

Criminal Jurisdiction of the African Court of Justice and Human Rights: Prospects and Challenges

By: WorkinehDessieTemesgen

Prepared under the supervision of:

Instructor AntenehGeremew(LL.B, LL.M)

A Thesis submitted to DebreMarkos University, School of Law in partial fulfillment of the requirements of Bachelor Degree of Law (LL.B)

Debremarkos University, School of law

Debremarkos, Ethiopia

December, 2009

Declaration and confirmation

I, Workineh Dessie, hereby declare that this dissertation **"the criminal jurisdiction of the African court of justice and human rights on its prospects and challenges" is** my original work and has never been presented by other person. To the best of my knowledge and belief, I also declare that any information used has been duly acknowledged.

Name: Workineh Dessie Temesgen

ID No. LAR/370/05

Signature_____

Date_____

Advisor: Anteneh Geremew (LLB: LLM)

Signature_____

Date_____

Examiner:Alemnew (LLB)

Signature_____

Date_____

Acknowledgement

First and foremost I thank GOD for his unconditional love, grace and blessing through my life. It all happened because he said. This research and the whole study would have been dream without valuable guidance, comments and patience of my advisor instructor Anteneh Geremew.My best friends Asnaku ,Dinku and Bekele are the best part of my life during this LLB thesis, my best love Wintana, mom, sisters and brothers. Thank you so much mom, thank you so much for your non-stop prayers throughout my life.

God bless you all!!!

Acronyms

ACHPR: African Charter on Human and People’s Right

ACJ: African Court of Justice

ACJHR: African Court of Justice and Human Rights

AU: African Union

AUPSC: African Union Peace and Security Council

ECOWAS: Economic Community of West African States

ICC: International Criminal Court

ICJ: International Commission of Jurists

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal of Yugoslavia

IMTR: International Military Tribunal of Rwanda

OAU: Organization of African unity

SCSL: Special Court of Sierra Leone

UCG: Unconstitutional Change of Government

Contents

Declaration.....i
Acknowledgement.....ii
Acronyms.....iii
Abstract.....1
Chapter One: Introduction.....2
1.1. Background of the Study.....2
1.2. Statement of the Problem.....5
1.3. Objectives.....7
1.3.1. General Objective.....7
1.3.2. Specific Objectives.....7
1.4. Research Question.....7
1.5. Significance of the Study.....7
1.6. Methodology.....8
1.7. Scope and Limitation of the Study.....8
1.8. Organization of the Study.....8
Chapter Two: Africa and Criminal Courts.....9
2.1. Introduction.....9
2.2. Forums to Punish International Crimes Committed in Africa.....9
2.2.1. National Courts.....9
2.2.2. The International Criminal Court.....13
2.2.3. The African Union Decision on ICC.....15
Chapter Three: The African Court of Justice and Human Rights.....18
3.1. Introduction.....18
3.2. The African Court of Human and People's Rights.....18
3.3. The African Court of Justice.....19
3.4. The African Court of Justice and Human Rights.....19
3.4.1. Background.....19
3.4.2. Jurisdiction.....20
3.4.3. Applicable International Law Instruments.....21
3.4.4. Institutional Structure of ACJHR.....22
3.4.5. Nomination, Appointment and Allocation of Judges.....24

3.4.6. Mechanisms of Enforcement of Courts Judgments and Financial Sources....25
Chapter Four: Criminal Jurisdiction of the African Court of Justice and Human Rights....26
4.1. Introduction....26
4.2. The AU's Power to Establish a Criminal Court....26
4.2.1. The UN Charter and ACJHR' Proposed Criminal Jurisdiction....26
4.2.2. AU's Constitutive Act and the ACJHR Proposed Criminal Jurisdiction....28
4.3. Individual Criminal responsibility under international law....29
4.4. The Criminal Jurisdiction of ACJHR and ICC....33
Chapter Five: Prospects and Challenges of the Proposed Criminal Jurisdiction of the African Court of Justice and Human Rights....35
5.1. Introduction....35
5.2. Prospects of Criminal Jurisdiction of the ACJHR....35
5.2.1. Legitimacy....35
5.2.2. Access to Justice....37
5.2.3. Effectiveness....38
5.2.4. Try Crimes Peculiar to African....39
5.3. Challenges on Criminal Jurisdiction of the ACJHR....40
5.3.1. The Problem of Combining Civil and Criminal Jurisdiction....40
5.3.2. The Complementarily Principle....41
5.3.3. Conflict of Jurisdiction with ICC....42
5.3.4. Lack of Financial and Political Will....43
5.3.5. Non-compliance and Lack of Cooperation by African states....46
5.3.6. The Effect of Immunity Clause and the Prevalence of Impunity....46
5.3.7. The Limitation of Access to the Court for Individuals and NGOs....48
5.3.8. Enforceability of the Court's Judgment....49
5.3.9. The Capacity to Deliver Mandate....50
5.3.10. Lack of Expertise of Judges and Investigators....51
Chapter Six: Conclusion and Recommendation....52
6.1. Conclusion....52
6.2. Recommendations....54
References....56

Abstract

Heads of States and Governments in Africa, through the African Union, have for some time expressed particular concern about two developments in current International criminal justice – the exercise of universal jurisdiction and the work of the International Criminal Court. Concern about the former relates to the indictment of senior government officials – including from a number of African states by certain European states for international crimes allegedly committed. With regard to the International Criminal Court, following the indictment of three African Heads of States and Governments, the charge being leveled is that Africa Specifically is being targeted by that court. Oppositions and appeals having failed to halt these developments, African leaders, through the AU, have resolved to address international Crimes at the continental level. To date, African court structures have not had the necessary Jurisdiction to do so. As a consequence, in June 2014 at a Heads of States and Governments Summit the AU amended The Protocol of the African Court of Justice and Human Rights to give it jurisdiction over the Three recognized international crimes – genocide, crimes against humanity and war crimes – And over 14 additional crimes. The amendment is problematic for a variety of reasons. Of Primary concern, however, is that it fails to address the relationship between the proposed Expanded Court and the International Criminal Court; and, while coaching the move as reflective of Africa's Commitment to end a culture of impunity for those guilty of gross human rights violations, The amendment specifically accords immunity from the jurisdiction of the Expanded Court To African heads and senior government officials. The only viable conclusion to be drawn is that the amendment is a conscious snub to the International Criminal Court and aims specifically to protect African heads and senior government officials from prosecution. In the light of current trends in International law, which value human rights over sovereignty, this move is lamentable and must be resisted. This thesis will assesses what possible prospects and challenges

will face the proposed criminal jurisdiction of African court of justice and human rights.

Key words: criminal jurisdiction, criminal responsibility, immunity, ICC, ACJHR

Chapter One: Introduction

1.1. Background of the Study

The idea of setting up of an international criminal court goes back to the 19th Century. The idea pre dated world war of I, when one of the founders of the international committee of the Red Cross Gustine monies proposed in 1877 for the creation of permanent court in response to punish the criminals of Franco-Prussian war.[1]

The effort establishes a permanent international court continued until First World War. After World War I, the peace treaty concluded between the allied and associated powers and Germany concluded at Versailles in 1919 to try and punish the leading figures responsible for war crimes during the war.[2]

It was only after the end of World War II, the effort to create permanent international criminal court and establishment of the two ad hoc international criminal courts took place to try the major suspects of the Axis powers (German and Japan). At this time, the serious effort began by establishing International Military Tribunal of Nuremberg (here in after, IMTN) and the International Military Tribunal of the Far East (here in after, IMTFE) is a milestone in the development of international criminal law.[3]Principally, the Nuremberg and Tokyo tribunes were concerned with

[1]TekleEnkossa, *The Legality of Indictment of President Hessen AL- Basher by International Criminal Court under International Law,* A Thesis Submitted to Addis Ababa University School of Graduates Studies, Addis Ababa, June 2010, Available online at www.chilot.me/LLMThesispaper accessed on 22 July, 2016, p.14

[2] Ibid

[3] M. Chief Bassiouni, *Establishment of International Criminal Court: Historical Survey, M*ilitary Law Review, 1995, Available online at www.loc.gov/n/frd/pdffile/277875/%pdffile

prosecuting crimes against peace, but they created a precedent that individual state leaders could be held criminally accountable for war crimes, crimes against humanity, genocide and war of aggression.[4] At this juncture the doctrine of that individual leaders or head of state should be considered immune from legal liability explicitly rejected.[5]Thus, the United Nations General Assembly (here in after, UNGA) had given the International Law Commission (here in after, ILC) the assignment for the establishments of the permanent international criminal court.[6]Though the first draft statute produced in the 1950s, it was not adopted because of the cold war tension.[7]Once after all the cold war tension dissolved the world community showed renewed interest in creating international criminal court.[8]

UN Diplomatic conference of plenipotentiaries held in Rome, Italy from June 15 to 17 July 1998, governments overwhelmingly approved and adopted the statue known as the Rome Statue of International Criminal Court (ICC Statue).[9]Indeed as of October, 2009, 110 states have become parties to the International Criminal Court (here in after, ICC)Statute and among those 30 of them are African countries. Unlike, the International Criminal Tribunal for former Yugoslavia (here in after, ICTY), and former International Criminal Tribunal for Rwanda (here in after, ICTR), ICC is a permanent international criminal court established by its founding statue with a jurisdiction to try genocide, war crimes, and crimes against humanity and war of aggression.[10]

---

accessed on 12 July, 2016, p.8

[4] Human Right History, "Individual Criminal Liability" available at http://www.Umich..Edu/…/accessed on12 July 2016,P.4

[5] Ibid

[6]Nuremberg Trial, Available online at www.enn.m.wikipedia.org/.../Nuremberg. accessed on 23 July 2016,P.12

[7] Ibid

[8] Ibid

[9]Papazuka, "The International Criminal Court Relation with African unfair bias?" available at www.pampazuka.org/ governance/pampazuka-news-voice-freedom-and-justice…accessed on12 August 12 2016. p. 12

[10] Ibid

Although Africa block which represent the largest regional grouping of countries within ICC actively participated in the establishment of the court and instrumental in bringing it in to being, cooperate and act friendly with ICC for the first few years of its existence.[11]Their friendly relation doesn't last long because of African doubts on fairness of ICC practices which till has received more than 9,000 complaints about alleged crimes in more than 139 countries, yetall investigations the ICC has opened to date are on African continent.[12]Moreover, all things dramatically changed when the Sudanese president Omar Hessen al-Basher was indicted in 2009 after the situation in Darfur was referred to ICC prosecutor by United Nation Security Council (here in after, UNSC).[13]By anti-ICC sentiment adopted a hostile attitude towards ICC and call on its member states to adopt a policy of non- cooperation policy under threat of sanction.[14]Following this, the pending trial of president Uhuru Kenyatta and trial of Deputy President William Ruto, whose case were initiated *proprio motu*(by own initiation or accords)of the then ICC chief persecutor Luis Moreno-Champoo in 2010 have served to further sore relationship between the two institutions.[15]

The AU made a decision about the ICC at extraordinary summit on 21 October 2013 that no criminal charges can be brought against sitting a head of state or government.[16]The idea of establishing court in African continent was the subject of discussion in the OAU since so long as 1961.The first proposed continental court was African Court of Human and

[11] "Establishment of International Criminal Court over View" available at http:legal.un.org/ICC/generaloverview accessed 25, July 2016, p.28
[12] Ibid
[13]Pampazuka News, Supra note 9, p.23
[14]Esmael Ali Baye, "Judicial Enforcement of Human Right through Economics: Comparative Analysis With the African Court on Human and People Right" Thesis Submitted to Addis Ababa University School of Graduates Studies, Addis Ababa, June 2010, available at http://chilot.me//LLM Thesis paper accessed 12 July 2016,P.24

[15] Ibid
[16] AU*, Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec.1 (Oct 2013), Extraordinary Session of the Assembly of the African Union, Addis Ababa, 12 October 2013,Available at http://www.iccnow.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct2013.pdf, accessed 24 July 2016, p.45

People's Right (here in after, the African Court).[17]However, the African Charter on Human and People's Rights (here in after, ACHPR) was not signed until OAU summit in 1981.[18]This was due to the idea of drafting human right convention with an organ charged with its implementation began took root in the 1960s effect the proposal to create an African Commission on Human and People's Right (here in after, the Commission) was put forward for the first time during the first congress of African jurists organized on the continent after states become independence at the initiation of International Commission of Jurists (ICJ) in January 1961, in Lagos, Nigeria.[19]They were able to reach an agreement on the creation of the Commission.

The Commission began to work in 1987chargedwith the responsibility of protection and up holding human right instead of judicial power this was due to keep African tradition.[20]A yearlater, the secretariat of OAU, prompted by atrocities in Rwanda, commissioned to draw up a protocol on establishment of African Court of Human and People's Right.[21]In 1998, the OAU Head of State and Government (here in after, HSG) signed the protocol on ACHPRforestablishment of the African Court.[22]The African Court complements the commission and has a competence to decide all cases and disputes submitted to it concerning to interpretation of, application of the ACHPR, the protocol and any other human right instruments and any other legal opinion on matter relating to the charter or any other relevant human rights instruments.[23]

---

[17] Andreas Zimmerman and Galena Baumar, *Current Challenges Facing African Court of Human and People Right*, 2010, p. 43
[18] Ibid
[19] Germaine Garcia, *Introductory preface: African Charter and African Commission on Human and People Right*, 2014, p. 1-19
[20] Ibid
[21] Ibid
[22]Esmael Ali Baye, Supra note14, p. 25
[23]Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 10 June 1998,Art .2.

The establishment of AU involved the establishment of another court; the African Court of Justice (ACJ) in addition tothe human right court. Accordingly, the protocol of the court of justice of the AU was adopted on July 2003 and entered into force on February 2009.[24]The protocolis so far ratified by 16 states. The ACJ is the principal judicial organ of the AU and it has jurisdiction over all disputes and applications relating to the AU constitutive act, treaties and other related subsidiary legal instruments adopted within the frame work of the AU.[25] However, the court has not been operational.

