisdiction between the ICC and the Criminal Chamber of ACJHPR left unaddressed under both Statutes has significant consequence on the development of international criminal justice. Kristen Rau exhaustively noted that this overlapping jurisdiction will give "...uncertainty for victims, defendants, and Prosecutors of international crimes[for instance risk of double jeopardy or *ne bis in idem*] or result in forum-shopping by the accused."[186] Moreover, Rau observed that there would be risk that both Courts will "compromise [their] legitimacy...by risking light sentences, weak enforcement, un-warranted acquittals, or politicized benches.[187]

4.1.2. Concurrency Jurisdiction of Regional Economic Communities[188]

According to the Statute of ACJHPR, the Criminal Chamber could assume jurisdiction not only after national Courts of States parties had failed to prosecute but also tribunals' of Regional

[183] Article 38 of the Statute of ICJ, *Statute of International Court of Justice,* USA, San Francisco, (1945)
[184] Even in case of withdrawal, the Rome Statute, insist on "...withdrawal shall not affect any cooperation with the Court in connection with Criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective". See Article 127 para 2 of the Rome Statute. *Supra* note 6
[185] Article 30 of Vienna Convention on Law of Treaties, *Supra* note 26
[186] Stated in Kristen Rau; *Supra* note 177
[187] *Ibid*
[188]RECs are intergovernmental organizations established in order to foster the economic, social and cultural integration of Africa Continent. RECs are established with, *Treaty Establishing the African Economic Community* , Abuja, Nigeria (June 3, 1991)

Economic Community are unwilling and unable to investigate and prosecute the specific crime. Abbas referred this stipulation of *sub regional complimentary* as 'not only problematic but also ill-advised' and puts three reasons behind his assertion; 1) Overlapping RECs memberships, 2) Individual access to tribunals of RECs and 3) Jurisdictions of international Criminal under RECs tribunals.[189] AU member State could be a member of more than one RECs at a time.[190] Therefore, in case where a national of a State whose membership is more than one RECs is suspected of a crime, it is difficult to select the RECs for the purpose of complementarity. Furthermore, while individuals have access to national Courts, most tribunals of RECs have not either access to or only admit individual complaints upon Member States declaration to that effect. The difference between tribunals of RECs regarding access to individual will has problem in uniformity of justice. The other setback concerning complimentarity of RECs is the fact that most RECs have no jurisdiction on individual-based gross human rights violations in which to give power of primacy jurisdiction for a tribunal who has no jurisdiction over international crimes is irrelevant.[191]

4.1.3. Omission of *Genuine* Requirement

Unlike the Rome Statute, the complementarity provision of the Statute of ACJHPR failed to incorporate the 'genuine' requirement for the inability and unwillingness of either national or RECs tribunals. Such failure, according to critical observation of Abass has implication on the strongeness of evidential standard and gives Member States an opportunity to withdraw their responsibility to prosecute in which the Criminal Chamber of ACJHPR will be left with a lot of case backloads. Abass wrote;

> "[t]he 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 prosecute' dangerously lowers the evidentiary standard of 'inability' and may seriously undermine that criterion. It implies that African States will easily avoid prosecuting their nationals and offload such cases on

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[189] Ademola Abbas, *Supra* note 87, pp 943

[190] Of all African States 25 of them belong to two RECs, 17 are member of three RECs, and 6 countries are members of four regional economic communities.

[191] Ademola Abbas, *Supra* note 87, pp 945

to the African Court, thereby unduly burdening the Court and making it a Court of first rather than last resort".[192]

4.2. Drawbacks Regarding the Stretched Jurisdiction

Pursuant to article 17 paragraph 3 of the Statute of ACJHPR, the Criminal Chamber is empowered "... to hear all cases relating to the crimes specified in this Statute."[193] These crimes are listed under article 28 of the Statute in which there are ten additional crimes[194] other than those orthodox international crimes being incorporated under the Rome Statute, war crimes, genocide and crimes against humanity. Furthermore, the AU assembly upon consensus of Member States may extend the jurisdiction with intent to reflect developments in International law.[195] As it is abovementioned under chapter 3, most African States are interrelated with and victims of this peculiar crimes in which judicial arrangement to prosecute perpetrators of such additional crimes is a progress that needs to be cherished. However, the fact that this crimes are qualified as of *international* and *serious* on one hand and the question of feasibility - either the Criminal Chamber of ACJHPR has the potential to effectively prosecute this much crimes - on the other hand are areas of contention.

