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College of Law and Governance
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**Withdrawal of African Countries from International Criminal Court: Is
African Court of Justice and Human and Peoples Rights an Alternative to
Fight Impunity in Africa?**

**A Thesis Submitted to the School of Graduate Studies College of Law and
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of Law (LLM) in Human Rights Law**

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CRIMINAL COURT: IS THE AFRICAN COURT OF JUSTICE AND HUMAN AND
PEOPLE RIGHTS AN ALTERNATIVE TO FIGHT IMPUNITY IN AFRICA?**

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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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Abbreviations and Acronyms

| | |
|----------------------|---|
| AU | African Union |
| ACJHR | African Court of Justice and Human Rights |
| AUPSC | African Union Peace and Security Council |
| AComHPR | African Human Rights Commission |
| ACJHPR | African Court of Justice and Human and Peoples Rights |
| ACHPR | African Court of Human Rights |
| ACJ | African Court of Justice |
| CSO | Civil Society Organizations |
| CAR | Central African Republic |
| Constitutive Act: | Constitutive Act of the African Union |
| DRC | Democratic Republic of Congo |
| ECCC | Extraordinary Chambers in the Courts of Cambodia |
| Genocide Convention: | Convention on the Prevention and Punishment of the Crime of Genocide |
| HRC | Human Rights Committee |
| ICC | International Criminal Court |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTR Statute: | Statute the Statute of the International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| ICTY Statute: | International Criminal Tribunal for the former Yugoslavia |
| ILC | International law commission |

| | |
|---------------|--|
| JEM | Justice and Equality Movement |
| UN | United Nations |
| UNSC | United nation's Security Council |
| SCSL | Special Court for Sierra Leone |
| SCSL Statute: | The Statute of the Special Court of Serra Leone |
| SLT | Special Tribunal for Lebanon |
| SADC | Southern African Development Community |
| SLA/M | Sudan Liberation Army/Movement |
| OTP | Office of the Prosecutor |
| OAU | Organization of African Unity |
| PALU | Pan African Lawyers Union |
| Rome Statute: | The Rome Statute establishing the International Criminal Court |
| VCLT | Vienna Convention on Law of Treaty |

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Abstract

Human rights are accepted as universal despite cultural manifestations. However respect for human dignity cannot be taken for granted. Starting from early civilization, human kind has suffered with atrocities and massive human right violations. The African Continent is one of the places that experiences individually orchestrated massive human rights violations. Different ad-hoc and national tribunals prosecuted individual-based gross human rights violations. After various studies conducted and intense negotiation made the Rome Statute was adopted in 1998 establishing the first permanent international criminal court. Since its establishment ICC has investigated number of cases including situations located in Africa. The AU doesn't seem interested on the opening of investigations in different parts of Africa thus, requested the UNSC to defer different ICC investigations in Africa. The UNSC failures to respond to the request of the AU lead, to pursue the establishment of an African Regional Criminal Court and adoption of a collective withdrawal strategy from the Rome Statute by the AU Assembly.

The AU Assembly adopted Malabo Protocol on June 27, 2014, that will empower an African Court with criminal jurisdiction. The swift shift from supporting the ICC to establishing regional criminal court is a political reaction rather than genuine legal effort of prosecuting perpetrators of massive human right violations. Regional criminal tribunal is a new approach to international criminal justice system and may positively contribute for development of international criminal justice system. However, the current AU move towards establishing an effective African Criminal Court has various operational, normative and practical limitations. Thus this paper, with the theme tune of empowering the African Court with criminal Jurisdiction, examines whether the proposed ACJHPR Criminal Chamber when and if it enters into force serves as an alternative to the ICC in the prosecution and condemnation of grave crimes of international concern in the region based on its legal and institutional framework. Meanwhile, the paper examines the critics forwarded by some African countries against ICC and the AU withdrawal strategy from the Rome Statute.

Chapter One

Introduction

1.1. Background of the Study

Human rights are considered and officially accepted as universal regardless of their genesis or cultural manifestation. However, respect for the dignity and rights of human beings cannot be taken for granted and they must be constantly nurtured and vigorously guarded. There is always a need to effective and efficient enforcement mechanism. The absence of a supervising or monitoring body in case of violation renders a right protected under international human rights instruments meaningless. The international community has been trying different mechanisms with the aim to fight impunity and deliver justice for victims of some of the world's worst atrocities by establishing different form of international criminal tribunals. The first proposal to establish an international criminal tribunal was made in the Paris Peace Conference in 1919¹ however, did not succeed. The Nuremberg² and Tokyo³ tribunals were the first criminal tribunals which were established in the wake of the WWII by Allies powers.⁴

After the Second World War the UN General Assembly recognized the need for the establishment of permanent international Criminal court.⁵ It was following the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide⁶ that the UN General assembly invited the international law commission (here in after, 'the ILC') to study the possibility of establishing an international judicial organ. The ILC concluded such kind of court

¹Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the United Nations Secretary General, United Nations General Assembly, International Law Commission, Lake Success, New York, 1949, A/CN.4/7/Rev.1, at 2

² 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., *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)

³The 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

⁴ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 279 (entered into force Aug. 8, 1945)

⁵ General Assembly resolution No. 260 for the establishment of International criminal tribunal, December 1948

⁶ The Convention on the Prevention and Punishment of the Crime of Genocide opened for signature, ratification and accession on 15 December 1949 and entered into force on 12 January 1951.(here in after, the Genocide Convention)

is desirable and possible and came up with draft statute in 1950's.⁷ However, these efforts were shelved during Cold War and become unrealistic.

The General Assembly tasked ILC once again to draft a Statute for a permanent criminal court in 1989. While the drafting work began, the International criminal tribunal for former Yugoslavia (here in after, the ICTY)⁸ was created in 1993, by the UN Security Council under Chapter VII of the UN Charter⁹ after investigation of crimes committed in the then ongoing armed conflict in the former Yugoslavia. One year later, the International Criminal Tribunal for Rwanda (here in after, the ICTR)¹⁰ was established in November 1994 by UN Security Council after approximately 800,000 Rwandans were massacred, with countless more raped, mutilated and tortured.¹¹

Then another Special Tribunal for Sierra Leone (here in after, the SCSL)¹² was created in 2002 through an agreement between Sierra Leone and the UN, in response to the atrocities committed during the civil war that ravaged the country throughout the 1990s. In the subsequent years, there were also hybrid tribunals created.¹³ The Extraordinary Chambers in the Courts of Cambodia (here in after, the ECCC)¹⁴ was one of the hybrid tribunal which was created in 2005 through an agreement between Cambodia and the UN to prosecute the surviving senior leaders of the Khmer Rouge. In 2007, UN Security Council also created the Special Tribunal for Lebanon (here in after, the STL)¹⁵ under Chapter VII of the UN Charter.

⁷ Report of the ILC on the work of its forty-sixth session (2 May-22 July 1994), vol. II, May (1994)

⁸ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993)

⁹ The United Nations Charter, adopted by the San Francisco Conference on 26 June 1945 at San Francisco., opened for signature and ratification on 26 June 1945 and entered into force on 24 October 1945

¹⁰ Statute of the International Tribunal for Rwanda, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 1994

¹¹ Rwanda genocide: 100 days of slaughter - BBC News - BBC.com. Available at: <www.bbc.com/news/world-africa-2687550> (accessed on March 3, 2017)

¹² UNSC Resolution on the Establishment of the Special Court for Sierra Leone, S.C. Res. 1315, U.N. DOC. S/RES/1315, August 14, 2000

¹³ Sarah M.H., "Hybrid courts: The hybrid category of a new type of international crimes courts", Utrecht Law Review, Volume 2, (2006) p 191

¹⁴ The Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)

¹⁵ UN Security Council Resolution No. 1757, adopted by the Security Council on 30 May 2007

This international ad-hoc and Special Tribunals have responded to the most outrages crimes that the world ever faced.¹⁶ Though there are different concerns raised on their effectiveness,¹⁷ it was believed that this was the least that the international community could offer in responses to egregious human rights violations.¹⁸ However, international ad hoc (ICTY, ICTR) and hybrid (SCSL, ECCC, and STL) criminal tribunals were established in response to a particular conflict or event. They were backward-looking or retrospective courts and temporal in nature. Their jurisdictions were limited to a given geographical area and particular types of the crimes and they were created to serve within a specific time limit.¹⁹ For example, the ICTY was established to adjudicate crimes against humanity, genocide, and war crimes committed in the territory of the former Yugoslavia after January 1, 1991. The same is true with ICTR which had jurisdiction over the same crimes committed in the territory of Rwanda between 1 January 1994 and 31 December 1994.

The creation of these tribunals further highlighted the need for a permanent international criminal court. The international community was still beholding for other permanent solutions for such kind of grave outrages which probably may happen in the near future and the efforts were continued by the UN General Assembly and ILC to make the proposed permanent international court a reality.

In 1994, the ILC presented its final draft to the General Assembly and recommended conference to be convened. An Ad hoc committee was created to study the establishment of international criminal court. Based on the finding of the Ad-hoc committee, the preparation committee was established to formulate generally acceptable instrument. After conducting various studies they come up with a first draft in 1994. The General Assembly convened a diplomatic conference in

¹⁶ Christian Tomuschat, "The Legacy of Nuremberg," *Journal of International Criminal Justice*, May, 2006

¹⁷ K. Sellars, "Imperfect Justice at Nuremberg and Tokyo," *European Journal of International Law* (Vol. 21 no. 4) 2010, P 23

¹⁸ Louise and Arbour, "History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda," *American University International Law Review* 13, No. 6 (1998) p1500

¹⁹ Besides, the military tribunals had exclusive jurisdiction over national courts while the UNSC ad hoc courts and the hybrid courts had primacy jurisdiction over national courts as opposed to the complementary jurisdiction of the ICC

Rome and after intense negotiation, the Statute of the International Criminal Court (here in after, the ICC)²⁰ was adopted on 17 July 1998.

African states were pressing the creation of permanent and impartial international criminal tribunal. They have been actively involved since the negotiation to the Rome Statute began. For instance, the Republic of South Africa, Senegal, Lesotho, Malawi, and Tanzania participated in discussions when the International Law Commission presented a draft ICC Statute to the UN General Assembly for consideration.²¹

The ICC becomes the first permanent, treaty-based international criminal court. It was aimed to promote the rule of law and to ensure that the gravest international crimes do not go unpunished.²² It has jurisdiction over core crimes under international law, specifically genocide, crimes against humanity, war crimes, and crime of aggression.²³ The ICC is complementary to national criminal jurisdictions. As a principle it exercises jurisdiction over nationals of a state party²⁴ who are accused of crimes, regardless of where the acts were perpetrated, and over crimes committed on the territory of states parties, regardless of the nationality of the offender.²⁵

The Africans were also at the forefront in ratifying and contributing to the entry into force of the Rome Statute. For instance, on 14th January 1999, the Senegalese National Assembly authorized its national Government to ratify the Statute, making Senegal, become the first state in the world to demonstrate support for the new era of international justice and human rights protection.²⁶ As of 4 March 2016, 124 Countries were State Parties to the Rome Statute. Out of these, 34 were African countries.²⁷ With respect to the organizational participation of Africans, there are a

²⁰ Rome Statute of the International Criminal Court, adopted on 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, entered into force 1 July 2002, U.N. Doc. A/CONF.183/9, (1998). (here in after, the Rome Statute)

²¹ Peter Brett and Engbo Gissel, Explaining African Participation in International Courts, Oxford Publication, (2018) Available at : <https://academic.oup.com/afraf/advance-article>, (Accessed on March, 1 2018)

²² Ibid The Preamble, Paragraph 5

²³ Ibid Art., 5

²⁴ Ibid, Based UNSC it can also exercise jurisdiction over nationals of non-member state and an Ad hoc acceptance of ICC's jurisdiction by non-member state can also enable the court to exercise jurisdiction over crimes listed under the Rome Statute

²⁵ Ibid Art., 16

²⁶ Ibid

²⁷ The States Parties to the Rome Statute - ICC – CPI, available at: <https://asp.icc-cpi.int/states/parties/> (accessed on September 13, 2017) However, as of October 2017 the withdrawal notification of Burundi will got effect bringing down the number of member states to the Rome Statute in to 123.

number of Africans who occupy high-level positions at the Court. There were also African judges who served the court.

However, turbulent relationship between the International Criminal Court and Africa was sparked in July 2008 when the ICC Prosecutor applied for a warrant of arrest for Omar Al-Bashir the sitting President of Sudan. On 4 March 2009, the Pre-Trial Chamber authorized and on the same day, the arrest warrant was issued by registry and transmitted with a request for cooperation to authorities in Sudan, all States Parties to the Rome Statute and all Member States to the United Nations.²⁸ However, the issuance of an arrest warrant raised a number of issues. Among others, the power of Security Council to refer the situation, immunity of an incumbent head of state of a non-state party to the Rome Statute in proceedings before the ICC as well as complementarity were thorniest. Therefore, based on these and other additional grounds, the African Union (here in after ‘the AU’) Member States agreed not to cooperate with the ICC’s request to arrest warrant of Omar Al Bashir. As a result, different concerns started to arise against the ICC by African countries.²⁹ The ICC has been criticized as targeting only African governments.³⁰

Moreover, the AU decision, warned that the ‘AU reserves the right to take any further decision’ in order to protect the ‘dignity, sovereignty and integrity of the continent’. Recently South Africa, Burundi and Gambia initiated withdrawal from the ICC. However, while the current newly elected Gambian President Adama Barrow has shown an interest to remain a member state to the Rome Statute, the South African Supreme Court invalidated the South African withdrawal notification made to the UN Secretary General. Currently, Burundi is the only African country who withdrawn from the Rome Statute.³¹ In this regard, the AU has also made various

²⁸ Prosecutor v Al-Bashir, Decision on the Prosecutor’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, Public Redacted Version, , ICC-02/05–01/09, (ICC Pre-Trial Chamber I)

²⁹ Max du Plessis, The International Criminal Court That Africa Wants, Institute for Security Studies, Brooklyn Square 0075, 2010

³⁰(BBC News Africa 22 July 2010 ‘Bashir Warrant: Chad accuses ICC of anti-African bias’), Available at, <http://www.bbc.co.uk/news/world-africa-10723869>. (Accessed on October 9, 2016).

³¹The withdrawal of Burundi is effective as of October 2017 after one year since formal letter of notification sent to the UN Secretary General for withdrawal in October 2016. Burundi was the first state to formally announce that it will withdraw from the ICC with a decree from its parliament. The government began proceedings following the April 2016 opening of an ICC preliminary investigation of violence in Burundi. <<http://www.africanews.com/2017/10/27/burundi-is-officially-not-a-member-of-the-international-criminal-court-icc/>> (accessed on January 24, 2017)

Decisions³² on the ICC and adopted Collective Withdrawal Strategy from the Rome Statute³³ on 28th Ordinary Session held from 30 to 31 January 2017 at Addis Ababa.

At regional level, a protocol was adopted to establish an African Court of Justice and Human Right or (hereafter, 'the ACJHR'), in 2008. The ACJHR was to establish a court with two chambers namely, the general affairs and human rights section.³⁴ However, in response to the above contestations, the Assembly of Heads of State and Government, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol) in June 2014³⁵ which introduced a third chamber, international criminal law section. Thus, if and when the Malabo Protocol enters into force, the ACJHPR will have jurisdiction to try international crimes at regional level.

1.2. Statement of the Problem

The ICC is a mechanism to respond to grave form of international crimes. It has jurisdiction on international crimes committed within or by the nationals of Member States to the Rome Statute which is 33 African States out of 123. As of 2017, eleven situations have been investigated by the ICC Prosecutor out of which 10 of the investigation were all located in Africa. Out of those situations under investigation the issuance of an arrest warrant by the ICC Pre-trial chamber against Sitting President of Sudan Omar Al-Bashir has raised number of contradictions between the ICC and AU. The AU has made a request to the UNSC to defer the investigation started against Omar Al-Bashir however, the failure of the UNSC to respond on the request lead the AU to be hostile towards the ICC functioning. There is also ongoing argument among some African states and between Africa and Western countries over proper administration of criminal justice by ICC within Africa.

³² Decision on the International Criminal Court Doc. Ex.CI/1006(Xxx) (Assembly of the Union, AU Twenty-Eighth Ordinary Session, from 30 - 31 January 2017)

³³ Withdrawal Strategy Document, (Draft 2) (restricted document) AU, Addis Ababa, Ethiopia (version 12.01.2017)(here in after, the Withdrawal Strategy)

³⁴ Protocol on the African Court of justice and Human Rights, adopted at the Eleventh Ordinary Session of the Assembly of Heads of State and Government, Sharm El-Sheikh, Egypt (July 1, 2008)

³⁵ 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 of Heads of State and Government, Malabo, Equatorial Guinea (June 27, 2014) (here in after, the Statute of ACJHPR)

As a result, African countries started a move to strength regional institutions with the aim of fighting impunity on the continent. The Malabo Protocol was adopted to grant criminal jurisdiction to the ACJHR over international crimes based on Art. 4(h) of the AU Constitutive act.³⁶ The Protocol comes into force 30 days after the deposit of instruments of ratification by 15 African countries. In addition, AU has also made a call for its member states who are also members to the Rome Statute for collective withdrawal from the Rome Statute by adopting a collective withdrawal strategy to be implemented by its member states.

This study examines whether the proposed ACJHPR Criminal Chamber when and if it enters into force serves as an alternative to the ICC in the prosecution and condemnation of grave crimes of international concern and fighting of impunity in the region based on its legal and institutional frame work. It is also examines the critics forwarded by some African countries against ICC and the AU withdrawal strategy from the Rome Statute.