On12 October2013, AU made decision that no charges can be brought against HSG.[26] Following this decision, the HSG adopted a protocol to merge the African Court on Human and People's Right and ACJ to form the African Court of Justice and Human Rights (here in after, ACJHR).[27]It is now waiting for 15 states ratification to enter in to force.[28]This was prompted by proliferation of courts that caused jurisdictional conflict between the two courts and to make the system more efficient by pooling onto one judicial organ.[29]

1.2. Statement of the Problem

The Malabo protocol established criminal law, general affair and human and people right sections. Based on the criminal jurisdiction provisions of the protocol, ACJHR will have jurisdiction to try 14 crimes.[30]Article 46 of protocol amendment, however, states that

[24] Amnesty International Peter Benson L.td, *The legal and Institutional Implication of the Merged and Expanded African Court*, 2014 , p.15
[25] Ibid, p,16
[26]NelagondleApandulanAmadhila,"Is the AU on International Criminal Court and the Adoption of Article 46/A Bias of the Protocol on Amendments to the Protocol on the Statute of African Courts of Justice and Human Rights un lawful under International law*",* Thesis submitted to University of Cape town, 2014, p.16
[27] Ibid
[28] Ibid
[29] Amnesty International, Supra Note 24, p.4
[30], The draftStatute of the African Court of Justice and Human rights Annexed to the amendment Protocol to the African Court of Justice and Human Rights 2014,Article 28/B

"no charges shall be commenced or continued before the court against any serving African union head of state or government or anybody acting /entitled/to act such a capacity or other state official based on their function during their tenure.[31.]

Head of state and senior government officials are therefore immune from being prosecuted by court for crime of genocide, war crimes and crimes against humanity.

On the contrary, Article 27 of the Rome Statute, state that

"Official capacity as head of state and government official are no entitled to immunity with regard to genocide, war crimes and crimes against humanity."[32]

Accordingly, HSG and officials are not entitled to immunity with regard to genocide, war crimes, and crimes against. But, when the protocol comes into force, the ACJHR will be the main judicial organ. The AU empowered the ACJHR to entertain issues of crimes, aggression and crimes against humanity. However, the protocol establishing the ACJHR does not say anything whether such Criminal Jurisdiction of the court shall be exercised in accordance with the provisions of Rome statue of ICC.

The ICC can only try cases where the domestic courts unable or unwilling genuinely to investigate or prosecute perpetrators. Above all, the establishment of ACJHR complicates the situation on the ICC.

Contradictory provisions from ICC and ACJHR at least, on face value, seem to be enough to create confusion about the intend motive of African states on the role of the ACJHR criminal jurisdiction and its relation with ICC. Therefore, the issue that whether establishment of African court of justice and human right and its operation will exclude ICC on African cases totally

[31] Id, Article46A
[32]The Rome Statute of the International Criminal Court document A/CONF.183/9 of 17 July 1998 entered into force on 1 July 2002,Article 27

is not clear. The interaction and status of the ACJHR and the ICC shall be made clear. With a broader perspective, this paper will assesses the criminal jurisdiction of African court of justice and human rights and what possible challenges and prospect will face the court when come in to force.

1.3. Objectives

1.3.1. General Objective

The general objective this research is to examine prospects and challenges that the ACJHRmay face with respect to its criminal jurisdiction.

1.3.2. Specific Objectives

Specific Objectives of the research are:

- To analyze the structure, power and operation of the Criminal Section of the ACJHR;
- To critically examine the possible relationship between the ACJHR and ICC;
- To identify what possible advantages the Criminal Section of the ACJHR may bring; and
- To identify what possible challenges the Criminal Section of the ACJHR may face.

1.4. Research Question

This research seeks to address one basic question of “what potential prospects and challenges will ACJHR face in its operation when it comes in to force?”

Furthermore, this question embraces several other indispensable questions including:

1. Why Africans found it necessary establish their own ACJHR with criminal jurisdiction?
2. How the new ACJHR criminal jurisdiction operates in lieu or besides the ICC?
3. What prospects may the Criminal Section of the ACJHR bring to the international criminal justice system?
4. What difficulties may the Criminal Jurisdiction of the ACJHR face in its operation?

1.5. Significance of the Study

Although the AU inestablishing its own ACJHR has some unique features the area has get great attention from international community. Academic writings on ACJHR as whole and the issue of relationship between this newly emerged organ and the ICC specifically remain hardly studied despite the fact that it needs critical reflection. This research will contribute to comprehensive and detailed manner study of the issue. Therefore I am hopeful that the paper will have an immense contribution in addressing the issue properly and fill the gap in academic sphere.

The paper will further serve as an important input for students, researcher and policy makers who are interested in the ACJHR and it's with relation with UN counterpart there will not be a doubt that this will motivate others to conduct further research of the area so the related issue to ACJHR will get proper attention from researcher.

1.6. Methodology

The research is purely qualitative research. The researcher has utilized both primary and secondary data sources. The primary sources includes: statutes, resolutions, official documents and other similar documents. With regard to secondary sources: literatures, reports, journal articles and other similar sources are utilized. These documents are critically analyzed.

1.7. Scope and Limitation of the Study

The researcher will only focus on exploring what prospects and challenges ACJHR potentially face in its criminal jurisdiction operation by inferring from the genesis of the newly emerged courts. It is with the intention to serve the main theme of the paper which is found one what will be the prospects and challenges that may face ACJHR.

The researcher faced a number of limitations and challenges. First of all material challenges it is difficult to get different sources that serve as secondary qualitative data that laws school does not have enough reading materials and internet services. Financially challenge is another problem to the researcher to cover the existing cost of inflation.

1.8. Organization of the Study

The paper is organized in to six chapters. The first introductory chapter introduces to the research proposal. The second chapter will give historical overview over international criminal courts. Chapter three of the papers discusses the ACJHR in general. Chapter four focuses on the criminal jurisdiction of the ACJHR.Chapter five of the paper is assigned to make in-depth analysis on the prospects and challenges of the criminal jurisdiction of ACJHR. The final chapter will come up with conclusion and recommendations.

Chapter Two: Africa and Criminal Courts

2.1. Introduction

The international community agrees that crimes against human kind should be prosecuted and punished pursuant to international law.[33]International crimes are considered to be heinous and crimes against every human kind and their gravity necessitated several tribunals to prosecute and punish perpetrators thereof.

This chapter attempt to look available forums for trying international crimes and will include the possibility of prosecuting international crimes through universal jurisdiction and international criminal tribunals such as ICC, ICTR and Special Court of Sierra Leone (SCSL). This chapter also looks at the AU's decision on its relationship with ICC and its legal implication. Besides, what factors militated in favor of the ACJHR proposed criminal jurisdiction will be discussed.

2.2. Forums to Punish International Crimes Committed in Africa

Forums exist to prosecute offenders of the international crimes in Africa. This section tries to show these forums including National Court as the primary Forums to prosecute international crimes the ICTR, SCSL and ICC.

2.2.1. National Courts

International law recognized four bases of for states jurisdiction to apply its domestic laws and to prosecute international crimes.[34]Particularly "the universality principle" is the most important basis of jurisdiction in cases of massive human right s violation as it permit states to prosecute international crimes considered to be heinous or harmful to mankind, regardless of any nexus to the state may have of prosecute international

[33]DF Orentlicher, *Setting Account: The Duty to Prosecute Human Right Violation prior Regime*, 100 Yale Journals, 1991, p.25

[34] KC RANDALL, 'Universal Jurisdiction under International *law*',(1998) ,TEXAS law Review Law 785-89 quoted in Rainer Abraham BISCHOFF 178; These are Territorial ,Nationality passive personality and universal principles.

crimes under customary international law.[35]It is believed that domestic courts shall maintain the primary jurisdiction to try international crimes.[36] For example the Lubanga case before the ICC considered to bebetter if remained in the Democratic Republic of Congo.[37]This is due to several reasons such as enhancing government legitimacy, to provide the people of DRC with benefits of national prosecution, to encourage domestic changes and the availability of police and legal force to hold the case.[38]Responsibility for various atrocities in peace and war, domestic legal system remain the primary for a rendering individual accountable for these acts.[39]Both treaties and customary international law have envisaged domestic courts as the primary arena for the trials those accused of act incurring individual responsibility under international law.[40]Genocide, crimes against humanity, war crimes and aggression crimes are subjected to universal jurisdiction.[41] Some African countries used their national jurisdiction such as Rwanda,[42]both under national courts and under traditional justice system called Gacaca and Ethiopia[43]to try international crimes in their domestic courts. Recent practice shows that bystander states that are willing to exercise universal jurisdiction over international crimes can be successful, providing that number of practical cumulative requirements met.[44]These include sufficient resource to carry out the investigation, the prosecution,

[35] Ibid, p.45
[36] G.A. Aneme, *Apology and Trials: the Case of Red Terror in Ethiopia*, 2006, African Human Right Journal, p.75
[37] R Bawman, L*ubanga and Democratic Republic of Congo Case by African Human Right Court* , 2008, para.45
[38] J. Stigen, *The Relationship between International Criminal Court and the National Courts Complementarily principle*, 2008, p.20
[39] Ibid
[40] R Bowman '*Lubanga, the DRC and the African Court: lessons learned from the first International Criminal Court case*' 2007 *African Human Rights Law Journal* 420,P.453
[41] Ibid
[42] By 2008, more than 10,000 had been tried in the Ordinary Courts and the *Gacaca*Proceedings are much faster than Ordinary Trials and have Already Disposed of over 70 cases.
[43] By 2008, the Government had charged over 5000 Individuals for Offenses including Genocide. The Offenders are leaders of the past Regime of the Dergue which is considered as Repressive including the ex-president Mengistu Haile-Mariam in Absentia.
[44] C Ryngaer, *The International Criminal Court and Universal Jurisdiction: a Fraught Relationship*?,New Criminal Law Review, 2009, P.505-506.

and the trial that is the state should, for instance be able to investigate site investigation and to fly in witness for trial.[45]It should be able to have accessed the crime scene in the territorial state cooperation.

Of the latter state is crucial as lack of access will normally translate into lack of evidence to support the case against the presumed offender. If these cumulative requirements are not satisfied, there is reason to caution and even distrust national proceeding under universality principle.[46]

2.2.1.1. The Ad-hoc Tribunal of ICTR

There are two ad hock tribunals that are established by the United Nations Security Council (Here in after, UNSC) under chapter VII of UN charter. These are ICTR, SCSL and ICTY. In light of the international crimes in Africa, it is relevant to talk about SCSL and ICTR.After the violence that devastated Rwanda in 1994.[47]The UNSC passed a resolution expressing its alarm at violation of international law and determining that the conflict represented threat to international peace and security.[48]On 8 November 1994, the UNSC established the ICTR[49]which is based in Arusha, Tanzania.It is established for the first time as international tribunal to adjudicateonthe law of genocide.

The Rwanda government initially objected the ICTR because of the latter's ability to order death penalty; its implied temporal jurisdiction and concerns that it seats is far from Rwanda.[50]The ICTR has limited jurisdiction to certain international crimes committed in Rwanda by Rwandan nationals in the neighboring state between Jan. 1994 and Dec. 1994.[51]The subject

[45] Ibid
[46] Ibid
[47] Ibid
[48] D.J. Bederman (Ed), *International Decisions,* American Journal of International law, 2004, P. 325
[49] Ibid
[50] UNSC Res 995 1994, Report of the Secretary General pursuant to paragraph 5 of the same Resolution, 13 Feb 1995, UN Doc S/1995/134, para 6 (reasons for creating Tribunal under Chapter VII).
[51]Statute of International Criminal Tribunal for Rwanda, UN Doc S/RES/955, 8 November 199 Art.1 & 7.

matter jurisdiction of the ICTR extends to genocide (including conspiracy, incitement and attempt to commit genocide), crimes against humanity and war crimes in light to the specific nature of the conflict.[52]

The ICTR had considerable impact on the development of international criminal law specifically the law on genocide and sexual offence.[53]However, the ICTR had its own challenges. One of such challenges facing the Tribunal from its inception was delicate relationship with Rwanda Government.[54]Despite their shared interest in bringing authorities to justice, it has caused also friction between the two.[55]Other challenges include the government's decision to suspend cooperation to the Tribunal, specifically its refusal to grant document to witnesses to travel to Arusha and withholding documents from investigators.

2.2.1.2. Special court of sierra Leone,

Since the year 2000,hybridor internationalized judicial structures have been set up a number of places like East Timor, Sierra Leone, Cambodia,Kosovo,Bosinia and Iraq[56] to prosecute persons suspected of committing serious crimes in the territory of concerned States. Sierra Leone civil war was marked by cruelty and barbarism.[57] The war erupted when rebels calling themselves "The Revolutionary United Front (RUF)" invaded Liberia with the support of Charles Taylor the then Liberia rebel leader who would later become president of that country.75 million civilians were killed, raped, kidnapped and subjected to amputation of limps.[58]Crimes

[52] Id, Article 2-4
[53]K.D. Askin, *Gender Crimes Jurisprudence in the ICTR: Positive Developments in International Criminal Justice* 2005, p.231
[54] S.R. Ratner, J.S. Abrams & J.L. Bischoff, *Accountability for Human Rights Atrocities in International law beyond the Nuremberg legacy,* 2009, p.43; Reservations to the Genocide Convention, ICJ Opinion (28 May 1951) ,1951, Para.23; *Prosecutor v GoranJelisic*, (Case No.IT-95-10) Trial Chamber, Judgment, (14 December 1999), Para 59; *Prosecutor v Musema*, (Case No. ICTR-96-13-A), Trial Chamber, (27 January 2000), Para 15; *Prosecutor v Rutaganda*, (Case No.ICTR-96-3). Trial Chamber, (6 December 1999), Para 46
[55]MH Morris, *The Trials of Current Jurisdiction: the Case of Rwanda,* Duke Journal of Comparative and International law*, 1997, P*. 349
[56] Ibid
[57] Ibid
[58] Ibid

against humanity and war crimes were committed during this non-international armed conflict between rebel group forces and the regular government forces from 1991to 1992.By Resolution 1315/2000,the UNSC decided to establish the SCSL on basis of agreement between the UN and the Government of Sierra Leone.[59]

The SCSL was a sui generis unique institution independent of Sierra Leonean system as the court conceives itself as international institution with attributes of similar to those the ICTY and ICTR.[60] However, unlike the ICTR and ICTY, the SCSL was established under chapter VI of the UN Charter. The SCSL is hybrid criminal court. Judges, lawyers and other appointed staff applies both international law and domestic laws.[61] The trial and appeal chambers of the SCSL have, however, held that the SCSL is truly international tribunal.[62]It was argued that the court has the characteristics like that of ICC, ICTR and ICTY in terms of personal and subject matter jurisdiction. The SCSL consisted of two trial chambers with two international and with one Sierra Leone judge; an international prosecutor and deputy prosecutor.[63]Based on the statute's mandate the SCSLfocused on those who bear the greatest responsibility for the atrocities in Sierra Leone.[64]The prosecutor has indicted only Taylor and major leaders of the rebel group as defendants. While its work has lasted longer than anticipated, the court represented a qualified success due in no smaller part to continuous infusion of technical expertise from well-trained international

[59]UNSC Res. 1315(2000) of 14 August 2000, (UN Doc.S/RES/1315), Para.12
[60]*Prosecutor v Taylor* Case No.SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May2004Para 38,42, 53.
[61]The Statute of the Special Court of Serra Leone adopted by Security Council resolution 1315 (2000) of 14 August 200014(1) & (2)
[62]*Prosecutor v Taylor* Case No.SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, paras 40-42; *Prosecutor v Kallon*Case No. SCSL-04-15-AR 72, Norman (Case No. SCSL-04-16-72AR, Kamara (Case No. SCSL-04-16-AR72), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, Para 55.
[63] Ibid
[64] Supra note 61, Art 1(1)

legal staff.[65]The SCSL jurisprudence has grappled with a number of novel issues in international law.[66]

As briefly discussed, international crimes are being committed in the continent and there have been proposalsto establish ad-hoc or special tribunals after a massive human right violation. For instance proposal were made to establish special court to try the 2007 post-election violence in Kenya[67] and the situation in Darfur, Sudan.[68] However, this can't be ever-lasting solution as it will be inconvenient and expensive to establish such tribunals all over the continent whenever such massive violations happen.