Although international tribunals are left for crimes that are international and serious, those crimes that are articulated under the ACJHPR Statute should fulfill these two requirements.[196] While the requirement of '*international*' is simple to identify, the '*seriousness*' qualification is subjective and difficult to evaluate. Schabas noted that crimes are international and serious where;

> "[t]hey [international crimes] were generally considered to be offences whose repression compelled some international dimension.... [in which] this feature of the crime necessitated special jurisdictional rules as well as cooperation between States ...

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[192] *ibid*
[193] Article 17 para 3 of the Statute of ACJHPR
[194] Ten of the crimes that are not incorporated under the Rome Statute are the crime of unconstitutional change of government, piracy, terrorism, mercenaries, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of and natural resources.
[195] Article 28A(2) of the Statute of ACJHPR
[196] Abass wrote the two requirements are "...*sine qua non* to establishing jurisdiction over international crime since, international Criminal tribunals are, by very their nature, only reserved for the most serious international crimes." Ademola Abass, *Supra* note 27, pp 34

[and their] nature elevates them to a level where they are of 'concern' to the international community."[197]

Not all of the peculiar crimes that are incorporated under the ACJHPR Statute are trans-boundary in their nature - and thus are not considered as international. Piracy committed on high seas, terrorism, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources could be trans-boundary in their nature and regional concerns of the African continent. Because these mentioned crimes are regional concerns, State cooperation is a necessity. The crime of corruption, unconstitutional change of government and mercenary, however are crimes that are difficult to categorize as international. Abass recalling that Corruption is troublesome for the economies and security of African States underlined that "...it is certainly overly ambitious to elevate the vice to the level of an international crime."[198] Furthermore, because Mercenary could be national or regional, it is difficult to categorize it under trans-boundary. The crime of terrorism and money laundry could also be restricted to certain locality of a country.

On the other hand, the requirement of seriousness is difficult to determine. For UN, criminal acts are serious when the offence is considered to be *'grave'*. The graveness requirement of an offence is indicated under the Rome Statute so that ICC could entertain cases[199] and the Prosecutor initiate situations.[200] Beyond the requirement of graveness, the fact that national and regional jurisdictions criminalized of and made continuous efforts to prosecute certain crimes could be considered as pinpointing of seriousness.

In addition to the fulfillment of international and seriousness requirements, because the Statute of ACJHPR, upon ratification requires Member States to internalize/domesticate the crimes under their national laws in which "... such congruity might well require a major rewrite of aspects of domestic Criminal law."[201] With this regard, because the crimes under the Statute are too many and there definitions controversial, domestication of elements of these crimes will require more time and effort in addition to political wills of Member States.

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[197] William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Second Edition (2004) pp 26
[198] Ademola Abass, *Supra* note 27 pp 33
[199] Article 17(1)(d) of the Statute of ACJHPR
[200] Article 53(2)(c) of the Statute of ACJHPR
[201] Garth Abraham, *Africas Evolving Continental Court Structures: At the Crossroads?*, Occasional Paper 209, South Africa Institute of International Affairs (January, 2014) pp 11

Moreover, investigations and prosecutions of international crimes are complex in which too many skilled manpower and considerable amount of financial resource is required for the stretched jurisdiction of the Criminal Chamber of ACJHPR.[202] Because the limited resources of the tribunal are distributed for this stretched jurisdiction, fair trial and due process of law could possibly be compromised.

Even though immunity for certain governmental officials is a well establishes international norm, contemporary customs gradually get rid of immunity defenses for international crimes. [203] Accordingly the fact that the Criminal Chamber of ACJHPR has jurisdiction over crimes beyond those of orthodox international and serious crimes leads to difficulty of differentiating those crimes in which immunities for State officials is not defense.[204]

4.3. Availability of Judicial Resource

Criminal proceedings are complex and time consuming. High amount of financial resource and skilled personnel is a necessity. The financial capacity of a tribunal has implication on the effectiveness and independence of a tribunal. In case of criminal proceedings, more resources of skilled personnel and finance for investigation, gathering of evidence and witness testimonies, travel costs and funds for the witness protection and defense legal aid unit is required.

Comparing an estimated budget of a single criminal trial made by various NGOs, 20 million[205] with that of annual budget of ACHPR for the 2016 fiscal year, 10,286,401,[206] it is phony to say the Criminal Chamber of ACJHPR sharing such budget with the other two Sections will function its jurisdiction effectively. Furthermore, even though the Criminal Chamber of ACJHPR - for different reasons - could minimize judicial costs,[207] in 2011, the ICC, which only has jurisdiction over three crimes, operated with 150 million USD.[208] Therefore, the Criminal Chamber of ACJHPR, which will

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[202] Availability of manpower and finance to entertain those stretched jurisdictions will be explained in detail under sub chapter 4.3.

[203] The fact that personal immunity in cases of international crimes is not defense is growing customary law will be explained under sub chapter 4.8.