1.3. Objectives of the Study

1.3.1. General Objective

The general objective of this research is, to examine whether the proposed ACJHPR criminal chamber is an alternative to respond to grave form of international crimes namely, genocide, crimes against humanity, war crimes and crime of aggression in the African continent. This study also examines the merits of the critics forwarded by African countries against the ICC.

1.3.2. Specific Objectives

The specific objectives are:

- To explore and evaluate the merits of the criticisms directed against the ICC by some African countries;
- To assess the collective withdrawal strategy developed by the AU in light of existing international principles;

³⁶ Article 4(h) of the Constitutive act of the AU provides, the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

- To examine the legal and institutional capability of the ACJHPR in addressing grave form of international crimes in the region; and
- To examine the practical and theoretical challenges of the implementation of the Malabo Protocol in fighting impunity in the continent

1.4. Research Questions

In order to address the objectives some of the basic questions the researcher will try to answer are:

1. Whether the critics on the ICC by some African States has a legal bases or not?
2. Is the collective withdrawal strategy of the AU in line with the international treaty law?
3. Is the collective withdrawal of AU an exit door for African countries not to take action in case of commission of genocide, crimes against humanity, war crimes and crime of aggression in the region?
4. Is the ACJHPR an alternative forum to prosecute grave crimes like genocide, crimes against humanity, war crimes and crime of aggression in the continent?
5. Would the ACJHPR be effective forum to fight problem of impunity in the continent?

1.5. Methodology of the Study

The doctrinal research methodology is followed under this research. The study used both primary and secondary sources of data so as to achieve the general and specific objectives stated herein above. Accordingly, different international and regional instruments are interpreted and related case laws are used. Review of literatures consists of reading and analyzing different online and library materials such as books, scholarly articles and Journals has also used. Comparison is also made when necessary to examine the ACJHPR in light of the international, ad-hoc and special tribunal's criminal justice experience.

1.6. Scope of the Study

This study basically examines effectiveness of criminal chamber of the ACJHPR on responding grave forms of crimes in the continent. Since the adoption of the Malabo protocol followed after

various critics forwarded against ICC, and leads the adoption of the collective withdrawal strategy of the African countries from ICC, the paper tries to assess the critics against ICC and the collective withdrawal strategy of the AU.

1.7. Limitations of the Study

The collective withdrawal movement has reached its pick point during the 28th session of the AU summit. The initial draft decision and strategy for collective withdrawal has been made and it may not come in to force during the conduct of this study which may make the study inconclusive. Different decisions may be reached after this study has been conducted and the fact and assertions under this research show only those drawn and happened before the end of this study.

1.8. Significance of the Study

- This study will contribute to having a clear understanding on the academic debate of the ICC-AU relations;
- The study will add value on road mapping the academic discussion on AU withdrawal strategy from the Rome statute;
- This study will clarify the legal and institutional framework of the International criminal chamber of ACJHPR; and
- This study will explore both the strength and drawbacks of the new Criminal Chamber of the ACJHPR if any, and make possible suggestion and recommendations

1.9. Structure of the Study

This introduction forms chapter one of the study. Chapter two address the growing tension between the ICC and the AU by raising basic grounds of concern on administration of criminal justice in the African continent. Chapter three broadly discusses the AU's withdrawal strategy from the Rome Statute and examines the withdrawal strategy in light of international treaty withdrawal. Chapter four analyses the immediate causes of AU's resort to extending jurisdiction of the ACJHPR to try international crimes. It further looks at AU's power to establish a criminal

jurisdiction to try international crimes in Africa under UN Charter and its Constitutive Act and this chapter will also discuss the legal, institutional framework and jurisdiction of the new criminal chamber. Chapter five explores the advantages and examines the normative and forecasted practical challenges of the new criminal jurisdiction in light of fighting impunity in Africa. The last chapter concludes the study and gives possible recommendations.

Chapter Two

The International Criminal Court and the Controversy Involved on the Administration of Criminal Justice in Africa

1.1. Introduction

Since the establishment of the ICC, the Court has been exercising its mandate over major types of international crimes. During these years, the ICC has been experiencing both support and critics. Some African countries have shown their support for the ICC starting from its establishment until present times. However, some other African countries have criticized the court on its activities and called the Court as racist and targeting African leaders alone especially after an arrest warrant has been issued for President Omar Al-Bashir of Sudan. They have also refused to co-operate with the ICC's order. AU has also affirmed the critics made against the ICC after the UNSC has failed to respond to its request for the deferral of the case against Al-Bashir.

This chapter discusses the establishment of the ICC and the role of African countries during its establishment. It also explores all the issues raised against the ICC by some African countries including the situation in the Darfur region of Sudan and it examines the Universal jurisdiction, immunity of Head of State and Higher Government Officials, referral of situation by the UNSC and complementarity.

1.2. The Establishment of the International Criminal Court

After the adoption of the bill of rights the international community was considering a mechanism through which the rights are protected properly and advanced through time. The Convention for the Prevention and Punishment of Genocide was adopted by the General Assembly in 1948³⁷ and the Geneva Convention Relative to the Protection of Civilian Persons in Times of War (here in

³⁷ Article 6, the Genocide Convention, provides, 'Persons charged with genocide or any of the other acts enumerated in article 3 shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.'

after, 'Geneva Convention IV')³⁸ followed one year later. In a resolution accompanying its adoption of the Genocide Convention, the General Assembly invited the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes.³⁹ Thus instructed, the International Law Commission embarked upon a fifty-year long discussion, voted in support of the desirability and feasibility of creating an international criminal court. However, their work was postponed⁴⁰ as the Cold War made it impossible to achieve consensus.

In 1989, the question of an international criminal jurisdiction found its way back onto the agenda of the General Assembly with the collapse of the Soviet Union and the re-opening of East-West relations. The International Law Commission was again instructed to proceed,⁴¹ and adopted a new version of a Draft Code of Crimes in 1991 and in 1992 established a Working Group which produced a report laying out the basis for the adoption of an international criminal court.⁴² The General Assembly responded positively, and the International Law Commission adopted a final draft statute in 1994 that served as the basic text⁴³ upon which the provisions of the International Criminal Court were established.

An ad hoc committee was established⁴⁴ to review the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission.

³⁸ Geneva Convention Relative to the Protection of Civilian Persons in Times of war, Diplomatic Conference held at Geneva from 21 April to 12 August 1949

³⁹ In resolutions No. 45/41 of 28 November 1990 and 46/54 of 9 December 1991, invited the Commission to consider further and analyze the issues concerning the question of an international criminal jurisdiction, including the question of establishing an international criminal court. ICC / International Criminal Court: Home Historical Timeline Available at:

<https://www.mtholyoke.edu/~kmllee/icc/historicalbackground.html>: (accessed on June 4, 2017)

⁴⁰ Leila Nadya Sadat, The International Criminal Court: Past, Present and Future, Cambridge Compendium of International Criminal Law, (April, 2014) P. 3

⁴¹ The General Assembly, in its resolution 44/39 of 4 December 1989, had requested the International Law Commission to address the question of establishing an international criminal court., Establishment of an International Criminal Court, Available at: www.un.org/documents/ga/res/49/a49r053.htm >:(accessed on June 5, 2017)

⁴² In resolutions 47/33 of 25 November 1992 and 48/31 of 9 December 1993, requested the Commission to elaborate the draft statute for such a court as a matter of priority., Establishment of an International Criminal Court, Available at: www.un.org/documents/ga/res/49/a49r053.htm >: (accessed on June 4, 2017)

⁴³ The International Law Commission considered the question of establishing an international criminal court from its forty-second session, in 1990, to its forty-sixth session, in 1994. At the latter session, the Commission completed a draft statute for an international criminal court, which was submitted to the General Assembly.

⁴⁴ The General Assembly, Resolution 49/53 on the establishment of an ad hoc Committee, 9 December 1994

The Preparatory Committee was convened by the General Assembly,⁴⁵ composed of representatives of UN Member States. The Preparatory Committee held fifteen weeks of meetings⁴⁶ beginning in March 1996 and ending in April 1996,⁴⁷ developing both technical and political issues of the statute that could be acceptable to states as well as civil society.⁴⁸

On 17 July, 1998, the Statute of the International Criminal Court was adopted at a Diplomatic Conference held in the city of Rome, in a vote of 120, with 21 States abstaining.⁴⁹ The Statute attained the requisite ratifications needed for its entry into force with the deposit of eleven ratifications in April, 2002, bringing the total number of States Parties to sixty-six and on July 1, 2002, in accordance to Art 126 (1) of the Statute.

1.2.1. The Role of African Countries in the Establishment of the ICC

The general support by African countries to the ICC dates back to the initial time for the establishment of the International Criminal Court. Siding with an idea for establishment of an institution designed to deal with perpetrators of international crimes began in the early 1990s when Rwanda requested the UN Security Council to establish the ICTR, and when Sierra Leone appealed to the UN to help deal with impunity in that country, and that request gave birth to the ICTR⁵⁰ and the SCSL.⁵¹

⁴⁵ The General Assembly, Resolution 50/46 on the establishment of the preparatory committee, 11 December 1995

⁴⁶ The Preparatory Committee on the Establishment of an International Criminal Court met from 25 March to 12 April and from 12 to 30 August 1996, during which time the Committee discussed further the issues arising out of the draft statute and began preparing a widely acceptable consolidated text of a convention for an international criminal court.

⁴⁷ A consecutive study has been conducted by the Preparatory Committee as to prepare a widely acceptable consolidated text of a convention for an international criminal court. The Preparatory Committee has also met from 11 to 21 February, from 4 to 15 August and from 1 to 12 December 1997, from 16 March to 3 April 1998, and from 16 March to 3 April 1998, during which the Committee completed the preparation of the draft Convention on the Establishment of an International Criminal Court, which was transmitted to the Conference.

⁴⁸ Report by the Preparatory Committee, on the Establishment of an International Criminal Court, vol. II (Compilation of Proposals), U.N. Doc. A/51/22, at 8 (1996) available at: <<https://www.legal-tools.org/doc/>> (accessed on June 6, 2017)

⁴⁹ The Rome Statute being subject to ratification, acceptance or approval, was adopted by the Rome Conference on 17 July 1998 and opened for signature on 17 July 1998, at the Ministry of Foreign Affairs of Italy and, subsequently, until 31 December 2000, at United Nations Headquarters in New York. The same instrument was also opened for accession in accordance with its provisions.

⁵⁰ Supra note 10

⁵¹ Supra note 12

Furthermore, the Southern African Development Community (SADC) held a Regional Conference⁵² on the International Criminal Court in Pretoria⁵³ in September 1997 and then again in June 1999.⁵⁴ Whereas, Senegal also hosted an African Conference on the establishment of the ICC in February 1998 in Dakar, where the participants adopted a declaration in which they affirmed their commitment to the establishment of international criminal court.⁵⁵

Apart from this, African States actively participated in the debates of the Rome conference. Some African countries like South Africa were members of the informal group that contributed for the development and ratification process of the Statute. South Africa and Ghana were also members of the so-called “like-minded group,”⁵⁶ which played vital role and which advocated for a strong ICC with an independent prosecutor.⁵⁷

At the first Ministerial Conference on Human Rights in Africa on 16 April 1999, the former Organization of African Unity (OAU) passed a resolution requesting all African States to ratify the Rome Statute of the International Criminal Court.⁵⁸ The Assembly of the African Union has also made a call for its member states for universal ratification of the Rome Statute in 2004.⁵⁹

⁵² The establishment of the International Criminal Court: SADC’s participation in the negotiations, African Security Review 9(1) (2000), Available at: <<http://www.iss.co.za/pubs/asr/9No1/>> (accessed on July 15, 2017)

⁵³ The Southern African Development Community (SADC) members met in Pretoria in September 1997 to discuss their negotiation strategies and to agree on a common position in order to make a meaningful impact on the outcome of negotiations. This meeting provided impetus for a continent-wide consultation process on the creation of the court. The participants agreed on a set of principles that were later sent to their respective ministers of justice and attorneys-general for endorsement. The principles proposed that: The ICC should have automatic jurisdiction over genocide, crimes against humanity and war crimes, the court to have an independent prosecutor with power to initiate proceedings *proprio motu.*, called for full cooperation of all states with the court at all stages of the proceedings, called for Stable and adequate financial resources to be provided for the ICC, and prohibited from making reservations to the statute.

⁵⁴ Fanny Benedetti, Karine Bonneau, John Washburn Martinus Nijhoff, “Negotiating the international Criminal court,” (2013) Page 82., available at: Amazon.com

⁵⁵ Campaign for the ICC: seminars and conferences (1996-1998), Available at: <www.npwj.org/node/>(accessed on June 15, 2017)

⁵⁶ “like-minded” States, which had started as a caucus in 1994 and emerged as a formal and powerful group of countries committed to the court’s ultimate establishment based upon certain core principles, Study by the International Law Commission of the Question of an International Criminal Jurisdiction, G.A. Res. 260B (III), U.N. GAOR 6th Comm., 3d Sess., 179th plen.

⁵⁷ Ibid

⁵⁸ Dakar declaration and Plan of Action, adopted April 1999, O.A.U., Ministerial Conference on Human Rights., Available at: <http://www.achpr.org/english/declarations/declaration_grand_bay_en.htm> (accessed on May 10, 2017)

⁵⁹ Kurt Mills, “Bashir is Dividing Us: Africa and the International Criminal Court,” Human Rights Quarterly 34 (2), (2012)

Indeed, the first country to ratify the Rome Statute was Senegal. Since the Court's Statute entered into force on 1 July 2002, 139 states have signed and 123 have ratified the Statute.⁶⁰ Out of those 123 States Parties, 33 were African. Africa represents the largest block of ratifications of the Rome Statute.

With respect to the participation of Africans, there are a number of Africans who occupy high-level positions at the Court, including the second Chief Prosecutor Fatou Bensouda (The Gambia). There were or are also African judges who served or serving the Court and even currently four of the Court's judges are African.⁶¹ Furthermore, in the ICC's 2009 judicial elections, 12 of the 19 judicial candidates were African citizens nominated by African governments.⁶²

Generally, African States had made active and strong participation in the creation and operation of the International Criminal Court. The founding document of the ICC is a result of joint ideas and determination to put an end to impunity for the most serious crimes of concern to the international community.

1.2.2. Jurisdiction of the International Criminal Court

The ICC has subject matter jurisdiction or *ratione materiae*, over 4 international crimes namely, Genocide, War crime, crime against humanity and crime of aggression.⁶³ A broad definition constitute elements of the crime is made under the Rome statute. Regarding crime of aggression there was no agreeable definition made at the time of adoption of the Statute. However, attempts made to give legally binding definition. In June 2010, the Assembly of States Parties held a

⁶⁰ Currently ICC membership stands at 123 states out of nearly 197 UN member states. Of these, 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States. See The States Parties to the Rome Statute, International Criminal Court, <<http://www.icccpi>> (accessed September 2, 2017).

⁶¹ As of 2009, out 18 judges five were African: Fatoumata Dembele Diarra (Mali), Akua Kuenyehia (Ghana), Daniel David Ntanda Nsereko (Uganda), Joyce Aluoch (Kenya), Sanji Mmasenono Monogeng (Botswana), and Navi Pillay (South Africa) who also served the UN High Commissioner for Human Rights. In addition, the first director of the secretariat of the ASP Medard R. welamira, was also a citizen of South Africa and Tanzanian by birth. Available at : <<http://www.icc-cpi.int/press/pressreleases/139.html>> (accessed on August 17, 2017)

⁶² Statement by Mr. Ben Kioko, Legal Counsel of the African Union Commission on Behalf of the AU Commission, at the Review Conference of the Rome Statute of the International Criminal Court (ICC), Kampala, Uganda, 31 May-11 June 2010.

⁶³ Article 5, Rome Statute

Review Conference in Kampala, during which a definition of crime of aggression was agreed upon, and a new Article was added to the Rome Statute.⁶⁴

In terms of jurisdiction *ratione temporis*, the Court only has jurisdiction with respect to crimes committed after the entry into force of the Statute, 1 July, 2002, unless that State decides otherwise.⁶⁵

Unlike the predominantly existing conception of State responsibility for any human rights violation, the Rome Statute has also taken the same stand with the pre-established international ad-hoc tribunals on individual criminal responsibility.⁶⁶ Individuals can be legally held accountable when the crime is committed within territory of State party or if the accused nationality belongs to the State party to the Statute or have accepted the jurisdiction of the Court.

The Court exercises its jurisdiction based on three grounds.⁶⁷ First, when referrals are made by a State Party pursuant to Art 14(1) of the Rome Statute, secondly, when referral is made by the UN Security Council as per Article 16 of the Rome Statute and thirdly, when the Prosecutor initiates on her own motion, using *proprio motu* powers.⁶⁸ When the Prosecutor initiated an investigation using her *proprio motu* powers, Article 15 requires the Prosecutor to secure an authorization from the pre-trial chamber of the Court to commence the investigation.⁶⁹

The ICC is not a Court of first resort. It exercises its jurisdiction based on the principle of complementarity.⁷⁰ It exercises jurisdiction only when a state is unable or unwilling to investigate or prosecute the case. The Preamble and Article 1 of the Statute provide that the ICC shall be complementary to national criminal jurisdiction, meaning the ICC is intended to function as a

⁶⁴Pursuant to the text adopted, which includes two separate articles on the exercise of jurisdiction over the crime of aggression, the Court cannot exercise jurisdiction over the crime until the Kampala amendments have entered into force for at least thirty states (i.e., those states have ratified the amendments) and the States Parties to the ICC Statute so agree under the provisions of the Statute governing amendments thereto which require either a consensus vote or an two-thirds majority. As of December 2017, 35 states parties have ratified the amendment the amendments, the jurisdiction of the International Criminal Court may begin one year after the 30th ratification of the amendment but not before the Assembly of States Parties has approved the commencement of jurisdiction after 1 January 2017., HANDBOOK, Ratification and Implementation of the Kampala Amendments to the Rome Statute of the ICC Crime of Aggression., Published by the Liechtenstein Institute on Self-Determination., 2012.,

lisd.princeton.edu

⁶⁵ Article 11, Rome Statute

⁶⁶ Article 25, Rome Statute

⁶⁷ Article 13, Rome Statute

⁶⁸ Article 15, Rome Statute

⁶⁹ Article 15(4), Rome Statute

⁷⁰ Article 17 (1) and (2), Rome Statute

court of last resort. Unlike the international ad hoc tribunals, the ICC functions as a secondary court and does not replace national jurisdictions. The complementarity principle allows the ICC to intervene where a State refuses or unable to prosecute those who commit the most serious of crimes of the international concern.