2.2.2. The International Criminal Court

2.2.2.1. Introduction to ICC

The ICC is a permanent international court established for prosecution and punishment of persons most responsible for international crimes; crimes of genocide, war crimes, crimes against humanity and the crimes of aggression.[69]Its temporal jurisdiction is on international crimes that have been committed after the Rome Statute entered into force that is July 2002.[70] When a state becomes a party to the Rome Statute, it immediately accepts the jurisdiction of the court over crimes that will be committed by its nationals[71] or any one territory.[72] The principle of complimentarily, which

---

[65]A Cassese, *Report on the Special Court of Sierra Leone,* (12 December 2006, Para. 8.
[66] Ibid
[67] Kenya/post-election violence: *UN Human Rights Chief Calls for Special Tribunal to Fight Impunity* Available on linehttp://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/FD956512C98A6469C125773C00545305?Open Document (Accessed14October2016); also available on line at<http://blog.marsgroupkenya.org/?p=1076> (Accessed 14 October 2016 ,p.45
[68]Report of the African Union high-level Panel on Darfur (AUPD) Peace and Security Council 207 the meeting at the level of the Heads of State and Government 29 October 2009 Abuja, Nigeria psc/ahg/2(ccvii), Para. 86-87
[69]MarthaBedaneGuraro, *Furthering Justice or Prompting Impunity? Critical analyses of the proposed Criminal Jurisdiction in African Court of Justice and Human Rights*, A Thesis paper submitted in partial fulfillment the requirement of degree LLM on human rights and democratization in Africa at the catholic university of central Africa Yaoundé Cameron, 2009, at http://www.amazo.com/.../3847335073/PDF file accessed on 12 August, 2016, p.27
[70] Ibid,
[71] Ibid
[72] Ibid,

is one of the principle on which the ICC Regime founded onrender the case in admissible if the state having jurisdiction over the crime is investigating or prosecuting the case unless the state is unwilling or genuinely unable to carry out the investigation or prosecution.[73]Anew system of international criminal jurisdiction consisting of the two levels which compliments each other is created under the ICC.The first level is constituted by states and their national criminal law system and the second level is constituted by the ICC.[74]As confirmed by the principle of complementarily, states continue to have the primary duty to exercise their criminal over those responsible for international crimes.[75]

There are three triggering mechanisms for the court to exercise jurisdiction. Firstly, when a situation in which one or more of the crimes appears to have been committed has been referred to the ICC prosecutor by state party.[76]Secondly, when a situation in which crimes appears to have been committed referred to the prosecutor by UNSC acting under chapter VII of the UN Charter.[77]The third path is when the prosecutor himself initiates investigation acting in his*propriomotu* power.[78]

2.2.2.2. African Cases in ICC

All cases that the ICC has so far prosecuted are African Cases. The proceeding subsection will try to look at these cases. The immediate factor that led the AU to propose the expanded jurisdiction of the ACJHR is all the indictments of the ICC are in African. It can be recalled that the AU was the main actor in the establishment of ICC. However, the AU has now changed its position and relationship with ICC after the indictment. After the

---

[73] Ibid,

[74]HP Kaul '*The International Criminal Court: Current Challenges and Perspectives*' *Washington University Global Studies Law Review* (2007) 577 also available at http://law.wustl.edu/WUGSLR/Issues/Volume6_3/kaul.pdf (Accessed 20 September 2016)

[75] HP Kaul, *'The International Criminal Court: Key Features and Current Challenges, in the Nuremberg Trials International Criminal law since 1945' (2006) 66 Washington University Global Studies Law Review, P.245*-246.

[76] Supra note 32,Article 14

[77] Id, Article13(b)

[78] Id, Article15(1)

indictment of Basher, the AU requested to defer the proceedings on President Basher in accordance with the Rome Statute's Article 16. The indictment by the pre-trial chamber by the ICC specifically results in high concern and criticism of the ICC by the AU member states. Sudan, not being member state to the ICC, Al Basher is the first sitting president to be prosecuted by the ICC.The other concern of the AU by the indictment of president of Sudan is that arresting and prosecuting would disrupt the peace process in Darfur.

Another ground breaking indictment that angers the AU is the indictment of Uhuru Kenyatta and William Ruto. The announcement of the 2007 presidential post-election results in triggered wide spread violence in Kenya laser from December 2007 to January 2008. More than 1000 people were killed and 600,000 civilians were displaced. Following this, ICC prosecutor initiated investigation in accordance with Article 15 of the Rome statute *proprio motu* on the basis of information on crimes within the jurisdiction of the court. Charges were brought against six citizens being of accused responsible for the violence.

2.2.3. The African Union Decision on ICC

The AUs souring relationship with the ICC was apparently revealed particularly when on 4 March 2009an arrest warrant was issued against the incumbent president of Sudan, Omar Hassan Al Basher and other members of Sudan regime for international crimes allegedly committed in Darfur.[79]On March 2010, the pre-trial chamber authorized the prosecutor to investigate the 2007 post-election violence in Kenya. Charges were brought against six Kenyan state citizens accused of being responsible for the violence. The current head of the government, Uhuru Kenyatta and his deputy William Ruto stand accused of being criminally responsible as direct coordinator pursuant to article 25/3/aof the Rome statute for crimes against humanity. Kenyatta faces charge of murder, deportation, forcible transfer of

[79]Supra note16 Para.86-87.

population, rape, persecution and other inhuman acts.Ruto faces charge of murder, deportation, or forcible transfer of population and persecution. On 11 and 12 of October2013, the AU made a decision about its relationship with ICC at an extraordinary summit in Addis Ababa.[80]The key points of the AU assembly decision were the following.[81]

- In order to safeguard the constitutional order, stability and integrity of the member states, no charges shall be commenced or continued before any international court or tribunals against any serving head of state of AU.
- The trials of Kenyatta and Ruto should be suspended until they complete their terms of office.
- The process to expand the mandate of the African Court to try international crime should be faster tracked.
- The commission should expedite the processes of expansion of the African Court to deal with international crimes in accordance with the relevant policy organ and invite member states to support this process.
- African state parties to the Rome statute of ICC are requested to inscribe on the agenda of indictment of African HSG by ICC and its consequences on peace, stability and reconciliation at forthcoming session of the Assembly.
- African state parties to the ICC proposed relevant amendments to the Rome statute of ICC in accordance to Article 121 of the statute.
- Any AU member state which wants to refer the case to ICC may inform and seek advice of the AU.
- Kenya should send a letter to UNSC requesting for deferral in accordance with Article 16 of the Rome statute in cases of Kenyatta and William Ruto.

[80]Id, 16 para 6.
[81]Id ,preamble , para.6

Besides, in the preamble of the AU decision, the organization reaffirmed its conviction against the abuse of the principle of universal jurisdiction and the activities of the ICC because of its method impede and jeopardize the efforts to promote peace and security.[82] The AU reiterated that it was concerned about 'politicization and misuse of indictment' against sitting African leaders, specifically unprecedented proceeding against head of state by ICC.It also underscored that the unprecedented proceeding of Kenyatta and Ruto could potentially undermine peace, security and stability in Kenya as well as in other member states reconciliation, reconstruction, and the normal functioning of the constitutional institution. The AU also reaffirmed the principle of state immunity as derived from customary international law.[83] Since it needs to be considering the legal implication of the AU decision on ICC on its member states, it will come in next sub topics.

2.2.3.1. Implication of AU's Decision on ICC

It is clear that the AU's decision on its relationship with ICC contradicts with the AU's commitment to reject impunity and prosecute those that commit international crime, regardless of official capacity.[84]The AU decision is in no way legally binding on ICC or state parties to the Rome statute. Therefore, the decision will have no legal impact on the ICC abilities to exercise its jurisdiction in Africa who ratified the statute.

However, it may instigate African member states to the ICC to leave the court. This is validated by recent withdrawals of some African States. Now three African states, South Africa, Gambia and Burundi, have made official decisions to leave ICC. Concerns are high that more African countries now will act on years of threats to pull out amid accusations that the court unfairly focuses on the continent. Withdrawal doesn't happen when a country announces it.[85] The country must officially notify the UN secretary-

[82] Id , para.46,p.24
[83] Ibid
[84]84Ibid
[85]http://cnsnews.com/news/article/ap-explains-why-african-states-have-started-leaving-icc Accessed on 12 July 2016, P.34

general of its intention to leave, and the pullout becomes effective one year after the receipt of that notice.

Chapter Three: The African Court of Justice and Human Rights

3.1. Introduction

This chapter discusses the historical developments to the ACJHR. Before the discussion on ACJHR there needs to be an overviewoncourtsprecursor to

the ACJHR; these are the African Court and ACJ. Furthermore, the chapter addresses competence of the ACJHR, institutional structure, applicable international law, allocation and appointments of the judges, complaints to the court, and enforcement of its decision.

3.2. The African Court of Human and People's Rights

The proposal to establish a court on the African continent to try international crimes is not recently a rise issue. The Malabo protocol has been the culmination of the process that began in 1981 with the adoption by the OAU theACHPR.[86] This Charter entered into force in1986 and has since been ratified by 53 of 54 member of the AU.[87]The African commission is the supervisory organ tasked with oversight and interpretation of the Charter.[88]In 1998, protocol to the charter was adopted that created the African Court of Human and People's Rights.[89] The protocol entered into force on 25 January 2005.Out of the possible 54 member states to the AU, currently 27 states are parties to the court.[90] Individuals and Non-governmental organizations may also institute complaints to the court if the defendant state makes a declaration in favor of individual communications.[91] Since 2008, 23 applications have been brought before the court. However, the continental justice hub is moving slowly as only two judgments are handed down to date.[92]

---

[86]The African charter on Human and People Rights, OAU/CAB/EG/6713/REVS/1982/1986, at http://www.achpr.org/files/instruments/achpr/banjul-charter-pdf accessed 12 July 2016, p.45

[87] South Sudan has yet to deposit an instrument of ratification to become state party to the charter.

[88] Ibid

[89] The protocol of the African charter on Human and people Right on the Establishment of AFCHPR /1998/2004,<http://www.achpr.org/files/instruments/court/establishment/achpr-inst-proto-court-eng-pdf accessed on12 july2016, p.65

[90] Ibid

[91] Article 34(6) of the Protocol provides for State Declaration Permitting Access to the AFCHPR by Individuals and NGOS once local remedies have been exhausted. To date, only seven member states made 34(6) declaration: Burikinafaso, Cote'divore, Ghana, Malawi, Mali, Rwanda and Tanzania

[92] The United Republic of TANZANIA vs. Rev. Christopher: The court considered the Right of the Citizens to Participate freely in the Government; the second is Abdul Nieviema, Tar nest zong, Basie Ilbloudo, Burkinabeon Human and People Right movement vs. the Republic of Burkina Faso related to the Protection of Journalist.

3.3. The African Court of Justice

The African Court of Justice has been second inter-state court structure in Africa. It is established in the AUs constitutive act of 2001.[93]The structure of the court was further developed in the 2003 Protocol to the court of justice.[94]The ACJ as institution known to, as intended as the principal judicial organ of the AU, with the authority to rule on disputes over the interpretation of the AU treaty and other subsidiary instruments adopted under the frame work of the AU.[95]Although the Protocol was adopted on 2003 and entered into force in 2010, in effect the court was still born and has been superseded by the protocol on the statute of ACJHR.[96]

3.4. The African Court of Justice and Human Rights

3.4.1. Background

Once after all, the adoption of the ACJ, The AUs concern and worry was about the proliferation of courts and lack of financial capacity in the continent.[97]The then chairperson of Assembly of AU and the Nigerian president Olusgun Obasango proposed that ACJ and ACHPR should be merged in to one judicial organ. In his remark he hinted that at the possibility of conferring the proposed merged court with criminal jurisdiction.[98]Following that the AU Assembly in 2007 commissioned legal experts to advice on the feasibility of the possible conjunction of the African Court and ACJ[99].Although the idea was not receptive to the idea, the AU Summit meeting in Sharm EL-Sheikh in 2008 decided that the two courts

[93]The Protocol of the ACJ of the AU Adopted and Enter into Force in 2003/2009 respective years. It has been ratified by 16 namely Algeria, Cameron, Egypt, Gabon, Gambia, Libya, Lesotho, Mali, Mozambique, Mauritius, Nigeria, Rwanda and South Africa, see at http://www.au.int/en/sites/default files/protocol-of-justice-of the-AU pdf file accessed on12 July 2016, P.5

[94] Ibid

[95] Ibid

[96] Ibid

[97] AU protocol on the Statute of ACJ, http://www.au.int/en/defualtfiles/protocol-statute-of-African-Court-of-Justice -and human right pdf accessed on 18 July 2016, p.34

[98] Amnesty International,supra note 24, p.23

[99] Garth Abraham*, Africa's Evolving Continental Court Structure; at the cross road?,* South Africa Institute of International Affair of African Perspective, Global Insight at DispaceAfrica.portal.org/saia-sop-209 pdf file accessed 23 July 2016, p.12

should be merged under the statute protocol of ACJHR 2008.[100]The AU decided that to adopt this new protocol for the integrated and extended mandate that takes additional criminal jurisdictional law.

3.4.2. Jurisdiction

The statute adopts as provide for two section within the ACJHR dealing respectively the 'General affair and Human right affair' each with eight judges.[101]Each of these sections has pre-trial, trial and appellate chambers. The general affair section has the competence to hear cases of article 28 of the Statute, except that human and people right issues.[102]The Human right section has the competence of hearing human right issues the same power to that of ACHPR.[103]

There are however a few challenges with regard to the merging of the African Court and ACJ of the two courts. The process of replacing one court with another has its own fair share of complexities. From perspectives of, there is a complex task of trying to integrate the two separate courts that have two different protocols and different jurisdiction.