[204] See Max du Plessis*, Implications of the AU Decision to Give the African Court Jurisdiction over International Crimes*, Institute for Security Studies**,** Paper 235, Number 235, (June, 2012), pp 8-9

[205] See *Implications of the African Court of Human and Peoples Rights being Empowered to Try International Crimes such as Genocide, Crimes Against Humanity, and War Crimes*, Opinion by various African NGOs, pp 16. (Undated), Stated in *Ibid* at pp 9

[206] *Decision on the Budget of the African Union for the 2015 Financial Year* – Doc.EX.CL/828(XXV)i, Executive Council, Twenty-Fifth Ordinary Session, Malabo, Equatorial Guinea (June 2014)

[207] See sub chapter 3.6

[208] *Proposed Programme Budget for 2015 of the International Criminal Court*, ICC Assembly of States Parties, Thirteenth session New York, 8-17 December 2014 (September 18, 2014)

entertain fourteen crimes, needs to have considerable amount of extra fund. However, the AU did not elucidate the approaches where this additional money will come from.

It has to be recalled that the major rationale behind the Merger of ACJ and ACJHR was financial constraint. The African Court even without constituting the Criminal Chamber had straggled with financial limitations. Funds from external donors took the largest share of the African court.[209] Therefore, it should be asked that - would international partners (who, for 2014 fiscal year had promised to contribute seventy-seven percent of the AU's budgets) be willing to contribute for the expanded Court. It should also be noted that donors did/do not provide the entire amount of money they had promised to contribute.

Moreover, the AU Member States have been observed in failing to contribute their financial shares regularly. For instance, despite their pledges to contribute funds for the *Habre* trial in Senegal, AU Member States had failed to contribute their financial obligation.[210] Therefore, if AU member State do not fulfill their financial obligation for a single case, it is difficult to declare that they will contribute their financial obligation of the Criminal Chamber of ACJHPR. In addition to economic capabilities, political wills towards its cause is also required for a State Party to contribute its financial obligations regularly.

Generally, financial constraint will surely be an obstacle for the effective functioning of the Criminal Chamber of ACJHPR. The drafters of the ACJHPR Statute should look back and do costing exercise including its impact on other priorities within the AU and existing work of the African Court.

4.4. Institutional Design of ACJHPR

The Statute of ACJHPR is intended to establish a tribunal of three Sections; General Matter Section, Human Rights Section and Criminal Section.[211] While the first two Sections have jurisdiction on civil cases, the Criminal Chamber will be empowered to entertain Criminal issues. Criminal proceedings are more expensive than that of civil cases that it will require higher amount of fund in which the

[209] For instance from the 2016 fiscal budget of AU, 416,867,326 USD, international partners will contribute 247,033,986 USD. See *Supra* note 206

[210] See, Decision on the Hissene Habre Case, adopted by the 14th Ordinary Session of the AU Assembly in Addis Ababa, Ethiopia on February 2, 2010, Doc. Assembly (AU/9(XVI), Assembly/ AU/Dec.272 (XIV), xx 4-8; Press Release No. 104, 15th AU Summit, Decisions of the 15th AU Summit, Addis Ababa, Ethiopia (July 29, 2010) Stated in Chacha Bhoke Murungu, *Supra* note 22, pp 1083

[211] Article 16 of the Statute of ACJHPR

ACJHPR "[should]... have to grapple with the resource implications of its combined jurisdiction."[212] The manner in which the limited resources of ACJHPR be distributed to the Human rights and General Matter Section on hand and the Criminal Section on the other may lead to obscurity.

Furthermore, the Human Rights/General Matter Sections and the Criminal Section will have jurisdiction on State-level and individual-level human rights violations respectively. When an act that constitutes both State and individual level responsibility arise, maintaining institutional distinction and level of interaction in between two Sections could be problematical task. Kristen Rau noted that this circumstance "...produces uncertainty about the interaction of regimes where such dual responsibility for a serious international crime is at issue."[213] Furthermore, separate judiciaries are better in case where their goals are not complementarity and irreconcilable. Beatrice Bonafè indicating potential irreconcilable goals of the two mechanisms, wrote; "...[s]tate-level accountability is rooted in the doctrine of international legal order, while individual-level accountability stems from a tradition of imposing legal obligations upon persons."[214] Therefore, in consideration of the objectives, State and individual level jurisprudences overlapped one another. In case of a tribunal with intertwined jurisdiction, it could be difficult to reconcile and apply the divergent solutions to that of practical problems. The Merger of State level and individual level jurisdictions under the ACJHPR could put in danger the integrity of different and irreconcilable goals of the two systems.