1.3. The Controversy between the ICC and Some African Countries: The fissure

In twenty years since the signing of the Rome Statute, 133 State have accepted the ICC's jurisdiction. In its first year of activity, the ICC received 473 communications.⁷¹ By 1 February 2006, this number had increased to 732 communications from 103 countries⁷² and by October 2007, the number of complaints had reached 2,889.⁷³ An initial review process found 80 percent of these complaints to be outside of the Court's jurisdiction. Out of ten situations subjected to intensive analysis, three had proceeded to the investigation stage, two were dismissed, and five remained ongoing.⁷⁴

As of November 2017, the ICC had opened eleven investigations,⁷⁵ out of which ten of the investigations located in Africa: Burundi, Democratic Republic of Congo, (DRC), Central African Republic (CAR I⁷⁶ and II⁷⁷), Uganda, Mali, Kenya, Ivory Coast, Libya and Darfur (western Sudan). Self-referrals are made by Uganda, Democratic Republic of Congo, Mali and the Central African Republic.⁷⁸ In the Uganda situation, the Ugandan government referred the

⁷¹The Office of the Prosecutor Report on Preliminary Examination activities, Report on Preliminary Examinations, December 2011, Available at: <<http://www.icc-cpi.int/>>

⁷² Ibid

⁷³ Ibid

⁷⁴Update on communications received by the office of the Prosecutor of the ICC, 10 February 2006, available at <<http://www.icc-cpi.int/library/organs/otp/>> (Accessed on December 21, 2016)

⁷⁵With the exception of Georgia, the investigation in Georgia is made based on the Prosecutor authorization to open *proprio motu* investigation on 27 January 2016 against alleged crimes against humanity and war crimes committed in the context of an international armed conflict between 1 July and 10 October 2008 and as per the Prosecution's request for authorization to investigate: in and around South Ossetia

⁷⁶ The first Situation referred to the ICC by the CAR Government was made in December 2004 and the investigations opened on May 2007 against alleged war crimes and crimes against humanity committed in the context of a conflict in CAR since 1 July 2002, with the peak of violence in 2002 and 2003.(See CAR I regarding the 2002/2003 conflict in CAR.)

⁷⁷ The second Situation referred to the ICC by the CAR Government on May 2014 and the investigations opened on September 2014 against alleged war crimes and crimes against humanity committed in the context of renewed violence starting in 2012 in CAR. (See CAR II for the situation in CAR from 2012 onward.)

⁷⁸ Uganda, Democratic Republic of Congo, Central African Republic (twice), Mali and Gabon (under Preliminary examination) 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, "State 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..." also See Supra note 20

situation to the ICC in 2003 after the Ugandan government failed to stop military rebellion and achieve peace in the region. Similarly, the CAR, DRC and Mali governments each referred their cases to the ICC. However, the situation in Libya⁷⁹ and Darfur is the first and only situations thus far to be referred to ICC by the UN Security Council.⁸⁰

The opening of investigations on the Darfur region of Sudan by the ICC prosecutor has raised various point of divergence between the ICC and AU. The tension further extorted after the issuance of an arrest warrant by the ICC Pre-Trial Chamber against the president of Sudan, Omar Hassen Al-Bashir. This is because of various questions involved on the referral of the situation. Firstly, Sudan is non-member state to the Rome Statute thus, the situation was the first referral made by the UN Security Council and secondly, an arrest warrant was issued against the sitting president of Sudan. As a result, some African states opposed the proceeding opened against Al-Bashir and failed to co-operate with the arrest warrant issued. This opposition has also got a full support by the AU. The case of Al-Bashir become a very detrimental factor for the involvements of AUs reaction on the ICC functioning which resulted in various complexity administration of criminal justice in the African continent. The ICC- AU relation has number of complex issues in this regard. This part of the paper will briefly discuss the situation in Darfur region of Sudan to touch up on all controversy involved between the two.

The conflict in Darfur started in 2003, when two rebel groups, Sudan Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM) launched a full-scale rebellion against the Sudanese government for reasons of ongoing economic marginalization. The attack was in response to years of marginalization of this region in western Sudan by the government in Khartoum.⁸¹The government armed local “Arab” militias to fight the “Black” rebels and responded with significant force.⁸²Since beginning in 2003, an estimated 400,000

⁷⁹Situation referred to the ICC by the United Nations Security Council Resolution number 1970 in February 2011, and investigations opened on March 2011 against alleged crimes against humanity committed in the context of the situation in Libya since 15 February 2011 throughout Libya in, inter alia, Tripoli, Benghazi, and Misrata

⁸⁰ UN Security Council Resolution No. 1593 Adopted by the Security Council at its 5158th meeting, on 31 March 2005, S/RES/1593, 2005

⁸¹ United nations and Darfur Fact sheet, Published by the Peace and Security Section of the United Nations Department of Public Information — August 2007, available at:

www.un.org/News/dh/infocus/sudan/fact_sheet.pdf (accessed 0n January 15, 2017)

⁸² Report of the investigation commission by Security Council, The crisis in Darfur, a timeline UN News Center, March 19, 2004

people have died directly or indirectly from the attacks.⁸³ The violence in Darfur is racially based. The Arab Sudanese displaced and murdered the Black Sudanese.⁸⁴ According to the reports of the International Law Commission, Report of the investigation commission by Security Council and some non-governmental organizations, the so-called Janjaweed killed thousands, torched villages, and forced hundreds of thousands to flee their homes. The world was slow to respond.⁸⁵ Humanitarian assistance was made to ceasefire from both the AU and the UN Security Council that fell apart following the agreement between the Sudan government and the rebels.⁸⁶

In July 2004 the UN Security Council passed its first resolution on Darfur,⁸⁷ and followed by another resolution which essentially asked the government to stop the killing, which it did not happen. The International Commission of Inquiry on Darfur was established by former United Nations (UN) Secretary-General Kofi Annan pursuant to the Security Council resolution 1564. The Commission reported to the UN in January 2005 that there was reason to believe that crimes against humanity and war crimes had been committed in Darfur⁸⁸ and recommended that the situation be referred to the ICC. The UN Security Council referred the situation in Darfur⁸⁹ to the ICC based on the prerogatives given to it in the Rome Statute.⁹⁰

On 27 April 2007, Pre-Trial Chamber I issued arrest warrants against Mr. Ahmad Harun, State Minister of Interior and responsible for the Darfur Security Desk during the relevant period, and Mr. Ali Muhammad Al Abd-Al-Rahman (also known as Ali Kushayb). Kushayb, a militia

⁸³ Do.Something.org, available at <<https://www.dosomething.org/facts/11-facts-about-darfur>> (Accessed on January 10, 2017)

⁸⁴ Ibid

⁸⁵ 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)

⁸⁶ In April 2004, an African Union-brokered ceasefire is signed in Chad's capital N'Djamena, and then repeatedly violated by all sides and again in July 2004, the UN Security Council gives Khartoum 30 days to disarm the Janjaweed, bring its leaders to justice and allow humanitarian assistance. The threat is not enforced. Available at <<https://newint.org/features/2007/06/01/facts>> (Accessed on September 15, 2017)

⁸⁷ UN Security Council Res. No.1564/ 2004 requesting, inter alia, that the Secretary-General to establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties

⁸⁸ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004

⁸⁹ The Security Council the Resolution No., 1593/2005, was adopted by 11 votes in Favor, Non against and 4 Abstentions (Algeria, Brazil, China and United States). Available at: <<http://daccesssdds.un.org/doc/>> (accessed December 26, 2017)

⁹⁰ Article 13 (2), Rome Statute

commander of Janjaweed also accused of war crimes and crimes against humanity.⁹¹ The government refused to cooperate with the ICC and again said that it would investigate war crimes in Darfur.

On 14 July 2008, the ICC Prosecutor requested that the ICC Pre-Trial Chamber issue an arrest warrant against Al-Bashir, the President of Sudan for war crimes and crimes against humanity.⁹² On 4 March 2009, the arrest warrant was issued by registry⁹³ for crimes against humanity and war crimes, and transmitted with a request for cooperation. The AU did not seem too interested in the investigation by the ICC. On 11 March 2009, the AU Peace and Security Council (PSC) called for the UN Security Council to defer the investigation started against the President of Sudan Omar Al-Bashir⁹⁴ in accordance with Article 16 of the Rome Statute.⁹⁵ This is because, in the view of the PSC,

*—..... approval by the Pre-Trial Chamber of the application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the peaceful resolution of the conflict in Darfur and Sudan more broadly, and thus result in greater suffering”.*⁹⁶

⁹¹ Pre-Trial Chamber I, Warrant of Arrest, issued 28 April 2007, Case: The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali. Later on, on 1 March 2012, Pre-Trial Chamber I has also issued an arrest warrant for Mr. Abdel Raheem Muhammad Hussein the third named suspect of ICC, the Minister of Defense, for 51 counts of crimes against humanity and war crimes

⁹² On 14 July 2008, the Prosecutor submitted an application for the issuance of a warrant of arrest for the Sudanese President Omar Al-Bashir. On 15 October 2008, Pre-Trial Chamber I requested additional supporting material in relation with the Prosecution Application. On 17 November 2008, the Prosecutor submitted further material in compliance with the above-mentioned decision of the Pre-Trial Chamber.

⁹³ On 4 March 2009, Pre-Trial Chamber I issued a warrant of arrest for Omar Al-Bashir for charges of war crimes and crimes against humanity. On 6 July 2009, the Prosecutor appealed the decision to the extent that Pre-Trial Chamber I decided not to issue a warrant of arrest in respect of the charge of genocide. On 3 February 2010, the Appeals Chamber directed the Pre-Trial Chamber to decide anew whether or not the arrest warrant should be extended to cover the charge of genocide.

Applying the standard of proof as identified by the Appeals Chamber, Pre-Trial Chamber I concluded, on 12 July 2010, that there are reasonable grounds to believe that Omar Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups. The Chamber delivered a second warrant of arrest against the President of Sudan, Omar Hassan Ahmad Al Bashir, considering that there are reasonable grounds to believe him responsible for three counts of genocide committed against the ethnic groups of Fur, Masalit and Zaghawa.

⁹⁴ Decision on the Application of the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, adopted at the thirteen Ordinary Session of the Assembly of Heads of State and Government, Sirte, Libya (July 3, 2009), para 3.

⁹⁵ Art 16 of the Rome Statute allows deferral of investigation or prosecution by the UN Security Council for the period of 12 months and it can be renewed.

⁹⁶Communique of the 175th meeting of the Peace and Security Council of the African Union 5 March 2009, PSC/PR/Comm (CLXXV) Addis Ababa Ethiopia para 2.

This concern was further reflected by Malawian⁹⁷ President Binguwa Mutharika, a chairperson of the AU during AU summit in July 2010 raised anxieties about threats to state sovereignty in the context of the Al-Bashir case:

“To subject a sovereign head of state to a warrant of arrest is undermining African solidarity and African peace and security that we fought for so many years. There is a general concern in Africa that the issuance of a warrant of arrest for Al-Bashir, a duly elected president, is a violation of the principles of sovereignty guaranteed under the United Nations and the African Union Charter”⁹⁸

Similar views were expressed by the African Union to the reference made by the UN Security Council Resolution 1970 to ICC against the situation in Libya⁹⁹ in 2011 and charges against President of Republic of Kenya Uhuru Kenyatta, and his deputy, William Ruto¹⁰⁰ in 2013. Arrest warrant was issued against Mohamed Gaddafi of Libyan President for two counts of Crimes against Humanity. The African Union took a similar position to these situations and decided not to cooperate with the International Criminal Court, noting that the warrant of arrest seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya¹⁰¹. The African Union, in its decision, also requested the UN Security Council to deferring the ICC process on Libya, in the interest of justice as well as peace in the country. However, the request was never considered and eventually the case against Gaddafi was terminated on 2011 following his death.

⁹⁷ On 13 December 2011, Pre-Trial chamber I decided that the Republic of Malawi failed to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir during his visit on 14 October 2011. The decision was referred to the President for transmission to the United Nations Security Council (UNSC) and to the Assembly of the States Parties (ASP) to take the necessary measures they deem appropriate.

⁹⁸ Warrant Subverts Peace and Solidarity in Africa, Business Day, 26 July 2010, <<http://www.businessday.co.za/articles/Content.aspx>>: (accessed on August 10, 2017).

⁹⁹ On 15 February 2011, demonstrations against the administration of the late Muammar Gaddafi broke out in Libya. In an attempt has been made to control these demonstrations, resulting into the deaths of several civilians and the UN Security Council, under its mandate of maintaining peace and security, to unanimously adopt Resolution 1970 which referred the situation in Libya to the International Criminal Court. An arrest warrant was issued against the then Head of State Gaddafi. Once again the concerns of the African Union in the Al Bashir case were raised with regard to the Gaddafi case. *See Supra* note 77

¹⁰⁰ On 12 October 2013, investigation opened before the International Criminal Court in respect to Kenyan President Uhuru Kenyatta, and his deputy, William Ruto, charged before the Court with crimes against humanity that were allegedly committed during the post- election violence that occurred in Kenya after the contested 2007 presidential elections.

The AU's main concern with respect to the charges against Kenyan President Uhuru Kenyatta, and his deputy, William Ruto was that the continued prosecution of the President and his deputy undermines the sovereignty, stability and peace of the people of Kenya, and that it also compromises their ability to spearhead the fight against terrorism in the East African region nevertheless the Charges was withdrawn due to insufficient of evidence in 2011.

The controversy over administration of criminal justice in the region started to arise while dealing between this two dichotomies 'Peace versus Justice'. This is the key area of divergence¹⁰¹ in how the AU and ICC deal on fighting impunity. Some African countries and the AU opt for a political solution focused on peacemaking and reconciliation, while the ICC focused on the prosecution of cases. The AU is a political body while the ICC is an international judicial body.

The AU and some African countries give priority for peace.¹⁰² They believe that both pace and justice could be achieved through a political solution. As Thabo Mbeki stated that the;

“The charges against Omar Al-Bashir in Sudan or Uhuru Kenyatta in Kenya aroused out of situations of conflict and Africa should first response or intervene to end the conflict and to stop the killing since its Africans who are dying. There must be reconciliation between the two conflicting parties which could only be reached through negotiation. This is the main task of the AU while not dismissing the need to tackle impunity, there should be temporary immunity guarantee for key actors in order to secure their engagement in peace negotiations. Therefore, ICC creates a problem because it could potentially obstruct efforts to peaceful settlements of this conflicts and ICC shall consult the AU before a decision to prosecute cases has been made, as the indictments may interfere with simultaneous peace negotiations.”¹⁰³

¹⁰¹ G. Werle, L. Fernandez and M. Vormbaum (ed.), *–Africa and the International Criminal Court,*” International Criminal Justice Series, (Vol. 1), (2014).

¹⁰² Philomena Apiko and Faten Aggad, *–The International Criminal Court, Africa and the African Union: What way forward?,*” European center for development policy management, No. 201 (2016).

¹⁰³Thabo Mbeki: Former South African President (1999-2008) and AU Mediator in Sudan, Talk to Al Jazeera., *Justice cannot trump Peace*’ October 2013. Available at:<www.aljazeera.com/programmes/talktojazeera/2013/11/> (Accessed on 12, December 2017)

In other hand Justice is a key prerequisite for lasting peace. ICC is not a political institution and will therefore seek to deliver justice where it is needed. The Prosecutor is obliged to prosecute where the requirements of jurisdiction are met. Elaborating the relationship of justice and peace, the ICC Chief Prosecutor, Fatou Bensouda,¹⁰⁴ noted that,

*“History has taught us that the peace achieved by ignoring justice has mostly been short-lived, and the cycle of violence has continued unabated.”*¹⁰⁵

According to this assertion, Justice can have a positive impact on peace and security through the shadow of the Court.¹⁰⁶ Moreover, after the referral made by the UNSC against the situation in Darfur region of Sudan in accordance Article 16 of the Rome statute, AU Assembly called for solidarity among AU member states in their opposition to the proceedings launched against Al Bashir, and called on the UNSC to defer the ICC's prosecutions against Al Bashir. However, the UNSC was reluctant to respond the request of the AU. The failure of the UNSC lead the perception that the power of the UNSC granted under Article 16 the Rome Statute, to refer or defer cases up to one year, with the possibility of renewing the deferral is a reflection of neo-colonial rule under the guise of international justice, thereby posing a threat to Africa's sovereignty, peace and stability.¹⁰⁷

This perception further reflected by the former AU Commission President, Jean Ping being concerned on ICC's prosecutions as only focused on African countries despite there being gross violations of human rights in other areas of the world, for example in Syria or Gaza.¹⁰⁸ It also reiterated that there were double standards and unfair persecution in the administration of international justice mechanisms in Africa. For instance, Chad accused the ICC saying that it is anti - African and biased for targeting only Africans. As a result Chad became the first state party

¹⁰⁴ Chief Prosecutor Fatou Bensouda, New York Times, Global Opinion, Available at: www.nytimes.com/.../world/.../challenging-start-for-bensouda-as-chief- (accessed on October, 28 2016)

¹⁰⁵ Ibid

¹⁰⁶ Shamila Batohi, Africa and the International Criminal Court: A Prosecutor's Perspective, —Africa and the International criminal court”, International Criminal Justice series, P 54, (Vol. I), (2014)

¹⁰⁷ Alexis Arieff, “International Criminal Court Cases in Africa: Status and Policy Issues,” Congressional Research Service (2011)

¹⁰⁸ Pursuit of Justice or Western Plot, International Indictments Stir Angry Debate in Africa, Available at: <http://www.un.org/ecosocdev/geninfo/afrec/vol23no3/233-icc.html>

to the Rome Statute which harbored a suspected international criminal¹⁰⁹ i.e. Al-Bashir from the ICC.