Some scholars argue that initially pointed out that merging the African Court and ACJ would face challenges based on the fact that the two courts have two different jurisdictions; because of they were initially established for two different reasons.[104]The human rights court established to protect and promote human rights, there for its jurisdiction extends all cases and dispute and other human right instruments that have been ratified by the state at issue.[105]The court of justice was established to deal with disputes between states and it has broader which cover all AU treaties and convention, international law and bilateral treaties and convention between

[100] Ibid
[101] Id.p.35
[102] Ibid
[103] Ibid
[104] Amdahl Thesis Paper, Supra Note 26, p.37
[105] Ibid

the AU member states.[106]As Kidlike argues that the merging of the African Court and ACJ would not such a huge problem with regards to the court's jurisdiction. That is why even though the human right section of the court can handle only human and people right case, the general affair section is not precluding from hearing cases of human right aspects.[107]He argues that the two section of the court share common jurisdiction in some cases .such an example is that the competence of the court of justice to deal with the right to property.[108]

The ACJHR has been given an extensive mandate in its statutes. The court generally merges the jurisdiction of ACJ and the African Court and takes an additional criminal law jurisdiction.[109]Each of these section have pre-trial, trial and appellate chamber. The ACJHR has a jurisdiction on three thematic areas: general affair, human right affair and international crimes.[110]The first are issue previously entertained by ACJ while the second encompasses the current mandate of the ACHPR.[111]Issues relating to the international crimes means the new jurisdiction cover the usual reference to genocide, crimes against humanity and war crimes.[112]The protocol does not stop herewith. It also mandates the court to entertain a number of issues including: genocide, war crimes, crimes of humanity, unconstitutional change of government, piracy, mercenaries', corruption, money laundering, trafficking in person, trafficking in hazardous waste, illicit exploitation of natural resource, the crime of aggression and inchoate offence.[113]

The entities that are allowed to summit a complaint to the court are state parties to the protocol, AU assembly, peace and Security Council; the

[106] Ibid
[107] Ibid
[108] Ibid
[109]GhetnetMetiku, *The African Court of Justice and Human Rights*, at http://www.slideshare.net/gmgiorgis/african-court-of-justice-and-human-right accessed 12 July 2016, p.5
[110] Id., p.6
[111] Ibid
[112] Supra note 30, Article 28/A
[113] Ibid

parliament and other authorized organs; staff member of AU on appeal and the staff of prosecutor.[114]The protocols on amendments has not increased in individuals and NGOS access to the court unlikely that of African court on human and people right. The statute of the protocol states that “African individual and NGOS “with observer status of the AU or its organ or institution can bring a case to directly to the court but only with regard to state that made declaration accepting the competence of the court to receive cases or application summated to it directly.[115]NGOS or individuals shall not apply or bring a case before court unless states party made a declaration in accordance to Article 9/3of the protocol on amendments.[116]

3.4.3. Applicable International Law Instruments

The ACJHR has the mandate to interpret and apply wide ranges of regional and international law instruments. It has innovative and providing comprehensive approach which has no limitation list of treaties and documents. In particular it will have the mandate to interpret and apply the AU constitutive act together with other treaties and all subsidiary legal instruments adopted within the frame work of the union orOAU.[117]It will also apply the African charter and its protocol on the rights of women in Africa, the African charter on the right and welfare of the child and any other legal instruments relating to human right ratified by the state concerned. In addition to its jurisdiction wide range of regional and international law instruments the ACJHR will has the following jurisdiction; On any question international law, all, acts, decision, regulation and directive of the organ of the AU, all matters provided for in any other agreements that state parties concluded among Themselves or with AU and which confer jurisdiction on the court and existence of any fact if

[114] Id, Article 16(1)
[115] Id, Article 30(f)
[116] Id., Article 9(3)
[117]Ibid

established would constitute a breach of obligation owed to state party or to the union.[118]

Whilst the use of treaties international legal instruments by the ACJHR as sources of applicable law it needs to have interpretative guide maybe appropriate. The ACJHR, particularly the criminal law section will need as a matter of priority its applicable core legal instruments including core elements of crimes, document and rule of procedure and evidence.[119]

3.4.4. Institutional Structure of ACJHR

The last proposal of the Malabo protocol restructured the AUs judicial institutional structure. The court shall be composed of four organs; the presidency, office of prosecutor (OTP), registers and defense office.[120]Furthermore, the protocol provides that the court shall have three section; general, human right and criminal section.[121]

The bureau of the court will be composed of president and vice president who will be elected by full court to serve the period of two years being the possibility of re-elected once.[122]The two function on full time basis and will be required to reside at the seat of the court.[123]The rest of the judges will perform their function on part time basis[124] with the AU assembly determine reserving the right to determine when all the judges of the court will serve on full time basis.[125]The OTP will be independent organ of the court[126] composed of prosecutor and two deputy prosecutor who elected by the AU.[127] It will be responsible for investigation and prosecution of the crimes listed in the protocol.[128] The prosecutor will serve for a seven year single

[118] Amnesty International, Supra Note 24, p.34
[119] Ibid
[120] Supra note 30, Article 2
[121] Id., Article 16 (1)
[122] Id., Article 22(1 and 2)
[123] Id. , Article 22(5)
[124] Id., Article 18 (4)
[125] Id., Article 8(5)
[126] Id., Article 2 and 22(6)
[127] Id., Article 22/A(1 and 2)
[128] Id., Article 22A(6)

terms[129]while its deputies serve only for four year terms.[130]The prosecutor will have the power to appoint staff OTP subject to the staff rules and regulation laid down by the AU.[131]There numeration and condition of service of the prosecutor and deputies will be determined by the AU on the recommendation of the court through executive council.[132]

The registry will be comprised of registrar and three assistance registrar appointed by the court[133]and assist by such other staff as maybe necessary for effective and efficient performance of the function of the court.[134]Like the prosecutor, the register will serve for a single and non-renewable terms of seven years.[135]The assistance provides for the Establishment by the registrar of victims and witness unit.[136]This unit will be responsible for providing protection measure and security arrangement, counseling and other appropriate assistance to witness and victims who appear before the court. The statute specifically provides that the staff witness and victims unit shall be included in experts in the management of trauma, Sexual violence.[137]The registrar also establishes within the registry of detention management staff that is charged with managing condition of detention of suspects and accused of person.[138]The defiance office will be responsible for protecting the right of accused and suspected and providing support and assistance to any defense counseling appearing before the court.[139]The statute also provides the AU assembly will establish within the jurisdiction of the court fund trust for legal aid and assistance for the benefits of the victim and their families.[140]

[129] Id., Article 22A(3 and 4)
[130] Id., Article 22(A)(9)
[131] Id., Article 22A(10)
[132] Id., Article 22B (1)
[133] Id., Article 22B(2)
[134] Id., Article 22 B(7)
[135] Id., Article 22 B(3)
[136] Id., Article 22B(4)
[137] Id., Article 43A(6)
[138] Id., Article 22 (9)(B)
[139] Id., Article 22(1 and 2)
[140] Id., Article 22 (C)(7)

3.4.5. Nomination, Appointment and Allocation of Judges

The ACJHR will be composed of 16 judges who are nationals of state party to the protocol[141] and elected among persons of high moral character who possess the qualification of required in their respective countries for appointment to the highest judicial office and or juries-consultants of recognized competence and expertise in international law, international human right law international humanitarian law, or in international criminal law.[142]The judges shall be elected by the AU executive counsel and appointed by the AU.[143]The assembly is required to ensure that there is equitable representation of the regions and the principal legal tradition of the continent in the composition of the court.[144]The assembly is also required to ensure equal representation of the gender in the court.[145]For the purpose of election each state party to the protocol may nominate up to two candidates.[146]States are also chose the section of the court which they wish their nominees to be placed if they are elected.[147]

The procedure to allocation of judges to the various section of the court spelled in to two separate provision of the statute Article 16/3 and Article 22/3. The researcher is concerned here that there is apparent conflict with thoseprovisions. Article 16/3 provides that allocation of judges in the three respective section and chambers shall be determined by the court in its rules.[148]Furthermore Article 22/3 provides that “the president and vice president shall in consultation with member of the court and as provided for in the courts rules assign judges to the section”. This may help in ensuring both capacity and independence of those appointed but may need to be matched with an overall appointment mechanism that insures political independence. However, Article16/3 and Article 22/3 aren’t in line with

[141]Ibid
[142] Id., Article 3(1)
[143] Id., Article 4
[144] Id., Article 4
[145]Id., Article 7(1)
[146] Id., Article 7(4
[147] Id., Article 3(4
[148] Id., Article 16(2)

Article 6/2 which provides that" the chairperson of the AU commission who will separate out list of candidates into the different section prior to their actual election." This shows that in practice which judge will sit in various section will be determined not by the court but by the AU.

3.4.6. Mechanisms of Enforcement of Courts Judgments and Financial Sources

Once after all of its decision passed it will be enforced. Article 45/1 and 45/2 of the protocol on the on amendments provides that if it is determined that there has been violation of crimes in the statute the court shall establish in the rules of the court principles rehabilitation. The court either up on requestor on its own motion in exceptional circumstance determine the scope and extent of any damage loss or injury to its own international criminal jurisdiction. The court can directly order against the convicted person specifying appropriate reparation or in respect of victims including restitution, compensation, and rehabilitation.[149]

Decision of the court is binding on the parties to a dispute.[150]When the party fail to comply with the judgment the court shall refer the matter to the assembly which shall decide up on the measures to be taken to give effect to that judgment and decided to impose sanction on that state.[151]However there is skepticism about the courts ability to enforce its judgment. It is the concern of chapter five of the thesis. With regard to the financial and funding sources of the court the preamble of the statute of the ACJHR provides that "state parties recall their commitment to take all necessary measures to strength their commitment on institution and to endow them with necessary powers and resources to carry out their mission

[149] Id., Article 6(1)
[150] Id., Article 46
[151] Id., Article 46 (4)

effectively."[152]The main reason to merge the two courts was lack of financial capacity that caused by proliferation of judicial institution in the continent and to make cost effective.[153]Funding of the court however consider to be as a challenge.

Chapter Four: Criminal Jurisdiction of the African Court of Justice and Human Rights

4.1. Introduction

The AU adoption of the protocols of the statute of ACJHR underscores that it is the first time that head of state and governments give immunity in international criminal law.[154] So that the chapter tries to assess the legality of immune head of state and government from the international law principles of individual criminal responsibility; like Rome statute of ICC and customary international law unlike the ACJHR which provides "granting immunity to sitting head of state and government officials from criminal prosecution in the court".[155]

The international criminal section of ACJHR divided onto three chambers: pre-trial chambers, trial, and appellate chamber.[156]Each chamber or section is believed to be having 16 judges who are nationals or member of states to the protocol.[157]According to the statute of Article 28 of the Malabo protocol explicitly mandated to adjudicate crimes of genocide, crimes against humanity, war crimes, the crimes unconstitutional change of government, piracy, terrorism, corruption, money laundering, trafficking in person, trafficking in hazardous waste, trafficking in drugs, illicit exploitation of natural resource, the crime of aggression in its international criminal

[152] Id., Preamble para.2
[153] Ibid
[154]NelagoNpandulan.AmadhilaThesis, Supra Note 26, p.45
[155]Supra note 16 Para 5
[156]Supranote 30, Article 16(2).
[157] Id., Article 21

section.[158]Except for the first four crimes, the rest are new developments in assuming jurisdiction in the ACJHR criminal section.

4.2. The AU's Power to Establish a Criminal Court

AU's power to establish a criminal jurisdiction for prosecution of international of crimes in Africa must be in line with international law specifically under the AU constitutive act and UN charter.

4.2.1. The UN Charter and ACJHR'ProposedCriminal Jurisdiction

The ACJHR proposed criminal jurisdiction to try international crimes is in conformity with the obligation of African states under the AU and under international law or UN Charter. Even though there is no specific obligation under international law or Un Charter either allowing or prohibiting intergovernmental organization the like AU to establish criminal jurisdiction to try international crimes, deep analysis of Article 52 peace and security are appropriate for region action provided that such arrangements the Charter will answer the question whether the proposed criminal jurisdiction is in line with the Charter or not Article 52 reads: "nothing in the present charter precludes the existence of regional arrangement or agencies for dealing with such matter relating to the maintenance international or agencies or and their activities are consistent with purposes and principles of the UN.[159]

The AU considers itself as regional organization within the meaning of above provision.[160]However there is dual criteria to determine whether the organization is regional or not. First the organization should play in the maintenance of international peace and security as is appropriate action for regional and the objective of the organization and its activities should be compatible with the purposes and principles of the UN.[161]

[158] Id., Article 28
[159]The United Nation Charter, 1945, Article 52
[160] Ibid
[161] Supra note 68 Article 17 (2)

Girmachew argues that can be characterized as regional organization under Article 52/1 of the UN charter since the AU plays a role in the maintenance of peace and security in Africa and observes the purposes and principles of the UN.[162]One of fundamental question that needs to be answered in addition is whether the prosecution of international crimes in Africa fall with the scope of the provision specifically with in the "the maintenance of international peace and security" It can be recalled that the situation in Darfur Sudan is referred by the UNSC resolution 1593 acting under chapter seven[163] to the ICC for investigation after the report of international commission inquiry on Darfur Sudan which characterized the conflict having crimes against humanity and war crimes.[164]It can also be recalled the UNSC can pass a resolution under chapter seven when it considers a situation as international peace and security. For instance the Resolution 1593 the UNSC decided that refer the situation in Darfur Sudan by determining that the situation in Sudan continued constitute a threat to international peace and security. Furthermore, the preamble to the Rome statute specifically recognized international crimes to be a threat to international peace and security.[165]With this analysis it can be concluded that the existence of international crimes of Genocide, war crimes, crimes against humanity and crimes of aggression as basis for regional organization like AU to take appropriate action such as intervention and prosecution of international crimes. Hence, the proposed criminal jurisdiction is in line with UN charter.

[162]Constitutive Act, Article 17 (1), Coalition for an Effective Court on Human and People Right Darfur consortium and other organizational implications in the African Court of Human and People Right being empowered to try International Crimes such as Genocide, Humanity, War crimes and Aggression.
[163] Constitutive Act Art 3(f) and (e); 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 < http://www.africa-union.org/root/au/auc/departments/psc/amisom/amisom.htm > (Accessed 09 October 2016, p.23.
[164]Ibid
[165] United Nation Security Council Resolution s/RES/1593, 31 march, 2005, para.5

4.2.2. AU'sConstitutive Act and the ACJHR Proposed Criminal Jurisdiction

The other multilateral treaty that must be observed in light of the proposed criminal jurisdiction of the ACJHR is the AU constitutive act. The question that posed here is that whether the constitutive act of the AU grants the power to establish a criminal jurisdiction to try international crimes. The AU constitutive act grants the AU assembly to establish any organ of the union.[166]The court of justice and human rights is established as court of the union, hence the extensive jurisdiction of the ACJHR can be said that in line with the constitutive act.