4.5. Lack of Political Will

An establishment of international institution including ACJHPR with the Criminal Chamber is subject to the political will of States. Moreover, after materializing, effective functioning and enforcement of international Criminal proceedings require cooperation of Member States. So that the African Court will be empowered with criminal jurisdiction, the ACJHR amending Protocol need to be ratified by 15 States.[215] After critical observation, Abass concludes the political will of African States on ratifications of regional treaties is minimal.[216] The rationales for this assertion, according to Abass are 1) source of a given treaty,[217] 2) the subject matter of the treaty,[218] 3) the

[212] Abass, *Supra* note 87, pp 944
[213] Kristen Rau, *Supra* note 186, pp 686
[214] Beatrice I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (2009) pp 7, Stated in Kristen Rau, *Supra* note 186, pp 687
[215] Article 11(1) of the Statute of ACJHPR
[216] Ademola Abass, 27, pp 37-46
[217] *Ibid*, African States over the past three decades reveals that treaties that emanate from the UN stand a better chance of ratification than those from Africa

perception that a treaty threatens sovereignty,[219] and 4) a concern of protest treaty.[220] Therefore, the off-putting political will of African States upon ratification of treaties will be an obstacle to the materialization of ACJHPR with criminal jurisdiction.

The Statute of ACJHPR entails obligations on State Parties to cooperate at the time of investigation, prosecution and enforcement of sentences. For the purpose of investigation and prosecution, State Parties, without prejudice to the rights of bona fide third parties are obliged to identify and locate persons; take testimony and produce evidence; serve documents; arrest, detain and extradite suspects; surrender to the Court; identify, trace, freeze or seize properties, assets and instrumentalities of crimes for the purpose of eventual forfeiture.[221] For the purpose of enforcement of sentences, a State Party who is selected by the Court from lists who have shown their willingness is expected to implement the imprisonment sentence.[222] In case of fines and forfeiture measures, State Party which is in the position of and capable of implementing the measures will put the measure into action.[223]

However, previous experiences of African States vis-à-vis cooperation to international Criminal proceedings were inadequate. The non-cooperation of AU Member States towards their obligation of the ICC[224] and that of European national Courts cases[225] are evident for the positions of African States towards performing their obligations of cooperation to international Criminal proceedings. Since parties to international proceedings are mostly senior officials and high ranked military officers, - like ICC case of Al-Bashir - there is probability that African States will raise an indictment of a specific official endangers fragile peace of a State and the region for their non-cooperation. Furthermore, because of the deep-rooted principle of non-interference in internal affairs of Africa, the probability that a State Parties could arrest and extradite an official of other African State is

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[218] *Ibid*, with this regard Abass wrote "... the fact that the Protocol criminalizes corruption and unconstitutional changes of government, offences whose prosecution African leaders are unlikely to enthusiastically embrace, will probably affect their disposition towards the new Protocol."
[219] *Ibid*, The probability that African States ratify a protocol that empowers an African court which prosecute African leaders(themselves), notwithstanding that the protocol emanated from their own organization is minimum.
[220] *Ibid*, since the main reason for empowering the African court with criminal jurisdiction is a protest treaty i.e. response to the Rome Statute in which it is "... fuelled by momentary passion rather than a thorough appreciation and genuine desire for legislation."
[221] Article 46L of the Statute of ACJHPR
[222] *ibid*
[223] Article 46Jbis of the Statute of ACJHPR
[224] Kenya, Djibouti, Malawi, Chad and recently South Africa failed to respect their obligations under the Rome Statute by failing to arrest Sudan President Omar Al-Bashir.
[225] Failure of Senegal that has persistently refused to observe her obligations to extradite Habre who is alleged to have committed crimes against humanity to the Belgium national Court is an example.

minimum. Generally, the readiness of African States and leaders to prosecute high governmental officials alleged of committing international crimes is doubtful.

4.6. Independence of Judges and Prosecutors

Independence of Judges and Office of Prosecutor have implication on fair trial and outcome of criminal proceedings. Independence of Judges and Prosecutors of the ACJHPR could be from either State Parties or any of the organs of the AU. An independence of international tribunal, as Asaala critically observed is related to "[a] conducive political atmosphere, aspects of remuneration, security of tenure and mode of appointment are the other key political determinants of the independence of any justice system."[226]

4.6.1. Independence of Judges

The Statute of ACJHPR in general terms stipulates that the tribunal "... shall be composed of impartial and independent Judges elected from among persons of high moral character..."[227] However, the mode of appointment and aspects of remunerations of Judges prejudice their independence vis-à-vis the AU Executive Council and the Assembly.