The proceeding lunched against sitting president of Sudan Al-Bashir was also subject for controversy on question of sovereign immunity of sitting presidents. Substantial number of African countries refused to cooperate with the ICCs order to arrest Omar Al-basher¹¹⁰ on the ground of immunity of acting head of the states. The argument made in this regard is that, co-operating with the ICC order will lead the violation of obligation under international treaty. For example, South Africa justifies its decision for non-compliance with ICC order because of the apparent conflict with her treaty obligations to the African Union which require granting immunity to serving heads of states.¹¹¹

The least but not the last concern of the AU and some African countries also relays on the indictment of African officials at European National Courts. The AU Commission published a report and argued that such act disregards the principle of sovereign equality of states.¹¹² Stating that the AU model law on universal jurisdiction excludes sitting Heads of State and Senior Officials from prosecution while in office, AU urges that there must be respect for diplomatic confidentiality.¹¹³

The AU has made various calls for its member states who are also member to the Rome statute to take actions from non-cooperation with the ICCs order up to withdrawal from the Rome statute. Based on the above discussion the following part of the paper will examine critics made against the ICC based on legal grounds.

¹⁰⁹ On 13 December 2011, Pre-Trial chamber I decided that the Republic of Chad failed to cooperate with the Court in the arrest and surrender of Omar Al Bashir during his visit on 7 and 8 August 2011. Further, the Pre-Trial chamber II has also issued a 2nd decision in relation to Chad on 26 March 2013, as the Republic of Chad failed to cooperate with the Court in the arrest and surrender Omar Al Bashir during his visit 16-17 February 2013 for the second time.

¹¹⁰ On 9 April 2014, Pre-Trial Chamber II decided that the Democratic Republic of the Congo failed to cooperate with the Court by not arresting and surrendering Omar Al Bashir to the Court during his visit to the DRC on 26 and 27 February 2014 and on 9 March 2015, Pre-Trial Chamber II also decided that the Republic of Sudan failed to cooperate with the Court by not arresting and surrendering Omar Al Bashir to the Court over the last years. The Chamber informed the UNSC to take the necessary measures it deem appropriate.

¹¹¹ Why-did-South-Africa-Burundi-and-Gambia-decide-to-leave-the-ICC ?, Available at: <<https://thewire.in/>> (accessed on December 22, 2017)

¹¹² African Union Report of the Commission on the use of the principle of universal jurisdiction by some non-African states as recommended by the Conference of Ministers of Justice/Attorneys General (2008).

¹¹³ African Union model national law on universal jurisdiction over international crimes., July, (2012)., Executive Council Twenty-First Ordinary Session 9-13 July 2012 Addis Ababa, Ethiopia

1.3.1. Immunity of Head of States and Senior Government Officials

Sudan has been objecting ICCs investigations and prosecution against the current president of the Country Omar Al-Bashir and his high ranking officials. The complaint essentially implicates questions about Head of State immunity under customary international law.

The principle of State Sovereignty calls for a State not to be subject to the jurisdiction of another State. Sovereignty can be *ratione personae*, *ratione materiae* and Lastly, State immunity refers to the underlying principle that one State shall not be subject to the jurisdiction of another State.¹¹⁴

An immunity *ratione persona* is status immunity.¹¹⁵ As a status-based immunity that attaches to a particular office shields the office holder only during his or her tenure, this immunity is temporal, lasting only so long as the official holds that office.¹¹⁶ The ICJ on its decision on a case between Democratic Republic of Congo v. Belgium considered immunity *ratione personae* to be subject to certain limitations: (1) it cannot shield an official from prosecution in his home country, (2) it may be waived by the official's home State, (3) it terminates at the end of an official's tenure, and (4) an individual enjoying such immunity may nevertheless be subject to the jurisdiction of certain international criminal courts.¹¹⁷

The principle of state sovereignty and immunity of head of states and higher government officials is implicated by domestic proceedings in a way it is not with respect to international *fora*. The case of prosecution of the Sitting president Omar Al-basher and his higher officials falls under this exceptional principle. Further, Article 27 of the Rome Statute constitutes a waiver of immunity for individual officials within the meaning of the ICJ judgment in Arrest Warrant case.

¹¹⁴ Thomas Weather, "Jus cogens and sovereign immunity: Reconciling Divergence in Contemporary Jurisprudence," (Oxford). (2015)., p 1157

¹¹⁵ Article 31, paragraph 1, of the 1961 Vienna Convention on Diplomatic Relations

¹¹⁶ Supra note 114, P 1168

¹¹⁷ Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility, The Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J.

1.3.2. The Power of Referral by the Security Council

The other objection against the ICC is made against the power conferred on the Security Council to refer and defer situations to the Court as provided under art 16 of the Statute. The argument raised by Sudan against ICCs exercise of jurisdiction basically relates to the way the referral¹¹⁸ has been made by the Security Council since Sudan is not member to the Rome Statute and Security Council has been criticized for ignoring African calls for deferral of the investigation opened against President Omar Al-Bashir of Sudan.

The objection made against the UN SC power to refer and defer situations against non-Member States to the Rome Statute is based on the assumption that UNSC is a political organ and it has nothing to do with justice. The referral or deferral is made by the majority vote of the UNSC Permanent Member which shows the decision is made based on international politics rather than law. In this regard, Mehari Taddele¹¹⁹ argues that, ‘since the majority of the Permanent UNSC members (USA, China, and Russia) are not States Parties to the ICC, conferring of powers for referral and deferral of cases to the UNSC is barely an imposition on the rest of the world’.¹²⁰ He further argues that, the USA refers cases to the ICC through the UNSC, even though bilateral agreements and the American Service-Members’ Protection Act shield American citizens from prosecution by the ICC.

However, the question that needs examination is that, whether the intervention of the Security Council on Darfur Region in-line with the international law. The crisis in Darfur was one of the worst crises that the human race has faced.¹²¹ There was a compelling reason that needs an intervention in the Darfur Region of Sudan. The main role of the Security Council is maintaining International Peace and Security. The Security Council has an obligation under the Chapter VI of the UN Charter to maintain the International Peace and Security. Whenever there is an act of threat or violation of International Peace and Order. Further, Article 16 of the Rome Statute also

¹¹⁸ Supra note 80

¹¹⁹Mehari Taddele, “The International Criminal Court and African Leaders: Deterrence and Generational Shift of Attitude”, *Analysis No. 247*, May 2014, p. 3

¹²⁰ Ibid.

¹²¹Jan Egeland, head of UN Emergency Relief Co-ordination, declares that ‘the humanitarian situation in Darfur has quickly become one of the worst in the world, available at <<https://newint.org/features/2007/06/01/facts>> (accessed on April 23 2016)

confers a power to the Security Council to refer a situation in to the eyes of the ICC. Therefore, the Security Council could make either judicial or peace keeping intervention in to the situation that threatening the International Peace and Security. This was what happened in the Darfur region of Sudan which is one of the UN member state. The Security Council recognized, the human rights violations in the region demanded an international prosecutorial response in the interests of peace and justice. Therefore, the power of the Security Council to refer the situation in the Darfur region of Sudan has legal basis.

1.3.3. Complementarity

The other issue that needs to be examined is that the issue of complementarity. Unlike the international ad hoc tribunals, ICC functions as a secondary court, and does not replace national jurisdictions. It gives priority to a state which has jurisdiction to prosecute those who commit most serious crimes of the international concern. On the other hand, the complementarity principle allows the ICC to intervene where a State is unable or refuses to prosecute.¹²² Sudan national Courts ability and willingness to bring the suspects to justice is the main issue that needs examination.

As per article 17 of the Rome Statute a case is inadmissible if it is being investigated or prosecuted by a State which has jurisdiction over it. If the State is unwilling or unable to genuinely carry out the investigation or prosecution the principle of complementarity will come in to picture.¹²³ However, it should be noted that Sudanese government did not investigate or prosecuted any crime committed in Darfur for two years.

On 7 June 2005 Sudan created Special Criminal Court on the events in Darfur. And, in 2007 the Sudanese Court had convicted two Sudanese military officers for murder of a Darfur local but, none of the suspects were charged with crimes of the same gravity as of the crimes¹²⁴ charged by the ICC.

The Government Officials announced that, the new Special Prosecutors for Darfur investigated the alleged crimes of 3 men and one of them is Kushayb, the named suspected in the ICC arrest

¹²²Article 17(1) (a), Rome Statute

¹²³Ibid

¹²⁴Twentieth report of the prosecutor of the international Criminal court to the UN Security Council pursuant to UNSC Rs.1593 (2005) para., 1

warrant, has been arrested and taken in custody for different crime than that he has been prosecuted on ICC. The other suspect of the ICC is Ahmad Harun (Minister of state for Humanitarian Affairs), were not prosecuted at all rather the government has promoted him to higher-level government position.¹²⁵

Therefore, these events clearly demonstrate unwillingness of the Sudan government to exercise its jurisdiction over international crimes committed on its territory. According to a report to UN Security Council, the ICC prosecutor stated that, a Government complicity in alleged crime is often a factor in States unwillingness to investigate or prosecute a case.¹²⁶

Further, the office of prosecutor concluded that Sudan was both unwilling and unable to prosecute the crimes due to the fact that Sudanese Special Court has no credibility and there is no way for proper trial to be conducted in Sudan.¹²⁷

¹²⁵Ibid

¹²⁶ Ibid para., 9

¹²⁷ Fifteenth report of the prosecutor of the international criminal court to the UN Security Council pursuant to Resolution No. 1593 (2005), para 26

Chapter Three

Collective Withdrawal from Multilateral Treaties and Its legal Implications

3.1. Introduction

The call for withdrawal has reached a pick point at the 28th of the AU Ordinary Session held from 30 to 31 January 2017. The Union called Member States to have one voice on their stand against the ICC by developing withdrawal strategy to be implemented by every Member States. The strategy has called for collective withdrawal of Member States from the Rome Statute. This chapter explores the international principles and rules of treaty withdrawal in general and withdrawal procedure of the Rome Statute. The withdrawal strategy of the AU draft law and its implication is examined in light of the international treaty withdrawal principles.

3.2. Withdrawal from Treaties under International Law

An old adage says that no one likes to talk about divorce before a wedding. Most legal scholars and political scientists agree that treaty exit provisions were long overlooked.¹²⁸ The act and process of terminating or withdrawing from a treaty by any party is an exclusive function of the executive authority of the State.¹²⁹

The foundational principle of State consent governs the design and operation of all treaty exit clauses. At the negotiation stage, State representatives have free reign to choose the substantive and procedural rules that will govern the future cessation of their relationship. Once those rules have been adopted as part of the final text, a State that ratifies or accedes to the treaty also accepts any conditions or restrictions on termination, withdrawal, or denunciation that the treaty contains.

Generally, the Vienna Conventions on law of treaties governs the denunciations or withdrawal from international treaties. The 1969 Vienna convention on law of treaty governs denunciations

¹²⁸ Laurence R Helfer, "Terminating Treaties," International Legal Studies Program, Vanderbilt University Law School. (April 2012) p 637

¹²⁹ Law Of Treaties, Second report by G. Fitzmaurice, Special Rapporteur, International Law Commission Documents Of The Ninth Session, The Report Of The Commission To The General Assembly Document A/CN.4/109, (24 April 1957) p 35

of treaties only between States¹³⁰ and the 1986 Vienna Convention on the Law of Treaty also governs treaties between States and International Organizations or between International Organizations.¹³¹

The Vienna Convention on the Law of Treaties (VCLT) is widely recognized as the principle and most authoritative source of law governing the creation, operation, termination and withdrawal from treaties, including the Rome Statute of the International Criminal Court.

Many of the VCLT's provisions codify and crystallize rules of customary international law which are binding on all states regardless of whether they are parties to the Convention. The provisions of the 1969 VCLT are widely regarded as reflecting or as restatement of customary international law.¹³²

3.2.1. Vienna Convention on Law of Treaty

The principle of *pacta sunt servanda* is a basic governing principle of treaty law and the law of treaty withdrawal. As it is enshrined in Article 26 of the VCLT, which states, 'every treaty in force is binding upon the parties to it and must be performed by them in good faith'.¹³³ The VCLT goes on to outline the limited circumstances intended to be exhaustive in which it would be permitted for States to suspend, terminate, or withdraw from a treaty they have consented to be bound by.

There are two types of withdrawals rules from treaty law that dealt under the 1969 Vienna convention on law of treaties.

The first rule governs a situation when the rules and procedures for withdrawal are dealt under the main treaty. As provided under Article 54(a) of the VCLT, that the withdrawal of a Party from treaty should in the first places occur in conformity with the provisions of the treaty. This is

¹³⁰Vienna Convention on the Law of Treaties, Vienna, Austria (May 23, 1969), entered into force on January 27, 1980

¹³¹ Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, Adopted 21 March 1986, (not yet entered in to force)

¹³² Draft Articles on the Law of Treaties with commentaries, Yearbook of the International Law Commission, vol. II, (1966), Available: http://legal.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf. (Accessed on February 3, 2017)

¹³³ Article 26, Vienna Convention on Law of Treaties

when the Parties for the treaty have agreed on the main treaty body regarding every elements of denunciation or withdrawal from treaty.

The second condition deals in case of an absent of an express withdrawal clause in the treaty in question. When the main treaty does not contain rules regarding withdrawal, it means that no withdrawal is allowed from that treaty.¹³⁴ In this case states can only denounce a treaty through ‘consent of all parties after consultation with the other contracting States’ or in accordance with Article 56 of the VCLT, which governs the withdrawal of States from treaties that do not contain an explicit denunciation clause. This scheme is considered as customary international law.¹³⁵

The Rome Statute being one of a multilateral treaty expressly governs issue of withdrawal of its member states from their treaty obligation under Article 126 and 127. Therefore, under the Rome Statute withdrawal can be made in conformity with the provisions of the Statute.

However, withdrawal will not release a state from any *erga omnes* obligations with respect to *jus cogens* norms that are codified in the denounced treaty. This is clearly provided under Article 43 of the VCLT that withdrawing states shall still be bound by international obligations which may have been codified in the treaty in question but also exist independently of the treaty i.e. customary international law or *jus cogens* or *peremptory norms*.¹³⁶ A *jus cogens* norm, also referred as a peremptory norm is defined as ‘accepted and recognized norm by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’ under the same treaty.¹³⁷

¹³⁴ Article 56 VCLT, provides that, ‘A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless: (A) It is established that the parties intended to admit the possibility of denunciation or withdrawal; or (B) A right of denunciation or withdrawal may be implied by the nature of the treaty.’

¹³⁵ Supra note 132

¹³⁶ During the drafting of the VCLT attempts has been made by the ILC to list out some instances which could interfere with just cogence norms of international law. Examples suggested include (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplating the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate. Available at: Draft Articles on the Law of Treaties with commentaries 1966, Year book of the International Law Commission, 1966, vol. II. P. 248

¹³⁷ Article 53 of the VCLT, *A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international*

International Human Rights treaty obligations are considered as preemptory norms. Determination of withdrawal from human rights treaty must be made regarding the original intent of the parties or to the nature of the treaty. Human-rights treaties, for example, are generally interpreted to exclude the possibility of withdrawal, because of the importance and permanence of the obligations.¹³⁸In this regard the UN HRC under its General Comment No. 26 stated that human rights Covenant like the International Covenant on Civil and Political Rights (ICCPR),¹³⁹ is not the type of treaty which, by its nature, implies a right of denunciation. The committee made it clear that the ICCPR together with simultaneously prepared and adopted international convention on economic, social and cultural rights (ICESCR) and the Universal Declaration of Human Rights (UDHR) does not have temporary character because the rights enshrined under this covenants belongs to the people living in the territory of the states.¹⁴⁰Therefore, as per HRC comment Human right norms are considered as preemptory norms from which withdrawal or wavier is not possible.

3.3. Withdrawal from the Rome Statute

The Rome Statute unlike other multilateral and bilateral treaties provides a provision that explicitly governs denunciation or withdrawal of State Parties from their treaty obligations. Thus, withdrawal from the Rome Statute follow same principle with that of the provisions of the Vienna Convention on the Law of Treaties, Article 42(2) which state that, denunciation or the withdrawal of a party may take place only as a result of the application of the provisions of the treaty.¹⁴¹ Treaty withdrawal from the ICC Statute is governed under Article 127 of the Rome statute.

law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

¹³⁸ New world Encyclopedia, available at <http://www.newworldencyclopedia.org/entry/Treaty> (accessed on 03, March 2018)

¹³⁹The United Nations Human Right Committee General Comment No.26,(61), General comments under article 40 paragraph 4 of the International Conventien on Civil and Political Rights, adopted by the committee at its 1631 meeting, Issued by UNHRC In 1997, North Korea attempted to withdraw from the International Covenant on Civil and Political Rights (ICCPR), which does not contain a withdrawal clause. The UN Secretary General took a different view of the denunciation, arguing that Article 54 of the VCLT precluded North Korea’s denunciation of the ICCPR because the other parties to the Covenant had not consented to the withdrawal.