Furthermore among the principles and objectives of the AU regional integration, peace and security, protection of human rights and respect to democracy and rule of law can be mentioned.[167]It is important to consider that any consideration whether or not to expand the jurisdiction of ACJHR must be governed by the obligation under taken by the state parties to the constitutive act of the union to promote and protect human and people rights in accordance with the ACJHR and other relevant human right instruments.[168]

AS mentioned the second chapter, the ACJHR will have the wide jurisdiction to entertain matters arising from instruments that are ratified by the states and any matters arising from international law. Most African states are state parties to major international instruments that specifically define crimes and put an obligation on them to prosecute and punish such international crimes. Furthermore the prosecution of crimes is considered to be to have evolved the rule of customary international law (jus conges norm) that applies to every state without the need to show that African states are a party on instrument.[169]Once operational, ACJHR will have

[166]Constitutive Act of the African Union adopted in Lomé, Togo on 11 July 2000 and entered in to force on 26 May 200 Art.9(d)
[167]Id Arts 3 & 4.
[168]Supra note 30, Art 28.
[169] Look at art 5(1d) of the Constitutive Act in line with ACJHR Protocol Art 3.

automatically jurisdiction over international instruments that African states are party to. Hence it can be argued that the proposed jurisdiction of the ACJHR to try international crimes in line with the constitutive act of the AU.

4.3. Individual Criminal responsibility under international law

One of the founding principles on which the AU, through its constitutive act is apparently based on "condemnation and rejection of impunity"[170]Indeed each of the decision of the AU assembly with the ICC has contained a clause reaffirming the commitment to fight against impunity that of July 2012 is typical.[171] Paradoxically, however, commitment is qualified; head of state and government officials are to enjoy immunity. Article 46/A of the Malabo protocol[172] reads:

"No charges shall be Commenced or continued before the court against any serving AU head of state or government or any acting or entitled to act in such capacity or other state official based on their function during tenure office."

It would appear that ensuring immunity for head of state and senior state official is the primary reason for the establishment the expanded court. The dominative view among African leaders as reflected in the position of the AU is that head of state and senior state official must be accorded absolute immunity.[173]

International law imposes right and duties not only on states but also on individual .Nothing the concern that international law produced no

[170] Supra note 166, Article 4(h) and (o)
[171]A decision on the Implementation of the decision of International Criminal Court /ICC/EX./CL/73/(XX)Assembly/AU/DEC/419,AThttp://www.au.int/en/sites/defualtl/file/ Assembly/%20AU%DEC%20416-44920 –E FINAL –PDF-ACCESSED 23 July 2016, Para 3
[172] AU, *Decision on the Implementation of the Decisions of the International Criminal Court (ICC)*,EX.CL/731(XXI)'Assembly/AU/Dec.419,http://www.au.int/en/sites/default/files/ Assembly%20AU%20Dec%20416-449%20(XIX)%20_E_Final.pdf, accessed 24 July 2016, p.12
[173] AU, *The Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs, supra note 30* Article 46 A.

punishment for actors with in sovereign states who committed offence against the law of nations and the law of war.[174]The Nuremberg judgment held that “crimes against international law were committed by men and not abstract entities” and that international law could only be enforced by punishing individuals who committed such crimes.[175]Article 7 of the Nuremberg charter provided that “the official position of the defendant not exempt that individual from criminal responsibility.”[176]This includes head of state or responsible officials or government.

The Nuremberg charter has since become part of international law. In 1946 its principles were adopted by the UNGA resolution 95.[177]These principles have also been adopted in the statutes of previous international tribunals and hybrid courts such as ICTR, ICTY and SCSL and the Genocide Convention.[178]Article 25 of the Rome statute reflects these principles of customary international law with regard to individual criminal responsibility.[179] It provides that in individual who commits crimes within the jurisdiction of the court shall be held individually responsible and liable for the punishment in accordance to the statute.

Despite this established customary international law a sitting head of state has never faced proceeding before an international court. For instance one could argue that, however though the ICC proceeding against Kenyatta and Ruto do not violate the principles of head of state immunities with regard to individual criminal responsibility, though they are still in office.[180]The well-

[174] International Military Tribunal Judgment of 1 October 1946. The Trial of German Major War Criminals.Proceedings of the International Military Tribunal sitting at Nuremberg, Germany.Part 22, 22 August 1946 – 1 October 1946, Para. 446
[175] Ibid
[176]The International Military Tribunal, 1945,Article 6(a)-(c)
[177] Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal A/Res/1/95, 11 December 1946
[178] The 1949 Versailles Treaties: 1945 Charter of the Military Tribunal at the Nuremberg: Statutes of Yugoslavia and Rwanda ALL has Articles of which expressed that Individual Criminal Responsibility exist irrespective of that Individual Official Capacity.
[179]The Rome Statute of the International Criminal Court document A/CONF.183/9 of 17 July 1998 entered into force on 1 July 2002, Article 27
[180] Ibid

known arrest warrant case Belgium vs. DRC by ICJ held that Belgium could not exercise jurisdiction over the ministries of foreign affair because the rule that governed the jurisdiction of national courts were not the same as that of that governed the jurisdiction of international courts or tribunals.[181]The court did, however that state immunity from jurisdiction did not equate to impunity with respect to crimes committed by that individual.

Indeed, while African states themselves have failed seriously to embrace the exercise of universal jurisdiction against high ranking officials whether in or out of the office charged the commission of international crimes it was the use of universal jurisdiction against senior Rwandese official's a decade ago that sparked the initial call for an African court with jurisdiction over international crimes.[182]The ICC's indictment of Al Basher and latter Uhuru Kenyatta and Ruto further provoked sufficient outrage to form the basis for the charge by some African leaders that ICC was biased against Africa. In 2012 the AU assembly endorsed a request for an advisory opinion from ICC on the question of immunities "under international law head of state and senior state official from the statutes that are not parties to the Rome statute.[183]At its extraordinary summit in October 2013, the assembly formally decided that

"No charges shall be commenced or continue before any international tribunal or court against any AU head of state and senior government officials or anybody acting or entitled to act in such capacity during their tenure office."[184]

[181]*Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* Judgment I.C.J. Reports
2002, p.3, Para. 56
[182] Ibid
[183] Garth Abraham, Supra Note 99, p.12
[184]AUDecisiononAfrica'sRelationshipwithInternationalCriminalCourtICC/EXT/ASSEMBLY/AU/DEC/,HTTP://www.iccnow.org/documents/Ext-Assembly-AU-/DEC-DED-12 Oct, 2013 – pdf file accessed 12 August 2016, p.87

Finally the decision of the 22nd ordinary session of the assembly in January 2014 called on the AU state parties to the Rome statute to support amendments to Article 27 of precluded prosecution of HOSG.[185]

Traditionally, international law differentiates between personal immunity (rationed personae) and functional immunity (rationale material).Personal immunities attach to the head of state and or senior state officials for such time as s/he is in office[186].The rule is to the effect that such person cannot be tried for any reason including international crimes by court of another state. Functional immunities may be invoked by sitting or former head of state senior state official in respect of state official. Obviously an international crime can never be an official act. On the contrary Article 46/A/ of ACJHR deal with personal immunity. In terms of customary international law, however personal immunity may only be raised against indictments for international crimes before national of another state: developments in international human rights law and international criminal law have barred plea of personal immunity before international tribunal.[187]

More importantly, the legal implication of Article 46 A of the protocol amendments and Article 27 of the Rome statute are in paradox. The decision to grant immunity for sitting head of state and senior government officials in the ACJHR can be considered to be attempting to shield presidents from prosecution when they are alleged to have committed human right violation, war crimes, genocide and aggression.[188]

---

[185]On 22 November 2013, Kenya submitted proposed amendments to the Rome Statute in accordance with Article 121 of the Rome Statute which provides that after the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto. The text of any proposed amendment shall be submitted to the Secretary-General of the United Nations, who shall promptly circulate it to all States Parties. Kenya proposed amendments to Article 27 to exempt sitting heads of state and their duties exemption from prosecution during their current terms of office (Submission by the Republic of Kenya on Amendments to Rome Statute of the International Criminal Court for Consideration by the Working Group on Amendments.C.N.1026.2013.TREATIESXVIII.10. 14 March 2014)

[186]Amdahl Thesis paper, Supra Note 26, p.26

[187] Ibid

[188] Ibid

Article one of the Rome statute provides that the court can exercise its jurisdiction based on the principles of complementarily.[189]The ICC is considered to be the last resort court. Therefore the court is supposed to only investigate a case when domestic courts have failed to exercise jurisdiction over individual who is alleged to have committed a crime provided for the Rome statute.

Rome statute can be read to mean that it can be exercise its jurisdiction over national members of states regardless of the official capacity ,when domestic courts has failed to act. In Belgium vs. Senegal had referred the case against Hessen Habre to the AU in 2006 in an attempt to delay prosecution and extradition to Belgium, the ICJ However held that Senegal's referral of The matter to the AU could not justify Senegal's delays in complying with its obligation under Article 7/1 of the torture convention.[190]

One can therefore ,argues that the African courts provision to grant immunity to sitting head of state and senior state official will have no bearing on the ICC'S ability to exercise jurisdiction when domestic courts of state that had ratified the Rome statute has failed to prosecuted an individual who alleged to have committed international crimes in Africa. That is because that state has accepted the jurisdiction of ICC to prosecute individuals in that circumstance. As stated before the adoption of this protocol by member states to the Rome statute would cause them to indirect Conflict and breach Article 27. The next sub-section come up with whether or the principles of complimentarily principle apply between the ACJHR and Rome statute of international criminal court.

4.4. The Criminal Jurisdiction of ACJHR and ICC

The international criminal section of the ACJHR and the ICC will exercise the same subject matter jurisdiction at least in relation to Rome statute

[189]Supra note 30 Article 1.
[190]Ibid

crimes committed in states which have ratified both the Malabo protocol and the Rome statute .However, given the immediate political circumstance that accelerated the proposal to establish the ACJHR, which makes no reference nor the ICC and the Rome statute.[191]The protocol fails to clarify how the two courts will function together in terms of cooperation, and surrender of suspects. Unfortunately, the ACJHR statute provides a complementarily principles relationship with between the ACJHR one the one hand and national courts and Regional courts communities on the other hand.[192]Though its relationship is desirable and necessary the protocol of the ACJHR statute does no for see its relation with ICC.

According to Garth Abraham 'ICC remained the pinnacle court for the continent'; matters should be referred to the ICC when African courts face limitation.[193]He denotes that 'the additional He adds that article 46 of the ACJHR which address complementarily jurisdiction 'relies only layer of complimentarily added by the African court would necessitate an amendment to the Rome statute which currently only compliments with the national mechanism with complimentarily vis-à-vis national courts and for courts of regional economics communities "where specifically provided by the communities.[194] It failed to make reference to the ICC.Accordingly, the reasonable interpretation of this exclusion can be that conscious snub by the AO born out when considering the manner in which the amending statute deals with immunities.[195]

Besides, Amnesty International argues that the amendment statute of the ACJHR does not in any way over ride the obligation undertaken by the states that have ratified the Rome statute.[196]The obligation of these states to coop rate with ICC will continue regardless of the Malabo protocol and the

[191] Amnesty international, Supra Note 24, p.45
[192] Ibid
[193] Garth Abraham, Supra Note 99 , p .12
[194]Supra note 30 Article46 (H).
[195] Ibid
[196] Amnesty International Report, Supra Note 24, P.45

establishment of criminal section of ACJHR determination of the admissibility of cases before ICC will continue to be made by ICC irrespective of whether an ICC member states ratifies or not the Malabo protocol. Currently, there is no legal reason that the ICC would defer to the ACJHR unless it were legitimately acting to bring those suspected of Rome statute crimes to justice .In addition the fact that the Malabo protocol grants immunity to the large categories of person who have no immunities under international law specifically the Rome statute .This means that the ACJHRs jurisdiction would not affect the admissibility of question before ICC in all cases involving such suspects.

Chapter Five: Prospects and Challenges of the Proposed Criminal Jurisdiction of the African Court of Justice and Human Rights

5.1. Introduction

This chapter disposes the prospects and challenges having the criminal jurisdiction to try international crimes in Africa. Among the prospects legitimacy, effectiveness, access to justice and prosecute peculiar crimes to Africa are the prospects of the criminal section of the ACJHR.However, there are also various challenges that the new proposed criminal jurisdiction of the ACJHR would likely face in the event that the AU decided to extended and merged as well as includes contrary clauses to the international and/or customary laws, particularly to the Rome statute. These are the problems of combined the criminal and the civil jurisdiction; the complementarily principles of the court; conflict of jurisdiction with ICC; double financial burden; the possibility of none cooperation and lack of non-compliance to the court; financial problem; the effect of immunity clauses and the limitation of the access to the court: individual and civil society organization and the capacity of the court to deliver decision on its mandate; over loaded jurisdiction ,the numbers of judges and expertise of judges and investigator.

5.2. Prospects of Criminal Jurisdiction of the ACJHR

There are various prospects that the new proposed criminal jurisdiction would bring in light of ending impunity in Africa. This is particularly true when see from perspectives of the various challenges that the ICC facing. Further the various concerns raised by the AU and African states challenges that the ICC highly will legitimize the AU’s proposal to establishing the criminal jurisdiction. This dissertation views legitimacy, access to justice, effectiveness and try peculiar crimes to Africa as advantage and possible contribution of the jurisdiction to wards to an effective criminal justice system .It is important to have the clear understanding that the criminal

Jurisdiction of the ACJHR will have rather than just to make the blanket conclusion that it is completely useless and in effective.

5.2.1. Legitimacy

Contending that the AU's proposal to establish the criminal jurisdiction would enable its leaders to escape from prosecution by ICC itself would lead to wrong conclusion. Rather seeing the rational of the proposal to establish in light of the fundamental principles of that are the principleof intervention in certain grave circumstances in its member states[197] as opposed to the OAU's corner stone principle of non-intervention in its member states' private affair.[198]OAU's principle of non-intervention led to several tragedies such as the collapse of the Somalia state, genocide in Rwanda, the protracted conflict in DRC and criticism in Darfur.[199]

The ultimate rational to incorporate the right of intervention in the constitutive act therefore stemmed concern about the OAUs failure to intervene and stop gross and massive human right violation witnessed in Africa in the past.[200]That said the violation and concerns like where was the AU while all the massive human right violation were committed and why the AU come up with this proposal to try international crimes in Africa now and not before groundless.[201]This is because the AU cannot so without an

---

[197] Supra note 166, Article 4(O) and (H)

[198]D Kowari, T*he end of Humanitarian Intervention: Evaluation of the African Union Decision Right of Intervention'* (2010), 1 at http://ajol.info/index/php/ajcr/article/view/52l65/4097/accessed 12 July 2016, P.34.
306T Murtha,' The African Union's transition from non-intervention to non-indifference': an ad hock approach to the responsibility to protect' at http://www.garnetsiencepobordeax.fr/garnet%paperpdf merits% pdf accessed 23 July 2016, P. 12.