The Criminal Chamber of ACJHPR will be composed of nine judges; one for the Pre-Trial Chamber, three for the Trial Chamber and five for the Appellate Chamber.[228] Member States of AU, specifying that their nominees are under the category of International Humanitarian Law or International Criminal Law will nominate judges in which the election will took place at the ordinary session of either the Assembly or the Executive Council.[229] In most cases, parties to ACJHPR Criminal proceeding will be State officials and thus they may abuse their power of appointing Judges that independence of these judges on trials where their appointers participate could be in danger. Evelyne Owiye Asaala scrutinizing previous experiences of Africa national Courts, asserted that most Judges have failed to prosecute their leaders in which political appointees have been key facilitators of impunity. Similarly, judges of Criminal Chamber of ACJHPR who have been appointed by African officials could also be instruments for impunity. Asaala wrote;

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[226] Evelyne Owiye Asaala, *The African Court of Justice and Human and Peoples Rights: An Opportunity for International Criminal Justice?,* Edited by Beitel van der Merwe, Konrad Adenauer Stiftung & Authors, *International Criminal Justice in Africa : Challenges and Opportunities*, November 2014, pp 50

[227] Article 4 of the Statute of ACJHPR

[228] Article 21 of the Statute of ACJHPR

[229] Article 6 of the Statute of ACJHPR

> "...the Judges of, domestic and regional laws[courts] have been applied [the laws] selectively so as to cushion these leaders from local justice systems [in which] national Courts have been the least interested in effective prosecution of their very own employers. It therefore defies logic that these same leaders would champion an independent Regional Court that would effectively hold them Criminally liable for their atrocious acts."[230]

Regarding the termination of the Judges, the Statute is silent but by implication, such an authority will be inferred to the AU Assembly. The Statute stipulates that all Judges except the President and Vice President of the Court works in part time bases. However, the AU Assembly upon "... the recommendation of the Court, decide the time when all the Judges of the Court shall perform their functions on a full time basis."[231]

Furthermore, so that Judges of ACJHPR Criminal Chamber be independent, sufficient remunerations are required to be paid. However, as it is indicated under sub chapter 4.3, the tribunal will probably be in short of financial resource, in which the Court could possibly be in difficulty of keeping the financial security of Judges.

4.6.2. Independence of the Prosecutor

So that the power of the Prosecutor to initiate situations with its *prio motu* power[232] is effectively functioned, the Office of Prosecutor should be independent of any of AU organs and Member States. As a matter of law, the Statute of ACJHPR stipulates the Office of Prosecutor should perform its duties "... independently as a separate organ of the Court and shall not seek or receive instructions from any State Party or any other source."[233] Nevertheless, on the subject of independence of the Prosecutor vis-à-vis the AU Assembly and Member States, the apprehension is not only on the manner of appointment but also condition of remuneration and service that are subject to determination of the AU Assembly.

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[230] Evelyne Owiye Asaala, *Supra* note 226, pp 50
[231] Article 8 para 5 of the Statute of ACJHPR
[232] Article 46A para 1 of the Statute of ACJHPR
[233] Article 22A para 6 of the Statute of ACJHPR

The appointment of the Prosecutor and Deputy Prosecutors is subject to the determination of the AU Assembly that the Assembly will elect Prosecutor and Deputy Prosecutors "...amongst candidates who shall be nationals of States Parties nominated by States Parties."[234]

AU organs further hold up power on the remuneration and condition of service of the Office of Prosecutor. Article 22A paragraph 10 of the Statute denotes;

> The remuneration and conditions of service of the Prosecutor and Deputy Prosecutors shall be determined by the Assembly on the recommendation of the Court made through the Executive Council.

The mandate of the Court to give recommendation, may give an impression that the power of the Assembly on remuneration and conditions of service is restricted. However as Abass analyzed "[w]hile the caveat that the Assembly seeks the 'recommendation of the Court' in setting the conditions of service of the Prosecutor seems reassuring, the mode of composing the Court itself is not free of the Assembly's control."[235]

4.7. Immunity of Governmental Officials

Immunity[236] for governmental officials from foreign jurisdiction traced back for a long period and is a well-established principle of International law. The raison d'être is protecting sovereignty and equality of States. However after the emergence of international criminal law, immunity came about as an impediment for the mere objective of Criminal law, punishing perpetrators of international crimes and avoiding impunity.