¹⁴⁰ Human Rights Committee General Comment No.26, para 3 and 4

¹⁴¹ Article 42(2),Vienna Convention on Law of Treaties

*“(1) A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.”*¹⁴²

The article deals exclusively with the terms of withdrawal and hence affirms the sovereign right of a State to withdraw from the Rome Statute or the ICC. As with any other treaty the terms still bind a State to its existing obligation under the ICC. Denunciation of treaty obligation under the Rome Statute has its own procedural arrangements and there are number of procedural regulations to be taken to give effect for the withdrawal. The next sub topic will deal the procedures of withdrawal from treaty obligation under the Rome statute.

3.3.1. Procedure for Withdrawal

The Rome Statute does not provide any ground or reason good or bad for withdrawing. Member States of the Rome Statute are free to initiate withdrawal at any time without the need to show any reason. It follows; therefore, for withdrawal to take effect first a State Party to the Rome Statute must make a written submission of its intention to withdraw for the Secretariat-General of the United Nations.¹⁴³ The Withdrawal takes effect one year after the date of receipt of the notification unless withdrawing State has provided a specific later date under the notification. Thus, the State which has submitted a written notification for withdrawal on the basis of Article 127 has a waiting period of one year for the notification to take effect before the withdrawal effective date.

There is exceptional withdrawal procedure under Article 121(6) of the Rome Statute. This exceptional situation comes in to picture when a State Party to the Statute fails to accept the new amendment made to the provisions of the Statute as per Article 121(4).The disagreeing State can withdraw immediately after notification of intention to withdraw.¹⁴⁴ This exceptional circumstance gives effect for withdrawal immediately after notification of the intention to withdraw by the withdrawing State is made.

¹⁴² Article 127, Rome Statute

¹⁴³ Article 127(1), Rome Statute

¹⁴⁴ Article 121 (6), Rome Statute

Submission of written notification for withdrawal does not mean that a State have no obligation under the treaty law. States Parties withdrawing from the ICC must abide different obligations until the withdrawal get effect and owe some legal obligations even after the withdrawal effective date. Article 127(2) sets out that, obligations that exist at the time of withdrawal remains in force. Among this, financial obligations and any case or matter which were already under consideration by the Court prior to the date on which the withdrawal become effective remains in force.

Moreover, the failure to comply with the above withdrawal preconditions in the treaty would result not in denunciation but in breach of international law and entails responsibility.

3.4. Collective Withdrawal Strategy of the Africa Union from the Rome Statute

After various decisions on the ICC-AU relation made by the Assembly of the AU, the Open Ended Committee of Ministers of Foreign Affaire on the International Criminal Court or _the Open Ended Minstrel Committee_(here in after _the Committee_) was established in June 2015.¹⁴⁵ The Committee was established with two main purposes. Firstly, in order to develop a Strategy with the aim of implementing various AU Assembly decision on International Criminal Court. Secondly, to follow up the AUs request on the suspension of proceeding against the Sudan's President Omar Al-Bashir and the Kenyan deputy president William Samoei Ruto.

In January 2016 the Assembly requested the Committee to develop comprehensive Strategy for Collective Withdrawal from the ICC. It was aimed at furthering the next action of AU Member States that are also Parties to the Rome Statute.

The Committee proposed two broad Strategies for withdrawal from the Rome Statute,¹⁴⁶ the legal and institutional¹⁴⁷ as well as political strategies.¹⁴⁸ The delivery of justice in a fair and

¹⁴⁵ As of April 2016, the members of the Open ended Ministerial Committee were as follows: Algeria, Angola, Burundi, Chad, Congo. Cote d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Equatorial Guinea, Kenya, Libya, Madagascar, Mali, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Sudan, Sudan, Somalia, South Africa, Tanzania, Uganda, Zambia and Zimbabwe and members of the Bureau were: Ethiopia (Chair); Burundi (Central); Algeria (North); Nigeria (West); South Africa (South); and Uganda (East)

¹⁴⁶ The withdrawal Strategy *See*, Supra note 33, p 11

¹⁴⁷ *Ibid*, p 9

¹⁴⁸ *Ibid*, p13

equitable manner that allows for the regionalization of International Criminal Law to flourish in the Continent was laid out as a key strategy.¹⁴⁹

The legal strategy provides for the amendments of some provisions of the Rome Statute as a precondition for withdrawal. To that effect, the requests made by some African countries¹⁵⁰ for the amendment of some provisions of the Rome Statute were confirmed by the AU Assembly decision. Among the proposed amendments, the major areas of concern were: the UN Security Councils deferral and referral power (Article 16)¹⁵¹, the inclusion of regional complementarity in to the ICC jurisdiction,¹⁵² Immunity of Heads of State and officials until they leave the office (Article 27),¹⁵³ the exceptional circumstances of trial in absence of the accused (Article 63(2)),¹⁵⁴ offences against administration of Justice (Article 70),¹⁵⁵ and called for strong Independent Oversight Mechanism (IOM) to be operationalized and empowered to carry out inspection, evaluation and investigations of all the organs of the Court.

Further the legal and institutional Strategy calls for a reform of the power of the UNSC based on the ground that:

“The power vested in the UNSC is controversial as it confers power to countries to refer cases to the prosecutor that have not submitted to the jurisdiction of the Rome statute themselves.”¹⁵⁶

¹⁴⁹ Ibid, p 2

¹⁵⁰ Proposed amendments to the Rome Statute have been submitted to the Working Group on Amendments by African State Parties, Kenya and South Africa. For example, in a meeting held from 3-6 November 2009 in Addis Abba by African States Parties to the Rome Statute chaired by South Africa decided to propose an amendment to Article 16 of the Rome Statute.

¹⁵¹ The proposed amendment of Rome Statute provides for two additional sub articles to be added under Article 16 of the Rome Statute immediately after sub article (1)(2) *A State with jurisdiction over a situation before the Court may request the UNSC to defer the matter before the Court as provided for in (1) above and..... (3) Where the UN Security Council fails to decide on the request by the State concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under paragraph 1 consistent with Resolution 377 (v) of the UN General Assembly.*

¹⁵² Emphasizes that International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.

¹⁵³ proposed that —....*Prosecution against the Head of State or Government or anyone entitled to act as such, should not be instituted until he/she has left office”*

¹⁵⁴ The exceptional circumstances for trial in absence of the accused to be defined and considered on a case-by case basis limited to which is strictly necessary and if the rights of the accused are fully ensured in his or her absence.

¹⁵⁵ With the exception of sub article (f) of Article 70(1), the article should be amended as to include offences by the Court officers too against administration of criminal justice and either of party to the proceedings should be granted a right to approach the Court when such offences are committed

¹⁵⁶ The Withdrawal Strategy See, Supra note 33

It calls for the UN system to play a role in addressing a structurally unequal problem and proportional representation of Africans in different organs of the court.

The Institutional strategy added emphasis as to the need to strengthen the legal regulatory frameworks and judicial mechanisms within AU Member States to try international crimes and made a call for Member States to ratification of the Protocol on the Amendments on the Statute of the African Court of Justice and Human Rights as to limit the intervention of the ICC.¹⁵⁷

Moreover, parallel to the Legal and institutional approach, the strategy also proposes Political engagements to be implemented through the Committee and other relevant structures such as African Groups, African Members of the UNSC to engage with stakeholders and put their influence on the ICC processes.¹⁵⁸

Therefore, unless the above discussed pre conditions not fulfilled as per the request that has been made to the UNSC, AU is forwarding its call for its Member States who are also Member of the Rome Statute to make Collective withdrawal from the Rome Statute. The Vienna Convention clearly provides that it's only States who possess the capacity to conclude treaties.¹⁵⁹ The right to acceding to or withdrawing from treaty law is usually within sovereign domain of every Member States.

Even though, if one accepts that the call made by the AU is for collective withdrawal, idea of collective withdrawal has not yet been recognized by international law.¹⁶⁰ Since collective act of withdrawal from treaty is no recognized under international law, the withdrawal strategy made by the AU could be consider as conscientious call for its Member States who are also Member State to the Rome Statute to consider the option of withdrawing by forwarding some preconditions. It is clear that in the absence of law governing collective withdrawal, the strategy could only be implemented on a State by State basis as per Article 127 of the Statue. It also provides the withdrawal to be done according to the constitutional provisions of individual States.

¹⁵⁷ Ibid, p 12

¹⁵⁸ Ibid, p 13

¹⁵⁹ Article 6, Vienna Convention on Law of Treaty

¹⁶⁰ Supra note 128

Furthermore, as Laurence R. Helfer¹⁶¹ stated, “collective withdrawal by a smaller number of treaty parties may indicate an attempt to shift from an old equilibrium that benefits some states and disadvantages others to a new equilibrium with different distributional consequences.”¹⁶² However, the AU withdrawal strategy is a mix of law and politics¹⁶³ which shows a collective bargaining strategy. The closer examination of the withdrawal strategy reveals that the strategy is a mere aspiration for a States who wish to withdraw from the Rome Statute rather than a legal obligation or a call that does not have any legal effect on State Parties who choose not to implement it. This is also evident by some African countries like Capo Verde, Nigeria, Senegal and Liberia who entered reservations to the draft withdrawal decision and Malawi, Tanzania, Tunisia and Zambia requested more time to study the Withdrawal Strategy.¹⁶⁴

The strategy further provides per-conditions to be observed by individual withdrawing states.¹⁶⁵ It provides that even if a state withdraws unilaterally from the Rome Statute, the withdrawal must be done in accordance with their respective constitutional requirements.

3.4.1. States Withdrawal Notifications from the Rome Statute

In recent years the growing discontent with the perceived unequal application of the Rome Statute of the International Criminal Court particularly among some African leaders and the call made by the AU resulted in 3 State withdrawal notifications.

The three AU Member State Parties to the Rome Statute, The Republic of South Africa,¹⁶⁶ the Republic of Burundi¹⁶⁷ and The Republic of The Gambia¹⁶⁸ submitted their written notifications of withdrawal from the Rome Statute to the United Nations Secretary General in accordance with

¹⁶¹Helfer, Laurence R., “Exiting Treaties,” Virginia Law Review, Vanderbilt University Law School. Vol. 91:1579 2005, p 1588

¹⁶² Ibid

¹⁶³ Patryk I. Labud, “The African Unions Collective Withdrawal from the ICC : Does bad law make for good Politics”, European Journal of international law (EJIL: Talk), online published (2017), (accessed on November 23, 2017)

¹⁶⁴ Supra note 32

¹⁶⁵ The Withdrawal Strategy *See*, Supra note 33, p 8

¹⁶⁶ Declaratory statement by the Republic of South Africa on the decision to withdraw from the Rome Statute of the International Criminal Court, Reference:C.N.786.2016.TREATIES-XVIII.10 (Depositary Notification), 19 October 2016

¹⁶⁷ Declaratory statement by the Republic of Burundi on the decision to withdraw from the Rome Statute of the International Criminal Court, October 2016

¹⁶⁸ <http://www.aljazeera.com/news/2016/10/gambia-withdraws-international-criminal-court-161026041436188.html>

Article 127(1) of the Rome Statute. And these notifications of withdrawals welcomed and supported by the AU as part of the AU's Withdrawal Strategy' from the Rome Statute.

However, both The Gambia and South Africa withdrew their notifications of withdrawal before they became effective. The newly elected president of Gambia Adama Barrow has announced his commitment to the ICC after he won the national election as a new president of Gambia. The South African court has also suspended the submission made for withdrawal due to lack of procedural irregularities.¹⁶⁹ The South African Supreme Court invalidated the decision made by the South African government due to lack of parliamentary deliberation¹⁷⁰ on withdraw decision.

The withdrawal notification made by Burundi has become effective as of October 18 2017. This make Burundi the first State party to the Rome Statute in the world to withdraw from the Rome Statute, sixteen years since the Statute entered into force.¹⁷¹

3.5. Legal Implication of Withdrawal

Even though, the strategy that has made a call for collective withdrawal does not have any legal effect on Member States for the Rome Statute, States are free to withdraw from the Statute at any later time following the legal procedures prescribed under Article 126 or 127 of the Rome Statute as discussed above. It is necessary to consider the implication of the withdrawal especially when it is made by sum number of States at same time. The act of withdrawing from treaty as provided on the main treaty has its own legal effect, releasing the State Party withdrawing from the treaty obligation. A State Party legally withdrawn from the treaty might not be bound by the terms of the treaty obligation anymore. Withdrawal from a treaty can give a denouncing State additional voice when it is made bilaterally by establishing a rival legal norm or institution together with other like-minder States.¹⁷² The collectiveness of the action has the potential to radically reconfigure existing forms of international rule and cooperation.

This assertion is not always true for obligations that have attended the Statues of Preemptory norms. The *Jus Cogens* rules of international law obliges that some rules and principles which

¹⁶⁹ Max du Plessis and Guenael Mettraux, –South Africa's Failed Withdrawal from the Rome Statute”, Journal of International Criminal Justice, (2017), p 363

¹⁷⁰ Ibid

¹⁷¹ Manisuli Ssenyonjo, –State Withdrawal Notification from the Rome Statute of International Criminal Court : South Africa, Burundi and the Gambia,” Criminal law forum, Published online June (2017), p 25

¹⁷² Supra note 161, p 1608

are attended the Statutes of Customary International law shall be respected even though there is no explicit treaty agreement made for that effect.

3.5.1. *Jus Cogens* Rule of International Law

The Rome Statute is one of a multilateral treaty that established a judicial organ with all necessary facilities to condemn certain misconducts by bringing individual criminals to justice. The Statute was ratified by 133 countries around the world with an agreement to prosecute and bring individual criminals to justice for heinous forms of crimes basically Genocide, Crimes against Humanity, War Crimes and Crime of Aggression.¹⁷³ Commission of Some of these crimes under this category of crimes are characterized as a *jus cogens* norms of the international law that places the *obligation erga omnes* upon states not to grant impunity to the violators of such crimes.

Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite.¹⁷⁴ This duty includes non- applicability of statutes of limitation and universality of jurisdiction over such crimes irrespective of where they were committed and by whom including Heads of State, against what category of victims, irrespective of the context of their occurrence either during peace or war time.

One of famous law professor M.Cherif Bassiouni on international criminal law argues –For *jus cogens* rule to constitute a peremptory norm of international law their implications must be of a duty and not of optional rights.”¹⁷⁵ This is would be a better mechanism for fighting impunity by making prosecution mandatory especially in the African continent. Scholars provide some criteria as to examine if a certain crime has effect of *jus cogens* rule. According to their assertion, if certain crimes affect the interests of the world community as a whole because they threaten peace and security of humankind and if they shock the conscience of humanity they are

¹⁷³ One of the issues while drafting the VCLT by the ILC was definition of Jus Cogence Norms of international law (Article 53). Members of the ILC expressed view that, acts which constitute crimes under international law; treaties violating human rights, the equality of States or the principle of self-determination were mentioned as examples of Jus Cogens norms of international law. See also Supra note 136

¹⁷⁴M.Cherif Bassiouni, –International Crimes: *Jus Cogens* and Obligation *Erga Omines*” Law and Contemporary Problems, (Vol. 59: No. 4), p 67

¹⁷⁵ Ibid

considered as *jus cogens* norm. The Draft Articles on State Responsibility,¹⁷⁶ for example, provides that situations that justify wrongful acts may not be used to justify conduct that is inconsistent with *jus cogens* norms of international law.¹⁷⁷

Once a norm is accepted as a *jus cogens* norm it is binding on states with and without their consent. Various literatures disclose that acts commonly recognized as *jus cogens* norms among others include: genocide, crimes against humanity, torture, war crimes, piracy, racial discrimination, slavery and slave-related practices, and prolonged arbitrary detention.¹⁷⁸ And there is sufficient amount of legal basis to reach to such conclusion that all these crimes are part of *jus cogens*. This legal basis consists of the International human rights treaties and declarations which 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. While the large number of ratifications of these treaties shows the common consciousness reached or psychological elements or *opinion juris*, that a certain act is practiced by States with belief that it is legally obligatory. The regular denunciations of these acts by national and international, Ad-hoc and hybrid tribunals, shows *State practice*, evident to States' duty to investigate, prosecute and punish international crimes.¹⁷⁹

The preambles and other provisions of treaties applicable to these crimes have made it clear that such conduct is against the interest of the international community. This indicates the commission of these crimes at any part of the world would affect the peace and security of the entire international community. The investigations and prosecutions of perpetrators of these crimes by different international, Ad-hoc, Hybrid, Special and the current permanent Court have shown an everlasting commitment of the international community to condemn those acts.

¹⁷⁶ Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10). , Yearbook of the International Law Commission, vol. II, (2001)

¹⁷⁷ Article 26 Draft Article on States Responsibility

¹⁷⁸ See paragraph 5 of the Commentary to Draft Article 26 in which the Commission, unambiguously, states that those "... *Peremptory norms that are clearly accepted and recognized include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination*".

¹⁷⁹ Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), Judgment of 20 July 2012, ICJ Reports 2012, para. 99

Further, the ICJ held that the prohibition against genocide is a *jus cogens* norm that cannot be reserved or derogated from.¹⁸⁰ The establishment of a permanent international criminal court having inherent jurisdiction over these crimes would be a convincing argument for the proposition that crimes such as genocide, crimes against humanity, and war crimes are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them.

Therefore, even if countries withdrawn from the Rome Statute it does not mean that they are free from taking action or prosecuting individuals who have committed one of the crime listed under the jurisdiction of the ICC.