[199] T Murithi, *The African Union's Transition from non- Intervention to non-indifference: An Ad hoc Approach to theResponsibilitytoProtect?*,http://www.garnet.sciencespobordeaux.fr/Garnet%20papers %20PDF/MURITHI%20Tim.pdf accessed 4 October 2016, p.23

[200] B Kioko, *The Right of Intervention under the African Union's Constitutive Act: From non-interference to non- intervention*, 2003, www.cicr.org/Web/eng/siteeng0.nsf/htmlall/.../IRRC_852_Kioko.pdf accessed 04 October 2016, p.123

[201] C.B. Murungu, *International Criminal Court, the African Union and prosecution of International Crimes in Africa* (unpublished article presented in a short course on International law at the University of Pretoria), p. 18

enabling instrument to make it intervene and take action to wards such atrocities.[202] This being the major reason and ground to establish the criminal jurisdiction has the complete legitimacy in the constitutive act. The ACJHR criminal jurisdiction is better than that of any jurisdiction discussed in chapter four if there are little amendments to the protocol. This is true considering the various challenges and concerns that African states are having towards ICC. This includes the use of double standard And the selective justice of the ICC to focus on situation and conflicts in Africa only while there are similar or even worse situation in other continent.[203]It can be said that the proposed criminal jurisdiction will mainly solve the problems that the ICC in its fourteen year operation and keep facing considering that African states dedications can be achieved.

There are various international crimes in the continent of Africa which necessitate a criminal jurisdiction that will try and punish them. It true that there is a need political will on part of African states to make this jurisdiction effective.[204]However it is submitted that the fact that it is going to be an African institution by Africans will high legitimize the future of the ACJHR Criminal jurisdiction.[205]It can be said that the proposed criminal jurisdiction will mainly solve the problems that the ICC in its fourteen year operation and keep facing considering that African States dedications can be achieved. There are various international crimes in the continent of Africa necessitated a criminal jurisdiction that will try and punish them. It is true that there is need for high political will on part of African states to make this jurisdiction effective. However, to it submitted that it is going to

[202] Ibid
[203] Situation in Iraq; http://www.saetlep.com/opinion/266162/Iraq survival htm;Afganistan, Cambodia and Sir lanka at http://www.ahrchk.net/statement /main faile/.php/2009 statements/1950/ accessed on 23 July 2016, P.234
[204] Charles Solo, *The pros and cons of the Criminal Jurisdiction of the proposed African Court of Justice and Human Rights*, policy review no.98, p.56. on human rights and Democratsation in African at the catholic university of central Africa ,Cameron,2010,at http://www.amazon.com/.../38473335073/pdf accessed 12 July 20016, p.125
[205]Martha BedaneGuraro Thesis supra note 69,p.27

be effective an African institution by African will legitimate the future of the ACJHR criminal jurisdiction.

5.2.2. Access to Justice

Establishing a criminal jurisdiction in Africa will bring a closer to home Africa. The court will easily accessible for all victims and participants of international criminal justice system in Africa. It is generally understandable that in the case of human right protection national system can work better than in the protection of human rights than the regional system.[206]The same is true that regional human rights system can work in the protection and promotion of human right than international system.[207]This is because closeness to the countries victims of violation and can be easily reached by the society that they are designed to work for. The same Analogy can be followed in the case of protection of human rights from massive atrocities through international justice system.[208]

Hence, the regional criminal jurisdiction of the ACJHR if established will be more accessible for protection of human rights than the ICC.The ICC located in the Hague Netherland, which is relative to African victims who suffered from mass atrocities and conflicts to observe justice being done as the maxim states“justice should not only be done but seen to be done”. In addition African states/societies will benefit from the accessibility of the ACJHR in using its Jurisdiction and having faith the trials that will be taken place. Besides their feeling of being part of justice process when prosecution is conducted in Africa highly legitimize the establishment of this jurisdiction in Africa.

Hence, African people will be more inclined to not only brining cases to the court but also to cooperate as they will be able to observe justice being done in their own context and language.

[206] Ibid
[207] Ibid
[208] Ibid

5.2.3. Effectiveness

For international crimes in Africa, an African court with a criminal jurisdiction will be much more effective than any other international court especially the ICC.[209]In light of the need to access the crime scene, acquire firsthand information and witness, the ACJHR would be better than the ICC.[210]This is true specifically with regard to some specific evidences and that might be destroyed if the evidence gathering process takes longer. Further bringing the witness and evidence to the ACJHR will be much easier that taking them The Hague for trials in the ICC.[211]

For future perpetrators of international crimes in Africa, the ACJHR will set an important precedent. It is believed that the new criminal jurisdiction of the ACJHR will be much effective. The new criminal jurisdiction will also be more effective in curbing international crimes in Africa in deterring future crimes rate in Africa.[212] The ICC generally lacks understanding of countries in which it is operating. It fails to take countries context and into account while applying international law during investigation, prosecution, and witness prosecution level.ICCstaffs are disproportionality European and Latin American.[213] Therefore, it faced problem of language, geographic, and local knowledge to contextualize the exact circumstances on the ground or from the possible witness in Africa.

The criminal court in Africa if established will fill the gap of impunity of non-state parties to the Rome statute. Out of 56 states of African states only 34 states are parties to the Rome statue, there by having an obligation to comply with the complimentarily principles and to cooperate with ICC. The rest of African states will have such obligation and will therefore end up

[209] Charles Solo,Supra Note 204,p.34
[210] Ibid
[211] Ibid
[212] Ibid
[213]For more on these States look D.H. Cotton &G.O.Odongo, *The magnificent seven: Africa's response to US Article 98,*African human rights law journal; D Nsereko 'Triggering the Jurisdiction if the International Criminal Court, African Human Rights Law Journal, 2004, p.261-263

being safe haven perpetrators of international crimes for instance the ICC arrest against Joseph Kone cannot be executed because of the residing in non-member states that is Sudan which is non-state member to the Rome statute.[214]Even among those 34 states most of them signed the bilateral treaty with USA not to surrender any US citizen if founding any of the international crimes in Africa.[215]In general, relying on the ICC for prosecution of international crimes in Africa as ultimate choice will lead to gap in fighting impunity in Africa. Hoping that the proposal of the AU to establish the criminal jurisdiction of the ACJHR will be unanimously agreed by the by its members states, these kinds of the problems will be addressed.

5.2.4. Try Crimes Peculiar to African

Apart from the above positive side of the ACJHR, the AU incurs distinct obligation to prosecute crimes peculiar to Africa, but over which the ICC has no jurisdiction. The ICC's non-inclusion of such crimes attributable either to perception of among greatest majority of ICC state parties that such acts do not constitute international crimes at all or perception that these international crimes are not serious enough for ICC.[216] There are a number of crimes peculiar to Africa, but one is worth mentioning due to its importance. Unconstitutional change of government (UCG) is, without doubt, one of the major sources of conflict in Africa.[217] The example of Zimbabwe's Mugabe, Kenya's Kibaki and Ivory Coast's Bagboy really come to in our mind.[218]

The rampant menaces of the UCG to take over the government and its indirect impact on the peace and stability of African countries drove the AU to adopt the African charter on democracy, election, and governance

[214]Ibid
[215] Ibid
[216] OAU .DOCAHG/5/XXXV/2006/,Ademol'prosecuting international crimes in Africa ;rationale, prospects and challenges ' the European journal of law of international vol,24 no.3 2013 oxford university ,p,936.aAbass,'prosecuting international crimes in Africa; rational; prospects; and challenges 937 (16) at ejil.oxford journals .org/…/24/…933/accessed 23 July 2016, P.15.
[217] Ibid
[218] Ibid

(ACDEG) in 2003.[219]The treaty entered into force in February 2012.Article 23 of the ACDEG list and criminalized the various acts constituting the UCG[220] in the hope of promoting a greater respect for rules of law and inducing a concomitant reduction in the prevalence of armed conflict.[221]As a result of the ICC or Rome statute is limited to the most serious international crimes which although crimes common to whole society or humanity are often committed in the after math the breakdown of law and order.[222]

Prosecuting peculiar crimes in African court of justice and human rights; the case of unconstitutional change of government with regard to the prosecution of crimes of UCG is itself sufficient mere fact legislation by the AU or it needs "seriousness of the crimes".[223]There is no internationally agreed custom or treaty that provides for the adjudication of crimes before regional court it needs to be serious.[224]

To date several AU member states, which are state parties to Rome statute which has no jurisdiction over USG,are still afflicted by UCG.So it is plausible though the AU were concerned the prosecuting of international crime codified by the AU under article 4/h of the constitutive act exclusively included in the ICC. The likely hood is that will to seek jurisdiction of competence over other crimes like UCG which has no jurisdiction.

5.3. Challenges on Criminal Jurisdiction of the ACJHR

5.3.1. The Problem of CombiningCivil and Criminal Jurisdiction

Article 16 of the statute of the court establishment protocol provides that the ACJHR shall have three section; general affair; human and people right section and international criminal law section.[225]The first two sections are embodies the civil jurisdiction of the court while the third section embodies

[219]AdemolaAbass ,Supra Note 216,p.12
[220] Ibid
[221] Ibid
[222] Ibid
[223] Ibid
[224] Ibid
[225]GhetnetMetiku, Supra Note 109 ,p.4

criminal jurisdiction. Thus the ACJHR combined the civil and criminal jurisdictions.[226]

The combined jurisdiction may face huge practical and procedural limitation. The worthwhile remark it needs brief discussion on the matter arising from. Besides Article 18/4 of the same statute provides “the appellate chamber may affirm, reverse the decision of appalled against. The decision of the appellate chamber shall be final.”[227] It creates doubtful whether this provision refers to appeal arising from criminal matters only or only appeal from other section of the court. This unclearness does not support by the fact that the “only appellate chamber mentioned in the protocol relation to the international criminal court.”[228]

The implication is that criminal appellate chamber will sit on appeals arising from civil cases. They also face resource limitation on its implication of combined the civil and criminal jurisdiction. The cost of prosecuting one international crime could be equal or more than the annual budget of the African court as a whole. For instance the cost of prosecuting the Liberian Charles Taylor stands equal to US dollar of 50 million while the annual budget of Sierra Leone justice sector is about 13 million USS dollars.[229] Highest cost of international prosecution derives mainly from evidentiary standards of criminal prosecution. It is in need of invest huge financial and time resource, comprehensive and expensive investigation exhausted investigation of extensive materials and above all, the serving of different levels of chambers within the court itself, the international criminal section of the African court consists of office of prosecutor, trial and pre-trial chambers and appellate chamber,[230] all of these with their distinct staff.[231]

---

[226] Ibid
[227] Supra note 30Article18
[228] Ibid
[229] Amnesty International Report, Supra Note 24, p. 78
[230] Ibid
[231] Ibid

5.3.2. The Complementarily Principle

Article 46 of the new protocol provides for a complimentarily principle as "the jurisdiction of the court shall complement to that of national courts and regional economic communities where specifically provided for by the communities."[232]This shows that the African court accept "double failure" unwillingness or unable of national court and regional economic communities. Unlike that of ICC, it advocates scheme of complementarily which makes admissible once national courts has failed the twin criteria that means unwillingness or unable to prosecute a person suspects.

For many reasons this provision is problematic or ill-devised. First, most African states belong to more than one regional economic community.[233] Therefore, this raises the question of which regional economic community court should be apply for the purposes of complimentarily principle where national states of an accused person holds multiple membership. Furthermore, national courts are accessible to individuals while some other RECs courts are not automatically accessible to individuals.[234] For instance the African court can only admit cases directly from individual if the respondent state ha deposed to the court jurisdiction under Article 34/6 of the protocol establishing the court. But also the REC courts by their nature don't deal with the criminal responsibility of individual instead the contentious jurisdiction of ECOWAS court of justice concern about only violation of human right of ECOWAS citizen.[235]Then how can court not accessible to individual or which cannot determine the criminal responsibility of individual, be asked to make.

An initial determination of such nature before their member states national courts has recourse to the African court. The other clause that create burden on the court is "the inability clause of prosecution". Unlike that of

[232] Supra note 30, Article 46/H/
[233]AdemolaAbass, supra note 216, p. 34
[234] Ibid
[235] Ibid

ICC which adopt the “genuinely inability to prosecute” principle, this non-qualification of inability clauses that open door for African states avoid prosecution their nationals and offload such African court here by unduly burdening the court and make it the court of first rather than the last resort.

5.3.3. Conflict of Jurisdiction with ICC

The other problem that can be raised against the proposed criminal jurisdiction of the ACJHR is the conflict of jurisdiction with ICC.The subject matter of the ICC and the new proposed criminal jurisdiction of the ACJHR is similar in some instances that means both will have the power to try international crimes of genocide, war crimes, crimes against humanity and crimes of aggression. Considering the already existing ICC designed and created for the purposes of trying International crimes, the Au proposal to create a criminal jurisdiction is considered as duplication of jurisdiction.[236]Indeed the proposed criminal is facing total rejection from numbers of important quarters: different international organization, African institution and some researchers.[237] African institution and NGOS raised their voice concerning the roles of the African states played in the creation of ICC and the effect of the new proposed criminal jurisdiction.[238]

As stated above, 34 African states are state parties to the Rome statute. If the proposal to extend to the jurisdiction of the ACJHR to try international crimes of genocide, war crimes against humanity and aggression are indeed; it will affect the obligation of 34 African states towards their obligation under Rome statute.[239] This is because these African states will

[236] Hirsh .*CharlesTaylor is guilty – but what is the on International Justice?* The guardian 26 April 2012, available atwww.guardian.co.uk/comments/free/liberitycentral/2012/apr/26/Charles-Taylor-guilty-ambulating-war- crimes/accessed on12 July 2016

[237] Amnesty International, ‘*International Criminal Court The Contribution Africa Can Make To The Review conference*’, 2009, p.12

[238]Sudan Coalition for an effective Court on Human and Peoples’ Rights (CEAC), *Darfur Consortium and other organizations Implications of the African Court of Human and Peoples’ Rights being empowered to try International Crimes such as Genocide, Crimes against Humanity and war crimes* (an opinion), Para.10

[239] Ibid

be in apposition not to refer the case or conform to their obligation under the Rome statute.

Additional argument was raised concerning the proposed criminal jurisdiction that it will make the ICC the last resort court.[240] However, even without the existence of the proposed criminal jurisdiction of the ACJHR, the ICC is required to be the last resort court under its statute. This means if national courts are effective, willing and capable to prosecute international crimes the Need for ICC will be almost non- existence as per the complimentarily principles dictates this makes the aforementioned arguments frivolous.