There are two categories of immunity under international law; functional (immunity *ratione materiae*) and personal (immunity *ratione personae*). While functional immunity covers acts of any governmental officials which are carried out under official capacity, personal immunity relates to any acts, either official or personal of certain officials when they are in office.[237]

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[234] Article 22A para 2 of the Statute of ACJHPR
[235] Abass, *Supra* note 27, pp 43
[236] The term immunity is derives from the Latin word *immunitas* meaning exempt from public service or charge.
[237] Examining the characteristics and differences of the two categories of immunity, Antonio Cassias wrote;

> "[t]he first class of immunity[functional immunity] ...(i) relates to substantive law, that is, it is substantive defense...(ii) covers official acts of de jure or de facto State agent; (iii) does not cease at the end of the discharge of official functions by the State agent ... (iv) is erga omnes, that is, may be invoked towards any other State ... in contrast the second class of immunity [personal immunity] (i) relates to procedural law, ... (ii) covers official

The immunity that is granted under the ACJHPR Statute is personal immunity *(ratione personae*). Article 46ABis of the Statute of ACJHPR reads;

> "[n]o 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 of office."

This immunity is personal because it is absolute (i.e. either the act is in individual or official capacity, there can be 'no charges') but temporary (it applies to officials while they 'serving as Heads of State during their tenure of office').

First, State practices under contemporary International Criminal Law has gradually lifted the defense of both functional and personal immunity of State officials who allegedly commit international crimes. Constitutive instruments of previous *ad hoc* Criminal Tribunals,[238] the Rome Statute[239] and Statutes of semi-internationalized tribunals[240] signified that committing international crime under official capacity or as of an incumbent official should not be defense from prosecution.

The ICJ under its judgment on the *Arrest* war*rant case*[241] asserted that personal immunity as a defense could only be raised before national Courts but not international tribunals in which "…an incumbent or former Minister for Foreign Affairs [or other senior officials] may be subject to Criminal proceedings before certain international Criminal Courts, where they have jurisdiction."[242]

Therefore, under International Criminal Law; State practice, customary international law and judicial decisions advocates for the non-existence of either personal or functional immunity defense for

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> or private acts carries out by the State agent while in office, [and]... prior to taking office... (iii) is intended to protect only some categories of State official, namely head of State, head of government, ...and possibly senior members of cabinet; (iv) comes to an end after cessation of the official function of the State agent; (v) may not be erga omnes..."

See Antonio Cassias, *When May Senior Officials Be Tried for International Crimes Some Comments on the Congo v. Belgium Case*, EJIL, Vol. 13 No. 4 (2002) pp 862-863

[238] See Article 227 of the Charter of the International Military Tribunal at Nuremberg, Articles 7 of the Statute of ICTY and Article 6 of the Statute of ICTR

[239] Article 27 of the Rome Statute, *Supra* note 6

[240] For instance see Article 6(2) of the Statute for the Special Court for Sierra Leone

[241] The cases started with the claim of Congo against Belgium that the latter is in breach of international law, violating the principle of sovereignty and immunity when it has issued arrest warrant against the foreign minister of Congo. *Case Concerning The Arrest Warrant* (Democratic Republic of Congo Vs Belgium) (April 11, 2000) Judgment rendered on February 14, 2002

[242] *ibid,* para 61

suspected perpetrators of international crimes. However, the ACJHPR in contradiction of the current International Criminal Law norm incorporates personal immunity.

The personal immunity under the ACJHPR Statute further contradicts with other commitments of AU and its Member States to promote justice and ending impunity. Members of the AU, under the AU constitutive instrument have agreed to intervene in cases where grave human rights violations in Member States took place.[243] Such obligation may constitute punishing perpetrators even at times where the perpetrators are in office.[244] Furthermore, customary international law and treaties where AU member States are parties to proclaims the duty to investigate, prosecute, and punish violations of International law.[245]

Incumbent head of States and other senior officials commit most international crimes. The fact that State officials have immunity from prosecution because of the mere fact that they are holding official capacity, could furnish incentives for not leaving office. Accordingly, the AU effort of promoting democratization will be undermined.

The other problem with regard to the provision of personal immunity is its failure to fill the controversial issue up to who will enjoy personal immunity. Even if the wording 'AU Head of State or Government' is apparent, the assertion of '...anybody acting or entitled to act in such capacity, or other senior State officials based on their functions...' are ambiguous to differentiate those specific senior State officials, who are granted with immunity. The indication of ICJ up to who are entitled to immunity i.e. "...diplomatic and consular agents, [and] certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs" is contentious,[246] in which the Statute of ACJHPR also failed to avoid the ambiguity.