¹⁸⁰See Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, 1951 I.C.J. 1, 15 (May 28); Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 1948, 78 U.N.T.S. 277.

Chapter Four

The Proposed African Court of Justice and Human and People Rights: Criminal Chamber

4.1. Introduction

The Protocol for the establishment of a new Criminal Chamber for international crimes under the ACJHPR is open for ratification as an immediate response to the critics made against the ICC by some African countries. Only ten States Namely, Benin, Chad, Cong Brazzaville, Ghana, Guinea-Bissau, Kenya, Sierra Leone, Mauritania, Sao Tome & Principe and Uganda have signed¹⁸¹ the Protocol establishing the International Criminal Chamber of the Court so far. This chapter discusses the establishment of the Court, the immediate factors for its establishment, the institutional arrangements and structure of the Court and its jurisdiction over international crimes.

4.2. The proposed Criminal Chamber under ACJHPR

There are two comprehensive continental supervisory mechanisms with the mandate to examine whether contracting parties met their human rights obligations under African human rights system, the African Human Rights Commission (here in after, _the AComHPR_) and the African Court of Human and People's Right (here in after, _the ACHPR_). Both of these enforcement mechanisms has been established under the 1986 Convention on African Human and Peoples Right Charter or (the Banjul Charter)¹⁸² and the 1998 Protocol for the establishment of the African Court of Human and People's Right¹⁸³ to preside over cases concerning AU States' compliance with the African Charter on Human and Peoples' Rights.

The Protocol for African Court of Justice (here in after, _the ACJ_) was also duly adopted on 11 July 2003 to set-up the ACJ as the _principle judicial organ of the Union_.¹⁸⁴ Unlike the AComHPR and the ACPHR, ACJ's adjudicatory jurisdiction extends, inter alia, to the

¹⁸¹ List of Countries which Signed, Ratified or Acceded to the Protocol on Amendment to the Protocol on the Statute of African Court of Justice and Human rights. Available at: <<http://www.au.int/>> (accessed on January 10, 2018)

¹⁸² African Charter on Human and Peoples' Rights or The Banjul Charter, adopted in 1981 and entered in to force in 1986)

¹⁸³ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted in 1998 and entered in to force in 2004

¹⁸⁴ The protocol for the ACJ fifteenth instrument of ratification was deposited by Algeria on 11, January 2008 and, consequently, the first pan-African judicial organ have been inaugurated on 11, February 2008.

interpretation and application¹⁸⁵ of the AU's Constitutive Act, other treaties, all acts and decisions issued by AU organs and any question of international law.

In July 2004 decision has been made to merge the ACJ with the ACHPR and to create a single judicial body. And, on 1 July 2008 the Assembly adopted the Protocol on the Statute of the African Court of Justice and Human Rights establishing single judicial body.¹⁸⁶ The Protocol required 15 ratifications to enter into force thus far, 30 African States have signed it but only six have ratified it.¹⁸⁷

However, none of the above Courts had a jurisdiction over international crimes. AU has embarked on a study to assess the feasibility of establishing the Criminal Chamber on its summit held at Addis Ababa in February 2009, the AU Assembly took a decision in which it requested the African Union Commission (AU Commission), in consultation with the (AComHPR), to assess the implications of recognizing the jurisdiction of the African Court to try international crimes such as genocide, crimes against humanity and war crimes.¹⁸⁸ In its decision of July 2010, the AU Assembly further requested the AU Commission to finalize the study on the implications of extending jurisdiction of the African Court to cover international crimes, and to submit, through the Executive Council, a report thereon to the regular session of the AU Assembly scheduled for January 2011.¹⁸⁹

The AU Commission engaged consultants to examine the implications of extending the jurisdiction of the African Court to include international crimes, and to draft a Protocol for the establishment of the Criminal Chamber within the African Court. The consultants, led by Mr. Donald Deya of the Pan African Lawyers Union(hereafter, the PALU) completed their study and submitted it to the AU Commission a Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.¹⁹⁰

¹⁸⁵ Article, 2 of Protocol of the Court of Justice of the African Union

¹⁸⁶ Protocol on the Statute of the African Court of Justice and Human Rights (2008), *See Supra* note 34

¹⁸⁷ Libya in May 2009, Mali in August 2009, Burkina Faso in June 2010, Congo in December 2011, Benin in June 2012 and Liberia in February 2014.

¹⁸⁸ Decision on the establishment of international criminal court Assembly/AU/Dec. 213(XII) adopted in February, 2009

¹⁸⁹ Decision on the Abuse of the Principle of Universal Jurisdiction Doc. EX.CL/606(XVII)Assembly/AU/Dec. 292(XV)

¹⁹⁰ Pan African Lawyers Union to produce a detailed study with comprehensive recommendations and a draft legal instrument amending the Protocol on the Statute of the African Court of Justice and Human Rights. In June 2010,

In August and November 2010, the AU Commission organized two workshops at Midrand, South Africa, to validate the findings of the study. At its summit in June, 2011 held at Malabo, Equatorial Guinea, the AU Assembly requested the AU Commission to actively pursue the implementation of the AU Assembly decisions on the African Court being empowered to try serious international crimes committed on African soil and to report to the AU Assembly.¹⁹¹

The AU Assembly meeting for its 23rd ordinary session in Malabo, Equatorial Guinea, adopted the Malabo Protocol.¹⁹² The Malabo Protocol amended Statute of the African Court of Justice and Human Rights.

The Malabo Protocol will come into force 30 days after the deposit of instruments of ratification by 15 African countries. In January 2015, the AU Assembly proposed the ratification of the Malabo Protocol be fast tracked¹⁹³ and ten countries (Benin, Chad, Cong Brazzaville, Ghana, Guinea-Bissau, Kenya, Sierra Leone, Mauritania, Sao Tome & Principe and Uganda) had signed the Protocol so far.¹⁹⁴

After attaining necessary ratifications, this Protocol will empower the African Court of Justice and Human Rights to exercise criminal jurisdiction over most serious international crimes committed in Africa.

4.2.1. The Triggering Factors for the Introduction of Criminal Chamber into ACJHPR

The inspiration to embrace a court with criminal jurisdiction traces back the time of drafting the African Charter on Human and Peoples' Rights in the 1970s, the possibility of including a Court with international criminal jurisdiction was raised, primarily as a mechanism by which to combat the apartheid regime of South Africa. However, relying on the likely creation of an international

PALU submitted its first draft report. Available at: <<https://au.int/.../protocol-amendments-protocol-statute-african-court-ju>>(accessed on January 8, 2018)

¹⁹¹Decision on the Implementation of the Assembly Decisions on the International Criminal Court doc. ex.cl/670(xix), Assembly/AU/Dec. 366 (XVII)

¹⁹²Supra note 35, the Statute of ACJHPR

¹⁹³ Decision on the Progress Report of the Commission on the Implementation of Previous Decisions on the International Criminal Court, Assembly/AU/Dec.547 (XXIV), January 2015

¹⁹⁴(Benin in January 2015, Chad in February 2016, Cong Brazzaville in May 2015, Ghana in January 2016, Guinea-Bissau January 2015, Kenya January 2015, Sierra Leone in January 2016, Mauritania in February 2015, Sao Tome & Principe in January 2016 and Uganda in July 2017)See also, Supra note 181

penal Court by the UN,¹⁹⁵ eventually the idea was dismissed. The ACJ was established as a judiciary organ of the Union. The Merger Protocol of ACJHR has also established two Chambers, to deal with Human Rights and General Matters Sections. Neither of these chambers, however, had jurisdiction over international crimes committed by individuals Member States to the Protocol.

Even though there were historical antecedents that show the tacit existence of a move to create regional judicial organ with jurisdiction over international crimes, there is one main immediate factor that has led to the speed up the establishment of a Criminal Chamber within the ACJHR. This is the indictment and prosecution of African state officials either by the domestic courts of some European States, especially France, the UK, Spain and Belgium, or by the International Criminal Court.¹⁹⁶

In general, as it has been discussed under chapter two of this paper, some African countries expressed their concerns that the ICC is largely portrayed as imperialist imposition by powerful western nations.¹⁹⁷ It has also been said that the ICC is extending its reach too eagerly and willingly. In doing so, the ICC is destroying the autonomy and development of governments and judicial systems in African countries.

It was following these concerns that the AU Assembly at its 13th Ordinary Session reaffirmed its previous resolution which adopted a decision on the implementation of its decision on the Abuse of the Principle of Universal Jurisdiction requesting the AU's Commission in consultation with the African Commission and ACHPR to examine the implications of the ACJHR to be empowered to try international crimes.

¹⁹⁵ 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."

¹⁹⁶ Chacha Bhoke Murungu, "Towards a Criminal Chamber in the African Court of Justice and Human Rights," Journal of International Criminal Justice (2011), Oxford University Press, 2011, p 1068

¹⁹⁷ Martha Bedane Guraro, Furthering Justice or Promoting Impunity: A Critical Analysis of the Proposed Criminal Jurisdiction in the African Court of Justice and Human rights, (2010, unpublished, School of Law Pretoria University) p 34

4.3. Legal Grounds for the Establishment of Regional Criminal Court

There is no specific provision under the UN Charter either allowing or prohibiting regional organizations like the AU to establish criminal jurisdictions to try international crimes. Article 52 of the Charter provides that:

“Nothing 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 provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the UN.”¹⁹⁸

The AU considers itself as a regional organization within the meaning of the above article.¹⁹⁹ There is a dual criterion for determining whether an organization is a regional organization under the above provision: first, the organization should play a role in the maintenance of international peace and security as is appropriate for regional action; and second, the objectives of organization and its activities should be compatible with the purpose and principles of the UN.

AU can be characterized as a regional organization under Article 52(1) of the UN Charter since the AU plays a role in the maintenance of peace and security in Africa²⁰⁰ and observes the purposes of the principles of the UN.

With this analysis, it can be clearly concluded that the existence of international crimes of genocide, war crimes and crimes against humanity can be a basis for regional organizations like the AU to take appropriate action, such as, intervention and prosecution of international crimes. Hence, the new Criminal jurisdiction of the ACJHPR is in line with the UN Charter.

The other key question that must be answered is whether the Constitutive Act of the AU itself grants the power to establish a criminal jurisdiction to try international crimes.

¹⁹⁸ Article 52(1), United Nation Charter

¹⁹⁹ Protocol relating to the establishment of the Peace and Security Council of the African Union adopted 09 July 2002, entered in to force 26 December 2003 as per Article 17 (2) of the same protocol

²⁰⁰ The African Union Mission in Somalia (AMISOM) is a regional peace keeping operated by the African Union to conduct peace support operation in Somalia to stabilize the security situation as per Article 3(e), (f) and Article 4(h), AU Constitutive Act. Available at: <<http://www.africa-union.org/root/au/au/au/departments/psc/amisom/amisom.htm>> (accessed on October 18, 2017)

Among the objectives and principles of the AU, regional integration, peace and security, protection of human rights and respect for democracy and rule of law can be mentioned. While these articles may not impose a strict legal obligation to establish a court, they demonstrate an acceptance by the AU that it has an obligation to prevent and punish international crimes.

Further, the Constitutive Act grants the AU Assembly power to establish any of the organs of the Union. The ACJHPR is established as a court of justice of the Union hence the extension jurisdiction of the ACJHPR can be said in line with the Constitutive Act. It is important to note that any consideration whether or not to extend the jurisdiction of the ACJHPR must be governed by the obligation undertaken by the State Parties to the Act of the Union to promote and protect human and people's right in accordance with the ACHPR and other relevant human rights instruments.

Moreover, Article 4(h) of the Constitutive Act of the AU provides for the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity. Also, Article 4(O) calls for, among other things, the rejection of impunity.

Therefore, intervention under Article 4(h) of the AU Constitutive Act shall also be interpreted to include peaceful intervention such as prosecuting perpetrators of such international crimes. This is particularly because forcible measures are not always effective and satisfactory.

4.4. The Substantive Framework of the Statute of ACJHPR

The ACJHPR amending Protocol does not change the name of the Court towards implying the 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.' 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 ACJHPR will be the founding and governing document of the entire AU judiciary system. The amending Protocol is comprised of

four Chapters, the General and Transitional Provisions,²⁰¹ Organization of the Full Court,²⁰² The Competence of the Court,²⁰³ and Procedural Matters.²⁰⁴

The ACJHR criminal chamber exercises subject matter jurisdiction over extensive list of 14 Crimes.²⁰⁵ If one or more than one of the crimes committed on the territory or on board vessel or aircraft of state party to the ACJHR Statute, or if the accused or the victim is national of member states the Court exercises its jurisdiction.²⁰⁶ The court also exercises jurisdiction over extraterritorial acts of non-nationals which threaten a vital interest of that Member State. In terms

²⁰¹ Chapter I and II of the Statute of ACJHR (contains Article 1-12 general provisions of the Statute). 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.

²⁰² 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). Regarding Review of judgments rendered by human rights or general affairs Section could only be made 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 decisions rendered by the Pre-Trial and Trial Chambers are subject to an appeal to the Appellate Chamber which is empowered to render the final decision (Article 8 of the ACJHR Amending Protocol. Article 10 of the ACJHR amending Protocol Reduced 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).

²⁰³ Article 13 of 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 ACJHR Criminal Section. Pursuant to Article 14 of ACJHR Amending Protocol, the Criminal Section is empowered to entertain 14 lists of crimes by insertion of new Articles 28A, 28B, 28C, 28D, 28E, 28F, 28G, 28H, 28I, 28I Bis, 28J, 28K, 28L, 28L Bis, 28M and 28N. After listing the crimes, subsequent provisions define the crimes sequentially. The same article indicates different level of individual criminal participation.

²⁰⁴ 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. 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). 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 work to the Criminal Section

²⁰⁵ Article 14, Statute of ACJHR

²⁰⁶ Acceptance of the jurisdiction of the African Court of Justice and Human and Peoples' Rights under Article 46Ebis (3) will also allow the court to exercise jurisdiction.

of temporal jurisdiction, the Court will have jurisdiction over crimes committed only after the entry into force of the Malabo Protocol.²⁰⁷

The exercise of Court's jurisdiction is triggered based on three grounds: when state party to the Statute of ACJHPR refers situation to the Prosecutor of the Court or when self-referrals made,²⁰⁸ when referral is made to prosecutor by the Assembly of Heads of State and Government and the Peace and Security Council²⁰⁹ and when the Prosecutor of the African Court of Justice and Human and Peoples' Rights initiate investigations on his or her own initiative.²¹⁰

The Prosecutor's will review information received regarding crimes falling under the jurisdiction of the African Court of Justice and Human and Peoples' Rights. For the purposes of this preliminary examination, the Prosecutor may seek additional information from a variety of sources. If the Prosecutor decides that there is no reasonable basis to proceed on the basis of the information received, he or she shall inform those who provided the information of the decision. If the Prosecutor believes that there is ~~a~~ reasonable basis to proceed with an investigation²¹¹, in which case he or she shall request the Pre-Trial Chamber to authorize the investigation.

If the Pre-Trial Chamber concludes that there is a reasonable basis to proceed with an investigation, authorizes the investigation as per Article 46G (4) of the Malabo Protocol.

4.5. Institutional Framework of ACJHPR Criminal Section

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

²⁰⁷ Article 46E of the Statute of ACJHPR

²⁰⁸ According to Article 46F(1) of the Malabo Protocol (Annex),

²⁰⁹ Article 46F (2), Statute of ACJHPR

²¹⁰ Article 46F (3), Statute of ACJHPR, unlike the Human Rights section of the court African individuals or African non-governmental organizations with observer status with the African Union or its organs or institutions do not have the right to refer a situation to the African Court of Justice and Human and Peoples' Rights with a view to it exercising its criminal jurisdiction, even in respect of states that have made a declaration under Article 30(f) of the Malabo Protocol (Annex).

²¹¹ Article 46G (3),(4), the Statute of ACJHPR

The ACJHPR will be composed of the President and the Vice President who will be elected by the entire members of the Court to serve for a period of two years with the possibility of being re-elected once. In consultation with the members of the Court and in accordance with the rules of the Court, they are empowered to appoint Judges²¹² for the three Sections of the Court including the Criminal Section. The President and, in his absence, the Vice President is expected to preside all sessions of full Court.

The Office of Prosecutors will be an independent organ of the Court, composed of the Prosecutor and two Deputy Prosecutors elected by the AU Assembly. It is the responsible organ of the Court for the investigation and prosecution of the crimes listed in the Protocol.²¹³ The Prosecutor will serve for a single term of seven years while his/her deputies may serve up to two terms of four years each.

To facilitate the effective and effect functioning of the Office of Prosecutor has a power to appoint the other staff according to the staff rules and regulations laid down by the AU. 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.

The Office of Registry²¹⁴ is an administrative organ of the Court. It is responsibility on the administrative and financial works of the Court. Office of Registrar will be comprised of a Registrar and three Assistant Registrars, appointed by the Court, and assisted by such other staff as may be necessary for the effective and efficient performance of the functions. The Registrar will serve for a single and non-renewable term of seven years. The Assistants may serve for a possible two terms of four years each.

The Office of Registry is also in charge of setting up a Victims and Witnesses Unit and Detention Management Unit.²¹⁵ The Victims and witness Unit will be responsible for providing protective measures and security arrangements, counseling, and other appropriate assistance to

²¹² Article, 2(4) and 4 of the Amended Statute, Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law and there must be equitable gender representation in the Court.

²¹³ Article 22A(1) , (2)and (6), the Statute of ACJHPR

²¹⁴ Article 22B, the Statute of ACJHPR

²¹⁵ Article 22B(9) (a)and (b), the Statue of ACJHPR

witnesses and victims who will appear before the Court.²¹⁶ The Detention Management Unit will be charged with managing conditions of detention of suspects and accused persons.