5.3.4. Lack of Financial and Political Will

The other major challenge towards the proposed criminal jurisdiction of the ACJHR is lack of financial capacity of the AU to sustain the court and its proceeding. This is true when we see from perspectives of the current financial problems of the AU and its organs. As the protocol of the ACJHR states "State parties recall their commitment to take all over necessary measures to strength their common institution and to endow them with necessary powers and resources to carry out their mission effectively."[241]The rapid proliferation of institution in Africa and the need to rationalize the two existing courts and make them more cost effective was the main reason behind the decision behind to merge the court of justice and the court of human and people rights.[242]Funding of the court is, however, considered to a challenge. On more, pragmatic level, member states of both Rome statute and the ACJHR will have to contribute financially to both the ICC and ACJHR which may prove a heavily burden on finance African states have poor records of providing adequate fund for their human right.[243]Court and this could be problematic when it comes to

[240] Amnesty International Report, Supra Note 24, p. 56
[241] Supra note 30 the preamble.
[242]NelagondleApandulanAmadhila, Supra Note 26,p.23
[243] Amnesty International Report, Supra Note 24,p.45

force to the efficiency of the merged court not only of Funding and resource important for the court, but also, the proper management of the resources that are available.[244] The cost of trial one international criminal court trial is estimated to be $20 million.[245]This is nearly double that of the approved 2009 budgets for the African Court.[246] The cost of protecting victims, witness and collection of evidences during and before the trial is much cost as it can be observed from the ad hock tribunals and the ICC.[247] If these costs were drawn from the budget of the African Court it wills without doubt seriously, its work results in another financial crisis which will delay trying Hessen Habre in Senegal because of financial problems sent an already ambiguous message about African states to end impunity.[248] The overall idea here is that the AU needs to see the practical problems that might arise in the future in of the various current financial problem it is having before decided to on the establishment of the Malabo protocol .It has been noted that one of the problems faced by the African commission has been and this has made it has less effective in being up to promote human rights through African. It is also considered to be under resourced.[249]The commission, at various times, hasbeen forced to rely on extra-budget funding from donors due to insufficient of funds received from the AU.[250] This made a certain states to criticize the commission for being influenced

[244] C Heyns, *African Regional Human Rights system*: *The African Charter* (2003-4) PSLR 679, p. 698.
[245]A.Smith, *After genocide: Bringing the Devil to Justice* (2009); The International Criminal Tribunal for Rwanda spent $1.1 billion US dollars to conclude 45 Trials, an average of some $24.4 million US per case quoted in CEAC) P.16
[246]African Union, *Budget Execution Report*, 30 September 2008, EX.CL/455(XIV) –a, p.1. Also in 2008 the annual budget of the African Court on Human and Peoples Rights was $7,901,214 and for the African Commission on Human and Peoples' Rights, $6,003,857 Referred in CEAC), p. 16-17
[247]NelagonPandulanAmadhila,Supra note 24,P.42
[248] Amnesty International Report supra note 24,p,45
[249]U.O.Umozurike, *The African Charter on Human and Peoples' Rights: Suggestions for more effectiveness* (2007)13 ASICL 179, p.188
[250]G.M.Wachira,*African Court on Human and Peoples' Rights: Ten years on and still no justice,* 2008,
Report from Minority Groups International, p. 10

by foreign donors.[251]The member states and the AU were strongly recommended to support the commission both morally and financially.[252]

The merged court is most likely to face the similar challenges that the African Court and the African Commission faced. Funds and finances are needed for the merged and expanded courts of the ACJHR in various aspects to build new office provide registry staff, lawyers and library staff and documents center.[253] Insufficient human resources will be needed to make sure that the court is able to effectively carry out its mandate.[254] Failure by member states for the court will be huge determinant to its ability to effectively function.

In addition to the mere apparent issues of fund the introduction of the criminal section will increase the cost of the court. It has been documented that international court and tribunals operated at extremely high cost. Since the establishment of the ICC in2008 for example had spent approximately US $ 900 million by 2012.[255] The inclusion of the third section therefore makes it to need high investment. This is in contradiction to the underlying motivation of merging the ACJ and the African Court as way of cutting of costs and saving to make courts single efficient .failure efficiently to fund the court will make it difficult for the court to operate in practice.

Lack of political will among African states is considered to be major challenges for the effectiveness of the proposed criminal jurisdiction.[256]The resource and financial availability is even further subjected to political will

[251] In 2008 the AU made a decision to increase the budgetary allocation to the Africa Commissionbyover400%toendits dependency on erratic donor funding.
[252]T.F.Yerima,*Comparative Evaluation of the Challenges of African Regional Human Rights Courts,* 2011, 4(2) *JPL* 120,p. 120
[253] Ibid
[254]G.M.Wachira,Supra note 250,p.43
[255] Jon Silverman, *Ten Years, $900m, one verdict: Does the ICC cost too much?'*BBC News Magazine.14 March 2012. Available online at: *http://www.bbc.com/news/magazine-17351946*, accessed on 9 September 2016, p.23
[256]Murungu T.B. Nyanduga, *Reflections and perspectives of the African commission on human and peoples' rights', paper presented at a consultative conference on international criminal justice, 'regional courts and commissions*, 9-11 September 2009, United Nations Headquarters, New York, p.1-8

of African states leaders would fear being prosecuted by the court that they funding.[257]While the establishment effectiveness of the ACJHR is important for a court addressing the human right violation and ensuring accountability of states which often lacking national level, over burdening the court with criminal jurisdiction will drain scarce resource of an already over stretched system; and distract the court from pursuing its original mandate effectively.[258]This will render the investigation and prosecution in effective under international law.[259]

5.3.5. Non-compliance and Lack of Cooperation by African states

African states are known for their non- compliance with the recommendation of the African Commission with no attendant consequences.[260]Even in the various sub- regional organization and their tribunals such as SADC Tribunal[261]and ECOWAS court of justice.[262] African states tend to fail and avoid the decision of these tribunals with regard to it can also been said that "in absence of such norms of compliance and cooperation the existing regional human right court with criminal jurisdiction would likely result in forum shopping by regional states accused of gross and massive human right violation."[263]

A mechanism of a 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 states. The other problem if the AU decides to have a criminal jurisdiction to the ACJHR

[257]Ibid
[258] Amnesty International Report supra note 24,p,56
[259]Ibid
[260] 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.
[261]Pierre De vs. UCT; Law Faculty statement on suspension of SADC Tribunal. 19 September 2012.Available online at*: http://constitutionallyspeaking.co.za/uct-law-faculty-statement-on-suspensionof-SADC-tribunal/,* accessed on 19 September 2014,P.12
[262] For example the Gambia has failed repeatedly to comply with decisions of the ECOWAS Court of Justice; see also Manneh v The Gambia, 5 June 2008, ECW/CCJ/JUD/03/08, see "IFJ Calls on ECOWAS and Gambia to Enforce Court Ruling on Disappearance of Journalist 3 Years On", available at http://africa.ifj.org/en/articles/ifj-calls-on-ecowas-and-gambia-to-enforce-court-ruling-on-disappearance-of-journalist-3-years-on .
[263]Ibid

impracticality of its operation will prevalent in near future. Hence the new proposed criminal jurisdiction of the ACJHR will be impractical if African states continued to non- cooperation with the court.

5.3.6. The Effect of Immunity Clause and the Prevalence of Impunity

There is no perfect institution to fight impunity in Africa. However in spite of imperfection, the ICTR has contributed to the erosion of the impunity top leaders and the verification and recording of historical facts.[264]The effect of the immunity clauses in the ACJHR is controversial provision which reads that.[265]

Here the challenge is inherent widening immunities, the lack of precise definition senior state official and difficulty of proving an exhausted list of persons should be included in the "senior state officials".[266] Under customary international head of state and government officials enjoy immunities from criminal prosecution of third state, not from international criminal courts.[267]Fortunately the ACJHR adopt contrary stipulation to this general rule that grant immunities to head of state and government officials from international criminal prosecution in international courts.[268]

In this regard the Rome statute provides that "the state shall apply equally to all people without any distinction based on their official capacity". In particular an official capacity as head of state and government, member of government, parliament and an elected representative does not in any way exempted from criminal responsibility under this statute ,nor it shall itself aground for reduction of sentences.[269] Further, Article 27/1 of the statute states that "immunities and special procedural rules which may attach to the official capacity of the person whether under national or international law shall not bar the court from exercise its jurisdiction." Other

[264]Garth Abraham supra note 99,p,16
[265] Id.,p.12
[266] Ibid
[267] Ibid
[268]Supra note 30 Article46A
[269] Id.,Article27

international or hybrid tribunals have not provided immunity for head of state and government or senior state officials like that of the special court of SCSL, ICTR and ICTY.[270]As a result, the immunity clauses in the ACJHR criminal jurisdiction will have serious implication for the fight against impunity international crimes in Africa and the legitimacy and the credibility. The clause will effectively prevent the investigation and prosecution of serving head of state and government officials who use their function to order, plan, finance or otherwise master mind crimes against humanity, war crimes, or acts of genocide.[271]

Experience has shown that on the African continent those in the position of power abuse their State authority and resource to commit international crimes.[272]The immunity clause essentially promotes and strength the culture of impunity that already stretched in most African states. The immunity clause is an odd and incompatible with the organization objective and principles of the AU. Article 4/h of the constitutive act grants to the AU to intervene if war crimes against humanity, acts of aggression and genocide are being committed in member states[273] while Article 4/o requires ensuring the sanctity of human life and rejection of impunity.[274]Therefore the immunity clauses undermine the objectives and principles of the act. Unfortunately, it creates serious risks to its integrity, legitimacy, and credibility. As such the court will lack the capacity to address the sour age of war, crimes of humanity and genocide that have afflicted the continent for decades now.[275]

---

[270] Sparking J, *The AfricanCommission on Human and People Right the future ACJHR: Comparative Analysis with European Courts of Human and People Right,* South African Journal of Law Affair, p. 281-293
[271] Ibid
[272]NelagonPandulan.Amadhila,Supra note 24,p.42
[273]Supra note 166, Article 4(h)
[274] Id.,Article4(o)
[275]Y.Beigbeder, *International Justice against Impunity progress and New Challenges,* 2005 P.110.

5.3.7. The Limitation of Access to the Court for Individuals and NGOs

Weakness of both the African Court and the African Commission is that individuals have limitation to access the court.[276]In the same fashion, the ACJHR limited individuals and NGOS access the court. Article 30/f of the protocol provides that

"African individuals or NGOS with the observer status to the AU or its organ or institution can bring the case directly to the court but only with regard to a state that has mad declaration that accepts the competence of the court to receive the cases or applications submitted to it."[277]

The court shall not receive any cases or applications involving a state party which has no made declaration in accordance with the Article 9/3.This provision remain an obstacle for individuals and NGOs who want to bring cases of serious of human right violation to the court because of they would need to have declaration in from the state in question. It is unusual that African states are willing to expose themselves to being brought before the court. Such an example is that *MicholotYogogombayevs.The Republic of Senegal* where citizen of Chad brought against HisseneHabre, the former president of Chad. TheAfricanCourt had no jurisdiction over the matter because Senegal and Chad do not make declaration under Article 34/6 of the ACHPR which allows the court to hear the case.[278]

When there is absence of declaration from the state in question, another member state can make declaration that NGOs and individuals can submit the case to the court. There is limitation on which individuals and NGOS can bring case to before the ACJHR as it is very unlikely that the other will give declaration to allow the court to have jurisdiction over another African states based on the fiercely guards of the principles of sovereignty.

[276]NelagonPandulanAmadhila Supra Note24, p. 42
[277] Supra note 30Article 30(f).
[278]The Michelet Yogogombaye vs. Republic Of Senegal by African Court of Human and People Right 15 December 2009, para. 46

Therefore the need for a state party to make declaration limits the opportunity to for individual and NGOS to hold state accountable for violation of human right violation in practice.

5.3.8. Enforceability of the Court's Judgment

On the face of it the decision of the merged court will be enforced. Article 45/1 and 2 of the statute provides that if it is determined that there has been violation of crimes in state, the court shall establish in rule of court principles relating to the reparation restitution or compensation.[279]The court may either upon request or on its own initiation in exceptional circumstances determines the scope and extent of any damage or injury or loss in respect of victims and will state the principle which is acting.[280]With respect to the criminal jurisdiction the court may make an order directly against the victim person specifying appropriate reparation to the victims including restitution, compensation, andrehabilitation.[281]Decision of the court is binding on the parties.[282] Where the party fails to comply with the judgment, the court shall refer the matter to the Assembly which shall decide to impose sanction on that state.[283]

However there is pessimism about the courts ability to enforce the judgments based on the fact that African governments have continues to commit gross human right violation. Such an example is the suspension of the SADC tribunal after it handed down several judgments against several governments like the Zimbabwe government. As a result it was decided that the new Tribunal would be negotiated and that its mandates would be limited to interpretation of the SADC treaty any protocol relating to the interpretation of the disputes. The tribunal no longer has human right

[279]Supra note 30Article45(1)(2)
[280] Ibid
[281] Ibid
[282] Supra note 30 Article 46 (1) of the Protocol of the Court of Justice and Human Rights
[283] Id 30 Article 46 (4) and (5) of the Protocol of the Court of Justice and Human Rights

mandate and it cannot consider individual case.[284]As seen above the lack of political will to carry out the decision of the SADC tribunal, the merged court is also likely battle effectively to hold state and individual accountability for their action.

Therefore the judgments and decisions can only be effective if there is level of compliance and with domestic and regional courts norms. The African current political will or environment is currently as impediment to the courts ability to enforce its judgment.

5.3.9. The Capacity to Deliver Mandate

The other challenge that will face the proposed criminal jurisdiction of the ACJHR is lack of capacity of the court to deliver on its mandate. As the court has so wide criminal jurisdiction it will be difficult for the court to function its mandate effectively and efficiently due to the over loaded jurisdiction of the court and lack of expertise judges and investigators and the insufficiency of the numbers of judges assigned to the section.