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[243] Article 4(h) of the AU Constitutive Act

[244] See Abass, *Supra* note 87, pp 151

[245] For instance the Genocide Convention and the Rome Statute proclaims an obligation of Member States to prosecute perpetrators of international crimes irrespective of their official capacity. Generally see sub chapter 3.3. above on obligations of AU and its member State to prosecute international crimes

[246] See Antonio Cassias, Supra note 237, pp 864

CHAPTER 5. CONCLUSION AND RECOMMENDATION

5.1. Conclusion

Regionalization of international criminal law and the future Criminal Section of ACJHPR is an area that is left unexplored. On June 2014, the AU Assembly, at its Ordinary Meeting held in Malabo, Equatorial Guinea adopted the amending Protocol of ACJHR. Upon coming into force, the amending Protocol of ACJHR will amend un-ratified Merger Protocol that will establish a third Section of tribunal, the Criminal Section. The Criminal Section, along with the General Matter Section and Human Rights Section, will be the third Section of the ACJHPR. The enactment procedure was speedy and miniature consultations were considered.

Noticeably, the expansion is a shift to the resistant of AU against UNSC, ICC and European National Courts. Scrutinizing an *exceptionalist* tendency of powerful States and that of the power and composition of UNSC, equality of States before ICC proceedings are in jeopardy. UNSC, with its power of referral and deferral of situations is composed, among other States is with three permanent members States who are not Party to the Rome Statute. The UNSC is empowered to refer situations of non-State Parties. Entailing obligations towards non-State Parties of the Rome Statute violates the basic treaty principle of not entailing an obligation to the third Party.

The Continent of Africa has been exposed to massive human rights violations. Individuals of high official statuses orchestrated most of the atrocities. In the midst of diverse limitations, national and supranational courts had failed to prosecute most perpetrators of grave human right violations in Africa. Impunity is the character of the continent. Without other judicial mechanisms, the Criminal Chamber of AU could prosecute the peculiar crimes that exclusively jeopardize the peace and security of the region. Crimes that are trans-boundary and common concerns of a specific region could better be prosecuted under regional courts than national or supranational tribunals. Starting from the establishment of OAU, AU Member States vowed to protect the region from gross human right violations. Various regional and international commitments in which African States are parties oblige Member States to investigate, prosecute and punish individual perpetrators of gross human rights violations. The establishment of the Criminal Chamber of ACJHPR is one of the approaches where AU Member States could fulfill their moral and legal obligations. Since the Criminal Chamber of ACJHPR will be situated close to the territory where an allegedly crimes is said to be committed, the Chamber could be effective and will be in a better position to contribute for judicial

reconstruction and restorative justice. Furthermore, an African Criminal Court will be more legitimate that co-operations from States parties and the society will be enhanced. The restricted resource contributed to an International Criminal Justice is minimized with Regional Criminal Courts than supranational tribunals. However, despite the fact that regionalization of criminal courts is an esteemed development of International law, the establishment and functionality of the Criminal Chamber of ACJHPR have intense challenges.

The recent expansion of ACJHR to include criminal jurisdiction seems to be a political shift than genuine effort of prosecuting international crimes. The recent deed of expansion came immediately after the dispute between the AU on one hand and the ICC, UNSC and European National Courts on the other hand have reaches to the climb. The Statute of ACJHPR failed to address the relation in between the Criminal Chamber of ACJHPR and the ICC. Creating uncertainty to State Parties, suspects and victims, the fact that there is no governing rule on the relation of ICC and the Criminal Chamber of ACJHPR will endanger the development of International Criminal Law. The overlapping member ship of African States makes the subsidiary of the Criminal Chamber to tribunals of RECs problematic. The fact that the genuine requirement is omitted for the ability and willingness of national and regional courts has implication on evidentiary standard.

Some of the crimes that are incorporated under the ACHJPR Statute are not trans-boundary and serious to be entertained at regional level. The fact that the Criminal Chamber entertains several crimes will compromise international standards of fair trial. Since criminal proceedings are expensive, the AU, which has been observed of financial constraints, will be in difficulty of securing necessary resources for the Criminal Chamber. Since most parts of the international community opposed the political motive of the expansion, donors, who are contributing the significant amount of AU financial resources, could not be willing to finance the Criminal Chamber.

The Criminal Chamber is intended to run along with other two Sections. Therefore, since the Criminal Chamber will be costly, it could get in conflict of resource allocations. Reconciliation and interaction up to the objectives/solutions of criminal and civil cases, especially when there is a case that entails both State and individual level responsibilities is not established.

The readiness and political will of AU Member States to prosecute senior governmental officials is doubtful. It is difficult to gain the political support of AU Member States either for the establishment of or cooperation to the Criminal Chamber of ACJHPR. Despite the incorporation of

independence of Judges and Office of Prosecutor in general terms, determinations of the appointment, remuneration and conditions of work restricts the independence of Judges and Prosecutors vis-à-vis AU Assembly.

Regardless of an emerging international law that both personal and official immunity of governmental officials is not defense from prosecution of International Crimes, the Statute of ACJHPR incorporates personal immunity to Head of States/Governments and that of other high-ranking governmental officials. The personal immunity that is granted under the Statute of ACJHPR contradicts with the commitment of African States to protect their citizens from gross human rights violation and avoiding impunity.