The Defense Office²¹⁷ will be responsible for protecting the rights of the suspects and accused persons and providing support and assistance to any defense counsel appearing before the Court. The office is headed by Principal Defender,²¹⁸ 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.

The Criminal Section of ACJHPR consist three Chambers, the Pre-Trial Chamber, Trial Chamber and the Appellate Chamber.²¹⁹ The Pre-Trial Chamber consists of only one Judge. The Pre-Trial Chamber upon the request of the Prosecutor is empowered to issue order and warrant for the purpose of investigation and prosecution.²²⁰ 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.²²¹ The Trial Chamber comprises of three Judges,²²² 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.²²³ The Appellate Chamber has five Judges who are empowered to render final judgment on appeals submitted against the decisions by the Trial Chamber.²²⁴ Appeals against an order of Pre-Trial Chamber and decisions of the Trial Chamber could be lodged either by the Prosecutor or by the accused to the Appellate Chamber. The grounds for an appeal could be procedural error, error of law or error of fact.²²⁵ The Appellate Chamber may affirm, reverse, or revise the orders or decisions in which an appeal is lodged from.

²¹⁶ The Statute specifically provides that the staff of the Victims and Witnesses Unit shall include experts in the management of trauma s per Article 22B sub Article, 9(A). Presumably, such experts will include those with expertise in trauma relating to crimes of sexual violence.

²¹⁷ Article 22C the Statute of ACJHPR

²¹⁸ Article 22C (4), He should be a person 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.

²¹⁹ Article 6, Amending Protocol of ACJHR stipulates new provision that replaces 16 of the Merger protocol in which paragraph 2 underlines the structural outline of the criminal Section

²²⁰ Article 9 of ACJHPR Amending Protocol stipulates new provision to be incorporated immediately after Article 19 of the Merger protocol, Article 19Bis para, 2 of the Statute of ACJHR

²²¹ Article 19Bis para 3, the Statute of ACJHPR

²²² Article 21 para 4, the Statute of ACJHPR

²²³ Article 19Bis para 4 and 5, the Statute of ACJHPR

²²⁴ Article 19Bis para 6 and 21 para 5, the Statute of ACJHPR

²²⁵ Article 18 para 2, the Statute of ACJHPR

4.6. Criminal Jurisdiction of the Court

The Malabo Protocol contains an extensive and ambitious list of crimes. In particular, the Criminal Chamber will have jurisdiction to try 14 different crimes²²⁶ namely: genocide, crimes against humanity, war crimes, crime of aggression as well as certain transnational crimes like corruption, terrorism, the crime of unconstitutional change of government, piracy, mercenarism, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit exploitation of natural resources, in the African institutional context and with reference to an African legal framework. Elements of some of these crimes, such as genocide, crimes against humanity and war crimes, are established in international criminal law jurisprudence. The list also contains new list of transnational crimes not covered under the Rome Statute. While some of the crimes such as, corruption, money laundering, and trafficking on hazardous wastes are already defined in existing AU treaties.²²⁷

However, elements of some of the crimes included under the jurisdiction of the ACJHPR are yet to be develop under international law, prominent among these is the crime of unconstitutional change of government and terrorism.

The other notable unique feature of the Protocol is with regard to immunity clause.²²⁸ This immunity clause limits the ACJHPR's jurisdiction by excluding Heads of State and Senior Government Officials from prosecution while they are in office. This immunity clause is directly contrary to the statutes of other international criminal courts, which state that a person's position does not shield them from being indicted and tried.

²²⁶ Article, 14 of the Statute of ACJHPR

²²⁷ Article 28A, the Statute of ACJHPR

²²⁸ Article 46Abis, the Statute of ACJHPR

Chapter Five

Assessment of the African Court of Justice and Human and People Rights Criminal Chamber in Fighting Impunity in the Continent

5.1. Introduction

This chapter explores the advantage that the establishment of the ACJHPR criminal jurisdiction brings to the continent and also broadly discusses possible challenges of the establishment of the Court. It is undeniable that there are number of opportunities that the criminal jurisdiction will bring in to the continent amongst, legitimacy, accessibility, enforcement, Physical Proximity to the Alleged Crimes and cost effectiveness. However, there might be also possible challenges which may follow the introduction of the criminal jurisdiction unto the ACJHR. This chapter broadly discusses the advantage and challenges that the establishment of the Court brings in ending impunity in the region.

5.2. Advantages or Opportunities of the New Criminal Chamber in Fighting Impunity

The universality of rights-based strictures against impunity proceeded from the assumption that national actors with sovereign responsibilities should be the principal defenders of these rights, with international actors only playing secondary and supplementary roles. However, this assumption has been changing through time due to fastest development of the various regionals, sub-regional and international criminal courts by bringing individual criminals to justice when national courts fail to do so.

There are several advantages that the new criminal jurisdiction of the ACJHPR would bring in light of ending impunity in Africa. This is particularly true when seen from the perspective of the various challenges that the ICC is facing.

5.2.1. Legitimacy

Legitimacy referred to the belief of society and State in which a tribunal possess some quality that leads people or states to accept its authority because of a general sense that the authority is justified.²²⁹ It refers to psychological closeness of the tribunal with the society and/or State. As

²²⁹ Nienke Grossman, —“Legitimacy and International Adjudicative Bodies”, Washington International Law Review (2009) p 107-

Nienke Grossman has stated for criminal Courts to be legitimate its authority should be perceived as justified.²³⁰

The court is legitimate when it interprets and applies norms consistent with what states believe the law is or should be.²³¹ Therefore, the legitimacy of the court emanates from its enabling document. In this regard the rationale of the proposal to create a court with criminal jurisdiction can be seen in light of the fundamental principles that are enshrined under the Constitutive Act of the AU. The OAU's corner stone principle of non-interference in the private affairs of member states was a major limitation to taking action to several tragedies in the region. This is because the AU cannot do so without an enabling instrument to make it intervene and take actions towards such atrocities. The cardinal principle of non-interference under the OAU²³² was a major limitation for the OAU²³³ to take response for various human rights violation in the region in the past.

The AU currently has the principle of intervention²³⁴ in specific circumstances in its member states as opposed to The inclusion of principle of intervention gives legitimate ground for the AU to establish the criminal jurisdiction under the Constitutive Act. The ultimate rationale to incorporate the right of intervention in the AU Constitutive Act therefore stemmed from concern about the OAU's failure to intervene and stop the gross and massive human rights violations witnessed in Africa in the past. This and other grounds lead the OAU member states to up bring the organization into a union with modified mandate of human right protection as its cardinal principle.

Legitimacy of regional courts also derives from the claim that regional groupings share some sense of common identity, culture and political ties and this is especially true for Regions like Africa.²³⁵ Supranational enforcement mechanisms risk being seen as an instrument of hegemony for powerful States. Even For national government to be politically able to cooperate with an international criminal tribunal, the tribunal must be perceived as legitimate by the affected

²³⁰ Ibid

²³¹ Ibid

²³² Article 3(2), Charter of the Organization of African Unity the establishing document of the OAU, signed ratified and inter in to force in 1963(here in after, the Charter of the OAU)

²³³ Ibid

²³⁴ Article 4(h), AU Constitutive Act

²³⁵ William W. Burke-White, "Regionalization of International Criminal Law, Enforcement: A Preliminary Exploration," [Penn Law: Legal Scholarship Repository](#).(2003), p 736

national polity. 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. In this regard the ACJHR's criminal jurisdiction is better than the ICC jurisdictions. This is particularly true considering the various challenges and concerns that African states are having towards the ICC.

5.2.2. Accessibility

Establishing a criminal jurisdiction in Africa will bring justice closer to home - Africa. It is generally understandable that in cases of human rights protection national systems can work better in the protection of human rights than regional systems.²³⁶ The same is true that regional human rights systems can work better in the protection and promotion of human rights than international systems. This is because of their closeness to the countries, victims of violations and can be easily reached by the societies that they are designed to work for. The same analogy can also be followed in the case of protection of human rights from massive atrocities through international criminal justice system. It is presumed that ACJHPR criminal jurisdiction will be easily accessible for victims and all participants of international criminal justice system in Africa.

Hence, The Hague can be by far accessible to the Northern and Western Africa countries but not for South, East and Central Africa. The poor infrastructure with in the most of developing African countries could be also a major limit for the accessibility of the court. The regional criminal jurisdiction of the ACJHPR, if established, will be more accessible to the reach of all parts of the continent for better protection of human rights. The ICC is located in the Hague Netherlands, which is relatively far for the whole reach of victims of African who suffered from mass atrocities and conflicts. As the maxim states 'justice should not only be done but must be seen being done.'

5.2.3. Enforceability

In terms of contextualizing the exact circumstance in the ground, geographic and local knowledge the establishment of an ACJHPR with staffs from the same would help the effectiveness of the court in enforcing its order and decision.

²³⁶ Ibid

The monetary costs of international criminal law enforcement have been and will continue to be a significant hindrance to the effective operation of international tribunals. The new Criminal Chamber of the ACJHPR as a regional court could significantly reduce the financial burden of international criminal law enforcement for a number of reasons. Burke has identified that regionalization of Criminal Court in general minimizes the financial expenses of criminal proceedings. Burke penned;

*"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, a Regional Criminal Court could pay staff salaries calculated to reflect costs of living within the region, thus reducing what is usually a Court's largest single cost.... and, particularly where linguistic patterns correspond to a Court's jurisdiction, significant savings could be attained by minimizing the working languages of the Court..."*²³⁷

In light of the need to access the crime scene, acquire first-hand information and witnesses, the proposed criminal chamber of ACJHPR would be a better and more effective option. This is true specifically with regard to some specific evidences and witnesses that might be destroyed if the evidence gathering processes takes longer. Further, bringing the witnesses and evidences to the ACJHPR will be much easier than taking them to The Hague for trials in the ICC. 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.²³⁸ A variety of similar efficiencies of scale and focus may be available at the regional level.

5.2.4. Physical Proximity to the Alleged Crimes

The physical distance of supranational courts from the site of the alleged crimes has troubling consequences in two respects: judicial reconstruction and restorative justice. While the success of the first is related to the closeness of an international tribunal to local judiciaries, the latter is

²³⁷ William W. Burke-White, *Supra* note 235, p 738

²³⁸ *Ibid*

associated with the closeness of the tribunal to the specific society who are victims of an alleged international crime.

Judicial reconstruction could be defined as "catalyzing future prosecutions domestically by restoring the rule of law and the efficacy of national institution". 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 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.²³⁹

Restorative justice is different from contemporary criminal justice in several ways.²⁴⁰ First, it recognizes that offenders harm not only the victims, but also the communities. Second, it involves more parties in responding to crime, it includes victims and communities as well. Finally, it measures success not only on how much punishment is inflicted, but on how much harm is repaired or prevented.

Restorative justice exclusively is concerned with restoring victims' dignity and setting up future harmonized living environment for the victims, perpetrator and affected community.²⁴¹ Therefore, achieving the goals of restorative justice requires a close connection between the adjudicating court and the society affected by international crimes.²⁴² With thousands of miles and trans-oceanic flights separating witnesses and evidence from the court in Hague, the ability of the ICC to perform a restorative justice function is limited. Furthermore, the ACJHPR upon its establishment will, through the Registrar set up Victims and Witnesses Unit. This unit, to achieve its mandate effectively needs to be situated in a place where enables it to contact concerned individuals and the community in question for purpose of achieving restorative

²³⁹ William W. Burke-White, —ACommunity of Courts: Toward a System of International Criminal Justice”, MICH. J. INT.L.L. (2002), p 61-71,

²⁴⁰ Restorative Justice Briefing Paper, Centre For Justice & Reconciliation Prison Fellowship International, May (2005)

²⁴¹ Elizabeth Kiss, Robert I. Rotberg and Dennis(eds.), —Moral Ambition Within And Beyond Political Constraints: Reflections on Restorative Justice, Compiled in Truth V. Justice: The Morality of Truth Commissions”, Thompson, Preston University Press (2000) p 83

²⁴² African Union Panel of the Wise, —Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity,” The African Union Series, New York: International Peace Institute, February 2013, p 5

justice. Restorative justice could also be enhanced by providing information of a legal proceeding for the ordinary citizen and affected community²⁴³

5.2.5. Crimes not covered under Rome Statute

The protocol that establishes the ACJHPR provides specific kinds of crime that have particular importance for the African region.²⁴⁴ These crimes are not covered under the Rome Statute and are particularly prevalent in the region.²⁴⁵ As Gerhard Kemp and Selemani Kinyunyu pinpointed that, ‘When a norm is transformed into a crime it is important not to lose sight of one of the foundational principles of criminal law, namely the principle of legality’.²⁴⁶ There was a need to criminalize those acts as to establish accountability in accordance with the principle of legality. Therefore, incorporating those specific acts would help to establish criminal responsibility which would in turn help fighting impunity in the Region.

5.3. Possible Challenges: Normative, Institutional and Operational Environment

The above stated advantages of introducing the criminal jurisdiction in Africa are not without possible challenges. There are various challenges facing the court starting from its initial establishment. Some governmental and non-governmental organizations have expressed their concern that the move to establish a regional court with criminal jurisdiction is made to shield African leaders from the jurisdiction of ICC bringing challenges in fighting impunity in the region. There are also various challenges including the political will and non-compliance of states parties, jurisdictional conflict with the ICC, and financial problems of the AU to sustain the expensive costs of international criminal proceedings, inclusion of immunity clause and independence of the judiciary and office of prosecution. The challenges combined together are considered to create an impunity gap contrary to the Constitutive Act of the AU.

²⁴³ Supra note 239

²⁴⁴ Article 28F, 28H, 28I, 28I Bis, 28J, 28L, and 28L Bis, the Statute of ACJHPR,

²⁴⁵ Research by the Financial Action Task Force (FATF) shows that maritime piracy activities off the coast of Somalia are escalating to dangerously high levels. Between January and March 2011 alone, 33 vessels had been seized, 711 hostages held seven fatalities incurred. In 2010 it was estimated that between US\$ 180 – 238 million were paid out in ransoms., FAFT Report, Organized Maritime Piracy and Related Kidnapping for Ransom (July 2011)

²⁴⁶ Gerhard Werle, Moritz Vormbaum,(eds.), The African Criminal Court: A Commentary on the Malabo Protocol International Criminal Justice Series, Volume 10, (2017)

5.3.1. Conflict of Jurisdiction with International Criminal Court

The amending protocol of ACJHPR seems intentionally omitted the principle of complementarity²⁴⁷ between the ICC and the proposed ACJHPR, criminal chamber. Both the ICC and the ACJHPR has a mandate over international crimes like war crimes, crimes against humanity, genocide and crimes of aggression. International law knows no hierarchy of criminal courts. As such both the ICC and the African Court occupies the same status in the international criminal justice realm. None of the two courts ranks higher than the other, Indeed. The major shortcoming of the amended Protocol is that it seems not to foresee probable competing jurisdictions between the ICC and the African Court under certain circumstances under which the ICC can be seized of a matter within the region.

There is also a possibility of developing a diverging norm and jurisprudence from the two of the courts. From the jurisdictional competences accorded to the two courts, it is evident that there is an overlap of their mandate.

*Effective international governance and state compliance requires a common understanding of the normative content of international law, normally achieved through norm clarification by judicial organs.*²⁴⁸

Underlying this philosophy is the need to ensure coherence in application of international norms. Duplicating the mandate of the African Court of Justice and Human Rights with that of the ICC only works to undermine this spirit. This will result in producing conflicting jurisprudence on similar issues.

The new criminal jurisdiction is facing total rejection from a number of important quarters: different international organizations, African institutions and some researchers.²⁴⁹ African institutions and NGO's raised their voices concerning the role that African states played in the creation of the ICC and the effect of the new criminal jurisdiction.

247 Article 46H, the Statute of ACJHPR and Paragraph, 17 of the preamble of the ACJHPR Statute

248 Dan Juma, A. Von and R. Wolfrum (eds.), *Lost or Found in Transition? The Anatomy of the new African Court of Justice and Human Rights*, *Max Planck Yearbook of United Nations Law* (Volume 13), (2009)P. 278

249 Report on the outcome of the conference in South Africa, 7-8 November 2016, two-days consultation organized by the Foundation for Human Rights, Amnesty International, Southern Africa Litigation Centre, Lawyers for Human Rights, Centre for Human Rights-University of Pretoria and Southern African Liaison Office with leading civil society groups, professional associations, government representatives, AU representatives, academics and key media leaders drawn from the Southern Africa region. Available at: <<https://fhr.org.za/index.php/latest.../malabo-protocol-final-communicu>> (Accessed on March 2, 2018)

5.3.2. Lack of Financial Capability

The AU has a poor record of funding not only its own institutions but also other international institutions. It would, therefore, not be easy for the ACJHPR to deal with investigations and prosecutions of complex criminal cases, in accordance with the highest standards of due process of law which, by their nature, are extremely expensive.²⁵⁰ The ACJHPR will be expected to be much more expensive than the African court of human and people rights as it will investigate a broader range of cases.

There is no projected budget that has yet been drawn up for the ACJHR new Criminal Chamber. For example, the ICC budget for 2016 was €153.32 million, representing an increase of €22.66 million, or 17.3%, over the 2015 approved budget.²⁵¹ The AU's entire annual budget for the same year stands at just \$416,867,326 million US dollars.²⁵²

On the other hand, the cost of a single trial for an international criminal trial is estimated to be \$20 million. This is nearly double the approved 2017 budgets for the ACHPR and the AComHPR standing which is \$10,315,284 and \$5,525,705 respectively.²⁵³ The cost of protecting victims, witnesses and collection of evidence during and before trials is very costly as it can be observed from the ad hoc tribunals and the ICC.