Without addressing most of the above-mentioned constraints, the Criminal Section of the ACJHPR could not effectively be materialized and after if it is established, it will be a political organ that could not work to promote justice and avoid impunity. Politicizing the establishment of an African Criminal Court will hinder the modest achievements of an international criminal justice in Africa.

5.2. Recommendation

After the findings that are reached under the body of this thesis and the conclusion specified above, the author came up with the below mentioned recommendations to the effect that an effective Criminal Chamber of ACJHPR which will promote justice and avoid impunity will be established.

- Primarily, the AU should analyze the treaty perspective implications of amending a Protocol that is not coming to force. Accordingly, future controversies up to the five State Parties of the Merger Protocol; regarding the requirement of notification up to the amendment, their opportunity to withdraw and the manner in which those five parties to the Merger Protocol will be attributed to the amending Protocol should be avoided.
- Some of the crimes that are incorporated under the Criminal Chamber of ACJHPR should be examined in light of the qualifications of *international* and *seriousness*. For the reason that the resources of the ACJHPR are limited and a regional Criminal Court should only be empowered to entertain trans-boundary crimes, the crimes of corruption, mercenary and terrorism that are limited to certain locality of a specific country should be excluded from the jurisdiction of the Criminal Chamber of ACJHPR and be left to the national judicial jurisdictions.
- Recognizing the expensiveness of international criminal proceedings on one hand and financial constraints of the institution (AU) on the other hand, the AU Member States should come up with possible means of generating considerable amount of financial resource for the Criminal Chamber. In addition to lobbying international donors, the AU Member States should comply with the commitment of their regular financial contributions.
- Acknowledging both the ICC and the Criminal Chamber of ACJHPR are functioning for the same objectives, their relations should be set up with a notion of cooperation but not conflict. Given most of African States are members to the Rome Statute, cooperation between the two Courts is not only important but a necessity that the contrary will have significant effect on the international criminal justice. The author of this paper proposes the jurisdictional relation between the Criminal Chamber of ACJHPR and the ICC be as of regional complimentary. Cooperation between the two Courts at times of investigations and with regard to trainings should also be enhanced.

- The legal provision with regard to the complimentarity of tribunals of RECs to the Criminal Chamber of ACJHPR should be reconsidered. To avoid the controversy up to overlapping memberships of States to different RECs and establish uniformity of justice, a single tribunal of RECs for a specific State Party should be identified for the purpose of complimentarity. Moreover, most of the tribunals of RECs have no jurisdiction over international crimes and do not grant *right to stand* for individual complaints. Those tribunals of RECs, which have jurisdiction to individual-based international crimes and accept individual complaints, should be identified and uniformly allocated to State Parties.
- Since an exclusion of the *genuine* requirement for the unwillingness and inability of national and RECs judiciaries minimize the evidentiary standard, it should be included under the Statute.
- The relationssship between the Criminal Chamber of the ACJHPR with the other two Sections of the ACJHPR should be comprehensible. Clarification unto the manners of resource distribution among the three Sections is crucial. Moreover, when there is a crime that entails both State and individual-based responsibilities, the approach that the three Sections could work together should be comprehended.
- Independence of Judges and Prosecutors is the major factor for an effective criminal proceeding. Therefore, to avoid political appointees, the mode of appointment, remuneration, and condition of work should be reassigned from the AU Assembly to other independent organs.
- Article 46Abis of the Statute of ACJHPR, which grants personal immunity for governmental officials, should be removed. In addition to the fact that the provision contradicts with the emerging customary international law that avoids immunity of officials in case of international crimes, it will hinder the effort of the African continent in fighting impunity.
- Understanding the inevitable political shift of AU towards an expansion of the African Court with criminal jurisdiction, international donors, rather than criticizing the expansion, should consider their support and push the AU towards the establishment of an effective Criminal Chamber.
- The AU Member States, by politicizing the establishment of the Criminal Chamber of ACJHPR should not waste the efforts and resources of the continent. African States should come across their readiness for prosecuting international crimes and should devote to come

up with a strong Regional Criminal Court, which will protect the continent from individually orchestrated massive human rights violations.

- Africa is a continent of mass human rights violations. The Continent of Africa desperately needs a Regional Criminal Court that prosecutes common crimes that are threat to the regional peace and security. Academics, accepting regionalization of Criminal Court in general and the establishment of the Criminal Chamber of ACJHPR in particular is a development that brings an effective International Criminal Justice, should consider the area and study towards an effective Criminal Chamber for the ACJHPR.

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