Furthermore, more than half of the AU budget is funded by non-African donors and external financing is likely to be essential to the ACJHPR as well.²⁵⁴ It must therefore invent ways of funding the additional structure and not rely on donor funding alone.

²⁵⁰ In Decision Assembly/AU/Dec.127 (VII), 2006, the AU mandated the Government of Senegal to try Hissene Habré the former president of Chad, who was accused of crimes against humanity, war crimes and torture 'on behalf of Africa.' In response to this call, Senegal argued that it was financially unable to come up with the estimated USD \$40 million for the trial. Subsequently, with the aid of multilateral donors, the AU worked with Senegal to set up a hybrid tribunal to adjudicate the trial against Hissene Habré

²⁵¹ International Criminal Court Assembly of States Parties, 2015, Proposed Program Budget for 2016 of the ICC Fourteenth Session ICC-ASP/14/10. 18-26 November 2016, the Hague

²⁵² Decision on the Budget of the African Union for the 2016 Financial Year, Doc. Assembly/AU/3(XXV), Decision No: Assembly AU/Dec.577(XXV)

²⁵³ Decision on the Budget of the African Union for the 2017 Financial Year, Doc. Ex.Cl/956(Xxix), Executive Council Twenty-Ninth Ordinary Session 13 - 15 July 2016 Kigali, Rwanda

²⁵⁴ For example, out of the approved total budget of US \$782,108,049 of the Union for the year 2017, only a total amount of US\$205,149,538 assessed on Member States and the rest US\$576,958,511 to be raised from International Partners

5.3.3. Lack of Political Will

As much as international criminal justice is a legal issue, it does not operate in a vacuum but within a political context. International politics is thus a cardinal component of any international criminal justice system. It is essential to guard against political interference that compromises the core mandate of such a system. In this regard, political considerations related to the independence of the Court and the actual political motives behind the establishment of the Court will be among the key determinants of the efficiency of the Court once established.

It is also important to protect the integrity of the Court from political influence. It is therefore suggested that appointment of judges to the Court must be rigorous and devoid of politics. For example, nomination of probable candidates to the bench should not be done by States alone but in conjunction with independent non-governmental organizations and national human rights institutions. This should be based on individual's qualifications and not political patronage. Scholars suggest a provision for two non-African judges in the criminal chamber must be provided.

5.3.4. Lack of Cooperation and Non-Compliance

African states are known for their non-compliance with the recommendations of the AComHPR and ACHPR with no attendant consequences.²⁵⁵ Member States have also been slow in meeting their state reporting commitments under the AU human rights instruments. For example, Member States to the African Charter are supposed to issue an initial report to the African Commission on Human and Peoples' Rights (African Commission) two years after ratification or accession to the African Charter, and periodic reports are required every two years after the initial report.²⁵⁶

²⁵⁵ Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach 24th ordinary session, OAU DOC/OS/50b (XXIV), Para 2 (1998) quoted in GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' rights: A possible remedy' (2006) African Human Rights Law Journal 467

²⁵⁶ None of the twenty-six original members had submitted their initial reports by the first due date. On its twentieth session of the Commission, the initial reports of sixteen states parties had been examined, and at forty-six second report no state had submitted a third, fourth or fifth report. As of May 2013, there are only eight African states that are up-to-date with their reporting obligations, forty-five states are behind schedule. Generally, twelve states have never submitted any reports to the Commission., African Commission on Human and Peoples' Rights, 'State Reporting', Available At: <www.achpr.org/states/>

The other potential problem to have the criminal jurisdiction of the ACJHPR is the impracticality of its operations and African states' problem with indicting a sitting president. International crimes are mainly committed by sitting Presidents or by their Higher Officials. It is highly doubted that other African states would be willing to enforce an arrest warrant issued by the ACJHPR. This might be true even if there is a clear link to the commission of the international crimes because of the deep-rooted principle of non-interference in internal affairs of another state in Africa. Hence, the new criminal jurisdiction of the ACJHPR will be impractical if African states continue to non-cooperate with the Court.

A mechanism of regional cooperation such as holding detainees and prisoners for the ACJHR would have to be established and implemented and it should be provided with such facilities by each member state.

5.3.5. Immunity Clause

Many critics forwarded by different civil society, human rights activists, international and regional human rights organizations and scholars that the intrusion of international criminal jurisdiction unto the ACJHPR is a move to shield African leaders from criminal responsibility especially, from the ICC prosecution. The adoption of the Malabo protocol has also confirmed this suspicion by providing an immunity clause²⁵⁷ for heads of the States and senior government officials. The provision would not allow the Office of the Prosecutor to indict or prosecute Heads of State and Senior Officials for international crimes while they are in office.

–No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity or other senior state officials based on their functions, during their tenure in office”²⁵⁸

As discussed under chapter two of this paper there are two categories of immunity under international law; functional (Immunity *ratione materiae*) and personal (*Immunity ratione personae*). The immunity that is granted under the ACJHPR Statute includes both personal immunity (*ratione personae*) and functional immunity (*ratione materiae*).

²⁵⁷ Article 46Abis, Statute of ACJHPR

²⁵⁸ Ibid

The protocol grants immunity to Senior State Official while in office and limits the ACJHPR's jurisdiction. This stand is against emerging norm of customary international law²⁵⁹ that gradually lifted the defense of immunity of State officials who allegedly commit international crimes. In addition, looking unto the experiences of majority African countries most heinous and gravest forms of human rights violations that amount to international crimes have been committed by Higher Officials and Leaders against the governed while they were at office. The history of the continent reveals that the majority of incidents have been state sponsored either directly or indirectly. Miriam Abaya argues that,²⁶⁰ core crimes such as genocide, torture, and crimes against humanity are outside or nothing to do with the official capacity of Senior State Officials. Therefore, functional immunities should not protect these senior state officials from prosecution for these crimes.²⁶¹

In addition granting of Immunity while in office could incentivize leader's already in power to use any means necessary to maintain their power²⁶² or could also be used as an input for African suspects of international crimes to gain positions of power to avoid proceedings against them, through more violent means.²⁶³

Therefore, ACJHPR Statute contradicts with other commitments of AU and its Member States to promote democratic change of government and justice and ending impunity in the continent. It would be one of a barrier or hindrance for the success of the new ACJHPR criminal jurisdiction.

5.3.6. Independence of the Judiciary and the Office of Prosecutor

The strength of any judicial system lies in its independence. 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.²⁶⁴

²⁵⁹ See the ICJ decision on Congo v. Belgium (also known as the "Arrest Warrant Decision")

²⁶⁰ Miriam Abaya, "No Place For Immunity: The Arguments Against The African Criminal Court's Article 46bis," *Temple International Law & COMP. Law Journal*, (2017) p 190

²⁶¹ Ibid

²⁶² Charles C., "Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa", *AFR. J.L. STUD.*, (2014) p 32

²⁶³ Ibid

²⁶⁴ Evelyne Owiye Asaala, "The African Court of Justice and Human and Peoples Rights: An Opportunity for International Criminal Justice?", Beitel van der Merwe, Konrad Adenauer Stiftung(ed.), *International Criminal Justice in Africa : Challenges and Opportunities*, November 2014, p 50

In fact, 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."²⁶⁵ Nevertheless, the manner of appointment, condition of remuneration and service of the prosecutor are subject to determination of the AU Assembly which is also made through the recommendation of the Executive Council.

Similarly, with regard to the independency of the 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".²⁶⁶

However, the mode of appointment and aspects of remunerations of Judges prejudice their independence vis-à-vis the AU Executive Council and the Assembly. 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. As Evelyne Owiye Asaala²⁶⁷ 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.

Further, to secure both institutional and individual independence of Judges of ACJHPR Criminal Chamber security of tenure and remuneration are vital, sufficient remunerations are required to be paid. However, as it is indicated under sub chapter 5.3.2., 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.

In addition, the Statute is silent regarding the termination of the Judges, but by implication, such an authority will be inferred to the AU Assembly which is purely political organ of the Union.

²⁶⁵ Article 22A Para 6 the Statute of ACJHPR

²⁶⁶ Article 4, the Statute of ACJHPR

²⁶⁷ Supra note 264

Chapter Six

Conclusion and Recommendation

6.1. Conclusion

It has been twenty years since the Rome Statute entered into force and the establishment of the ICC. The ICC is established with the aim of ending impunity and prosecuting the commission or omission of core international crimes namely, genocide, crime against humanity, war crime and crime of aggression. Since its establishment African countries have shown their support to the new era of international criminal justice. They have been actively involved and participated in the negotiation process as well as ratification of the Statute. The number of complaints made to ICC is also increasing through time.

The ICC exercises its jurisdiction based on communication of the commission of the international crime by Member State, public prosecutor or by the UN Security Council as per Article 16 of the Statute. However the ICC has been criticized for particularly focused criminal prosecution in Africa. As of 2017, the ICC opened investigation on eleven situations out of which ten of the situations were all in Africa. Amongst, the situation referred in Darfur region of Sudan created particular issues. The power of the Security Council to refer situations to ICC against Non-Member State to the Rome Statute as provided under article 16, indictment against sitting Head of State and Higher Government Officials, and complementarity are dealt under chapter two of this paper.

These issues further resulted on deferral question of the situation on Darfur region of Sudan by the Assembly of the State of the AU. However, the UN Security Council was reluctant to respond the deferral question. As a result, Assembly of the AU passed different decisions showing its stand on the ICC's administration of criminal justice in the African continents. The decisions highlighted the need for regionalization of international criminal court. In addition, on its 28 ordinary session held at Addis Ababa, adopted a draft legislation (declaration) calling for collective withdrawal from Rome Statute of its Member States who are also member to the Rome Statute. While the call made for collective withdrawal has some legal implication, it does not impose legal obligation on member States of the AU. This is because under international law,

the issue of either signing or denouncing treaty is purely a sovereign right of individual state alone. In addition, there is no well-developed rule of collective withdrawal under both international treaty obligation and customary international law. However, the collectiveness of the act poses a possible denunciation of the power of the ICC. It has also a power to shift a regime of the international legal norm on international criminal prosecution.

There is no any collective action taken so far as to give effect to the draft withdrawal strategy. And, so far, Burundi is the only and the first African country to withdraw from the Rome Statute. Though, the withdrawal releases the withdrawing State from any treaty obligation under the Rome Statute, States are under obligation to prosecute and punish perpetrators of international crimes according to the principles of customary international law. Withdrawal will not release a State from any *erga omnes* obligations to respect *jus cogens* norms that are codified in the denounced treaty.

Furthermore, based on the decision of the AU Assembly as to the need for regionalization of international criminal court as a resistance against UNSC, ICC and European National Courts, On June 2014, at its Ordinary Meeting held in Malabo, Equatorial Guinea adopted the amending Protocol of ACJHPR. Upon coming into force, the amending Protocol of ACJHPR 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.

It is undeniable that, the expansion of ACJHPR to include criminal jurisdiction could have a positive contribution in ending impunity in the continent. Impunity is the character of the African continent. The continent of Africa has been exposed to massive human rights violations. Individuals of high official statuses orchestrated most of the atrocities. Therefore, the criminal chamber will create a legitimate ground to strength the fight against impunity since the ICC has being seen/ criticized as an instrument of hegemony for powerful States.

The Criminal Chamber of ACJHPR has jurisdiction over crimes having peculiar that exclusively jeopardize the peace and security of the African continent. Crimes that are trans-boundary and common concerns of a specific region could better be prosecuted under regional courts than national or supranational tribunals.

The Criminal chamber has also a lot to do in bringing justice to home, Africa. The accessibility and proximity of the court to witnesses and crime scene will result in cost effectiveness of the regional criminal proceeding. It also creates a chance for African people to see justice being done. Regional collaboration would also contribute for effective and efficient enforcement of the orders and decisions of the court.

There are however, various impediments as to the effectiveness of the Criminal Chamber attributed to, the legal as well as institutional framework of the ACJHPR. To begin with, the recent deed of expansion of jurisdiction of the ACJHR came immediately after the dispute between the AU on one hand and the ICC, UNSC and European National Courts on the other hand. Therefore, the expansion seems to be a political shift than genuine effort of prosecuting international crimes.

The amending protocol of ACJHPR failed to address the relation 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. As Kemp, Gerhard stated that, *„the creation of an African regional International Criminal Court can be viewed as negative complementarity creating an attempt to create a regional exceptionalism in the face of the ICC’s currently directed investigations on the African continent.“*²⁶⁸

The inclusion of immunity clause under the amending protocol of ACJHPR is a basic limitation to the effectiveness of the court as to ending impunity in the continent. The amended protocol grants personal immunity to Head of States, Governments and other High-Ranking Governmental Officials. However, the African Continent has witnessed massive human rights violations throughout its history and most of the atrocities were committed by individuals of High Official statuses. Therefore, the inclusion of the immunity clause will shield Heads of States and Higher Government officials from criminal prosecution which in turn promotes impunity in the continent.

²⁶⁸ Kemp, Gerhard, “Faking Stock of International Criminal Justice in Africa : Three Inventories Considered”, Beitel van der Merwe, (ed.), International Criminal Justice in Africa: Challenges and Opportunities, (November 2014), p 20

The personal immunity that is granted under the Statute of ACJHPR is also in contradiction with the emerging international law and commitment of African States to end impunity in the continent and protect their citizens from gross human rights violation.

Further the amended protocol of ACJHPR provides independence of Judges and Office of Prosecutor in general terms. Nevertheless, the determinations of the appointment, remuneration and conditions of work of the judges and Office of Prosecutor are made by AU Assembly. The Assembly is political organ of the union therefore; it could interfere with the independence of Judges and Prosecutors.

The political will and readiness of AU Member States to enable the establishment of the court and to co-operate with the decision of the Court is unconvincing. The amended protocol of the ACJHPR is yet a draft protocol requires ratification by 15 African countries to come into force. The ACJHR was replaced with the amended protocol of the ACJHPR before the ACJHR Statute come into force due to lack of required number of ratification by African countries. African countries also have a very poor history of compliance with the order of the existing human right machineries, AcomHPR. It is difficult to gain the political support of AU Member States either to meet the required number of ratification to make the court a reality or for cooperation to the decision of the court if Criminal Chamber of ACJHPR came unto a reality.

And finally, the ACJHPR is expected to be much more expensive than the African court of human and people right as it will investigate a broader range of cases. It will need a huge budget as to conduct the investigation, prosecution and enforcement of its decision. The budget allocation must allow the office of Prosecutor as to meet the principle of due process of law.

Unless and otherwise the above-mentioned constrain properly addressed the Criminal Section of the ACJHPR could not effectively be materialized and if it is established, it will be a political organ that could not work to promote justice and end impunity in the continent. It could not be an alternative to the other criminal jurisdictions including the ICC. The modest achievements of an international criminal justice in Africa will only be materialized if the Court is established in consideration the above mentioned restraints.

6.2. Recommendations

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.

- Most of the critics made against the ICC by African leaders and the AU lacks legal basis and made based on subjective standards. As of 2017, five states namely, Uganda, Democratic Republic of Congo, Central African Republic, Gabon and Guinea referred situations on their country to Prosecutor. All of these referrals were made against leaders of opposition and insurgent groups within their respective countries. However, when the investigations are made against a leader yet in power, the investigation would be subject to critics mostly, by African leaders in power and the AU. Therefore, this shows the double standard applied by African leaders. They used the ICC as a means to avoid any opposition political movement and criticize its activity when it comes to be against Higher Government Officials in power to shield ICC suspected criminals from any criminal responsibility. Any critics and concerns to the ICC must be made in accordance to the provisions of the Rome Statute and with genuine commitment and effort to help the criminal proceedings. The question of amendment of the Rome Statute must also be made to the appropriate forum the ASP.
- The collective withdrawal strategy adopted by the AU has no any legal effect under international treaty or customary law on AU Member states who are also Member of the Rome Statute. The withdrawal of African States from the Rome Statute does not release them from the obligation to prosecute international criminal acts. The AU Member States are also under obligation to fight and end impunity in the continent as per the Constitutive Act of the Union and other international human rights instruments. Therefore, the African countries shall observe legal obligation to condemn, prosecute and punish any grave form of crimes under international customary *jus-cogens* rule and other human rights instruments.
- For the realization of the ACJHPR Criminal chamber the AU and its Member States shall ascertain a full cooperation and political willingness to support the new criminal jurisdiction of the ACJHPR. The commitments and willingness of each Member States to cooperate and be submissive to the ACJHPR criminal jurisdiction must be obtained.

- Since both the ICC and the Criminal Chamber of ACJHPR are working for the common objectives, fighting impunity, their relations should be set up with a notion of cooperation but not conflict. Either the Rome Statute or the Statute of the ACJHPR must be amended as to include principle of complementarity between this to judicial organs. In terms of chronological order the amended protocol must insert a provision explicitly referring for complementarity with the ICC.
- The provision of the amended protocol of ACJHPR, which grants personal immunity for governmental officials, should be amended. It will hinder the effort of the African continent in fighting impunity. In addition the provision contradicts with the emerging customary international law that avoids immunity of officials in case of international crimes. It will also create different international criminal law jurisprudence which would result in normative difference on international criminal justice administration in the African continent.
- The AU must allocate enough resources as to enable the institutional independence of the ACJHPR. 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.
- The determinations of the appointment, remuneration and conditions of work of the judges and Office of Prosecutor by AU Assembly must be made based on genuine legal requirements. There shall not be any legal lacuna or gap that could enable the determination to be made based on political consideration.
- International donors, human right organizations and activists should study and give their insightful recommendation, support and push the AU towards the establishment of an effective Criminal court rather than criticizing the expansion of the criminal jurisdiction in general.

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