The ACJHR criminal section has the aim to cover crimes under international law (transnational and organized crimes). This will over load the court and undermine its capacity to deliver decision and judgment on its mandate. Surprisingly ACJHR is the first regional criminal court that to have such expanded jurisdiction.[285]Besides, it will have also the mandate to interpret wide range of regional and international treaties and instruments.[286]The ability of the court to handle such wide range of international crimes is the issues of unrealistic to imagine that the court will effectively deliver on all these fronts taking onto account that the courts will have 16 judges out of five are seasoned to the criminal section.[287]When comparison is made with the ICC which to date conduct investigation on to four core international

[284] Pierre De vs. UCT Law Faculty statement on suspension of SADC Tribunal. 19 September 2012.Available online at*: http://constitutionallyspeaking.co.za/uct-law-faculty-statement-on-suspensionof-Sadc-tribunal/,*accessed on 19 September 2016,P.34
[285] Amnesty International Report, Supra note 24,p.45
[286] Ibid
[287] Ibid

crimes with the expanded list of crimes provided in the protocol, no doubt that these numbers are insufficient to proper function. The experience of ICC shows that for a case proceed from pre- trial to appellate chamber 11 judges are required to dispose the issue in hands that no doubt that six judges are not sufficient for three chambers of the section and for 14 crimes relatively 11 judges for 4 international crimes in ICC practice. Even the ACHPR provided 11 judges who dedicated on issues of human right only.

5.3.10. Lack of Expertise of Judges and Investigators

Article 22/4 of the statute of ACJHR provides that there are situation in which the judges of the court will sit as full court.[288]These situations are not specified and will have to clarify in the court rules of procedure.[289]However, given that the judges of the court will be appointed basis their expertise in only one of the three thematic areas covered the in the jurisdiction of the court.[290]It seems that the court will in certain circumstances sit to adjusted cases or on issues over which the judges have no little knowledge or experience.Becauseit is difficult to find a blend of judges with competence and experience in all 14 crimes covered by the court is uphill task.

[288]Supra note 30Article22/4/
[289] Id.,Article16/3/
[290] Ibid

Chapter Six: Conclusion and Recommendation

6.1. Conclusion

The main question for this research is that “what possible prospects and challenges will face the proposed criminal jurisdiction of the ACJHR to try international crimes “; crimes against humanity, genocide, war crimes, and aggression as well as other ten crimes. Toanswer this question other sub-question were raised first why Africans found it necessary to establish their own ACJHR with criminal jurisdiction? Is it legally and practically possible to immune head of state and government from prosecution of international crimes? And other related question that are relevant to solve the main question.

Each chapter attempted to answer the question accordingly. The second chapter showed African and the existence of international criminal courts or forums to punish criminals such as national courts, the SCSL, the ad hoc tribunals of the ICTR and ICC. Since national courts are no with all provide

the sources to carry out the investigation, the prosecution and the trial cannot be reliable to prosecute international crimes in Africa. The ICTR and SCSL have specific jurisdiction in terms of time and places of commission of crimes which makes them not to be the ultimate answer to prosecute international crimes in Africa. The same holds true for special tribunals that can be established along with inconvenience and cost of maintaining the tribunal. Furthermore the chapter tries to discuss the possible relationship of African and the ICC.

It also tries discuss various reasons that militated the AU to proposed the criminal jurisdictions of the ACJHR among of which the indictment of the sitting president of Basher and latter Uhuru Kenyatta, the selective justice over peace by ICC. With this background the third chapter assessed the establishment of the ACJHR in general and the criminal jurisdiction in particular.AS well as the chapter tries to assess the pre-courts structure of the continent; the African Court and ACJ.

The fourth chapter attempted to answer the other question with regards to the proposed criminal jurisdiction of the ACJHR.This thesis argued that AU's decision on its relationship with ICC and the adoption of Article 46/A of the proposed criminal jurisdiction of the ACJHR is contrary to the principle of international law that does not immune individuals from international criminal responsibility. The statute of the ACJHR criminal jurisdiction is contrary to the Rome statute of the ICC which adopts under its Article 27 that the official position of head of state or senior government officials does not relieve from criminal responsibility. As well the chapter also tries to argue that the proposition of the AU in terms of its power establishes regional organization is in light with the AU act and UN charter. This action also demonstrates lack of political will to hold African leaders accountable for committing international crimes such as genocide, crimes against humanity, and war crimes. These actions also demonstrate that the

African states lack of commitment to ensure that victims of the crime have accesses justice and redress.

The researcher argued that the AU action in no way affect the jurisdiction of the international criminal court. Though the AU's ACJHR remain silent on the issue of complimentarily, the court still can prosecute and investigate sitting head of state and senior government officials in African in accordance to the Rome statute.

The African union proposition action also violates the Article 4 of the Constitutive Act. On the continent where impunity is rife, the AU action without doubt encourages head of state and government officials to hold power as the way to avoid prosecution. It has been argued that head of state and senior government officials are the most perpetrators of great and massive human right violation atrocities specificallygenocide, crimes against humanity, war crimes and aggression. The AU action is therefore a betrayal of victim's crimes. Thisencourages African leaders to commit international crimes without any consequences or repercussion.

The fifth chapter discussed the main themes of the thesis on the possible prospects and challenges of the establishment of criminal jurisdiction under the ACJHR. The research identified as prospects legitimacy, access to justice, effectiveness in light of access information and evidences for the trial along with the possibility of closer justice to home-Africans-for-African and tries peculiar cries in African which are not the thematic area of the ICC.The chapter also made remark that all prospects can be obtained if the various challenges such as; lack of cooperation, funding by African states, jurisdictional tension with ICC,the limitation of accesses to individuals and NGOs.The combination of civil and criminal jurisdiction, the lack of compliance with its judgment and other challenges which affect function and effectiveness of the court are solved by African states.

The research findings answer the main question on the prospects and challenges of the proposed criminal jurisdiction of the ACJHR to be relevant in light of several international crimes that have been and still being committed in African; if and only if it make repeal regarding to the immunity clauses of HOSG and establish the principles of complimentarily with ICC. It is therefore crucial that African states demonstrate political courage and resist the pressure to shield leaders from prosecution for serious international crimes in the interest of their citizens.

6.2. Recommendations

The idea of having an African criminal court to try international crimes committed in African by itself is not considered irrelevant for the continent and contrary to international standards. But rather, the decision on the proposed criminal jurisdiction to the ACJHR to try international crimes is yet to be considered when the AU and the member states rendered.In doing so that the AU and every African state recommended taking in to account several consideration and factors that might actually help to fight against impunity actually as per the constitutive act and international law.Over looking these problems is endangering the operation of the ACJHR when it comes in to force.

First and foremost, the AU and its member states shall carefully study and take note of the implication and concerns out lined in this policy brief when considering whether or not to sign or ratified the Malabo protocol. Secondly, they also ascertain there will be full cooperation and political willingness on parts of the member states to support the proposed ACJHR.The AU specifically recommended to inquire and ascertain if these commitment and willingness of each member states to cooperate and submissive to the ACJHR criminal jurisdiction can be obtained. Despite the advantages of having this jurisdiction keeping the realistic view of the future possibilities while deciding the on the proposed of this criminal

jurisdiction in African is highly recommended. The AU needs to enhance its capacity indifferent perspectives such as; creating a mechanism through which its organ over see, control and take measures on member states that are not complying or cooperate with the proposed jurisdiction. For instance the AU peace and Security Council can be authorized for this purpose. Furthermore, in financial resource the AU must ascertains it can actually the financial support by state members is insignificant comparing to the high amounts of finance international criminal proceeding requires by their nature.

Thirdly, African states are generally recommended to develop the culture of compliance to the general African human right system. It can be recalled that from the previous chapters that states that non-compliance with the recommendation of the African Commission is an obstacle to the full realization of regional courts in African continent. Hence the effectiveness of the ACJHR criminal jurisdiction might face similar fashion.

Fourthly it is unlikely or impossible to obtain states willingness or cooperation if the AU cannot enhance its capacity and secure the necessary finance for the proposed jurisdiction of the court and shall address the perpetrators going to punish.

Fifthly, the researcher forwards recommendation specifically to AU and its member states that:

A. Amend Article 46/A of the amendment protocol of the ACJHR statute on immunity of HOSG to ensure that it complies with international standards and replaced by provision indicating official capacity of a person shall not bar from prosecution of the ACJHR

B. Amend Article 46/H of the same statute to adopt complementary with ICC;

C. Amend Article 30/F of the statute that in order to grant unlimited right for individuals to complain to the court;

D. Adopt transparent budgeting appropriation and allocation process for the ACJHR to ensure that its independence and ability to properly act on its mandate;

E. Besides, it shall appoint and allocate sufficient number of judges to fulfill its mandates properly.

References

1. InternationalInstruments (laws)

- Charter of the International Military Tribunal, 8 August 1946
- Charter of the United Nations, 24 October 1945
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984
- Convention on the Prevention and Punishment of the Crime of Genocide Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948
- United Nations Convention Jurisdictional Immunities of States and Their Property, 2

December 2004

- Vienna Convention on Diplomatic Relations, 18 April 1961
- Vienna Convention on the Law of Treaties, 23 May 1969
- The Rome Statute of the International Criminal Court document A/CONF.183/9 of 17 July 1998 entered into force on 1 July 2002

2. RegionalInstruments (Laws)

- Constitutive Act of the African Union adopted in Lomé, Togo on 11 July 2000 and entered in to force on 26 May 2001.
- Protocol of the Court of Justice of the AU adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, Mozambique, 11 July 2003.
- Protocol relating to the establishment of the peace and Security Council of the African Union adopted on 09 July 2002, entered in to force 26 December 2003.
- Protocol to the African Court of Justice and Human Rights adopted by the 11th Ordinary Session of the Assembly, held in Sharm El-Sheikh, Egypt, 1st July 2008.
- Statute of the African Court of Justice and Human rights Annexed to the Protocol to the African Court of Justice and Human Rights.

- African Charter on Human and Peoples' Rights, 27 June 1981
- Organization of African Unity Charter, 25 May 1963
- Protocol to the African Charter on Human and Peoples' Rights on the Establishmentof an African Court on Human and Peoples' Rights, 10 June 1998
- Protocol relating to the Establishment of the Peace and Security Council of theAfrican Union, 9 July 2002
- Protocol of the Court of Justice of the African Union, 11 July 2003
- Protocol on Amendments to the Protocol on the Statute of the African Court ofJustice and Human Right,
- Statute of the International Criminal Tribunal for the Former Yugoslavia, UN DocS/RES/827 25 May 1993
- Statute of International Criminal Tribunal for Rwanda, UN Doc S/RES/955, 8November 1994
- The Statute of the International Criminal Tribunal for the former Yugoslavia adopted 25 May 1993 by Resolution 827.
- The Statute of the Special Court of Serra Leone adopted by Security Council resolution 1315 (2000) of 14 August 2000.

3. **African Union Resolutions and Communiqués**

- Report of the African Union high-level Panel on Darfur (AUPD) Peace and Security Council 207the meeting at the level of the heads of state and government 29 October 2009 Abuja, Nigeria psc/ahg/2(ccvii)
- Ext/Assembly/AU/Dec. 1(Oct.2013), Extraordinary Session of the Assembly of the African Union, 12October 2013, Addis Ababa, Ethiopia
- The Decision on African Relationship with International Criminal Court, Ext/Assembly/AU/Dec./October 12, 2013, Extraordinary Session of the Assembly of the AU, 12 October 2013 Addis Ababa, Ethiopia
- AU, *Decision on the Implementation of the Decisions of the International Criminal*

Court(ICC),EX.CL/731(XXI)'Assembly/AU/Dec.419,http://www.au.int/en/sites/default/files/Assembly%20AU%20Dec%20416-449%20(XIX)%20_E_Final.pdf, accessed 24 July 2016

- AU, *the Report, the Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs*, *op. cit*., Article 46 A *bis*.
- African union, Budget Execution Report, 30 September 2008, EX.CL/455(XIV) –a, p.1. Also in 2008 the annual budget of the African court on human and people's rights was $7,901,214 and for the African Commission on Human and Peoples' Rights, $6,003,857 Referred in CEAC)

4. Literature

- Tekle Enkossa, *The Legality of Indictment of President Hessen AL-Basher by International Criminal Court under International Law,* A Thesis Submitted to Addis Ababa University School ofGraduatesStudies, Addis Ababa,June2010,Availableonlineat www.chilot.me/LLMThesispaper accessed on 22 July, 2016
- Esmael Ali Baye, "Judicial Enforcement of Human Right through Economics: Comparative Analysis With the African Court on Human and People Right",A Thesis Submitted to Addis Ababa University School of Graduates Studies, Addis Ababa, June 2010, available at http://chilot.me//LLM Thesis paper accessed 12 July 2016
- NelagondleApandulan.Amadhila, "*Is the AU on International Criminal Court and the Adoption of Article46A Bias of the Protocol on Amendments to the Protocol on the Statute of African Courts of Justice and Human Rights un lawful under International law",* A Thesis in partial fulfillment of requirement for the degree of master of philosophy International law

- Martha BedaneGuraro,*Furthering Justice or Prompting Impunity '? Critical analyses of the proposed Criminal Jurisdiction in African Court of Justice and Human Rights*, A Thesis paper submitted in partial fulfillment the requirement of degree LLM on human rights and democratization in Africa at the catholic university of central Africa Yaoundé Cameron, 2009, at http://www.amazo.com/.../3847335073/PDF file accessed on 12 August, 2016

5. **Journal or other Articles**

- M. Chrief Bassiouni, *Establishment of International Criminal Court: Historical Survey, M*ilitary Law Review, 1995, Available online at www.loc.gov/n/frd/pdffile/277875/%pdffile accessed on 12 July, 2016,
- HumanRightHistory,"IndividualCriminalLiability"availableathttp:// www.Umich..Edu/.../accessed on12 July 2016
- Nuremberg Trial, Available online at www.enn.m.wikipedia.org/.../Nuremberg. accessed on 23 July 2016
- Papazuka"The International Criminal Court Relation with African unfair bias?" available at www.pampazuka.org/ governance/pampazuka-news-voice-freedom-and-justice...accessed on12 August 12 2016.
- "Establishment of International Criminal Court over View" available at http:legal.un.org/ICC/general over view...accessed 25, July 2016
- Andreas Zimmerman and Galena Baumar*, Current Challenges Facing African Court of Human and People Right*, 2010,
- Germaine Garcia, *Introductory preface: African Charter and African Commission on Human and People Right*
- Amnesty International Peter BensonL.td"The legal and Institutional Implication of the Merged and Expanded African Court" 2014
- DF Orentlicher ,'*Setting Account; The Duty to Prosecute Human Right Violation prior Regime*; 100 Yale Journals ', 1991

- GA Aneme,"*Apology and Trials: the Case of Red Terror in Ethiopia* "2006, African Human Right Journal,
- R Bawman,"lubanga and Democratic Republic of Congo Case by African Human Right Court, 2008,
- J Stigen, The Relationship between International Criminal Court and the National Courts Complementarily principle,"2008
- R Bowman 'Lubanga, the DRC and the African Court: lessons learned from the first International Criminal Court case' 2007 *African Human Rights Law Journal* 420, P.453.
- C Ryngaert,theInternational Criminal Court and Universal Jurisdiction: a FraughtRelationship?' *New Criminal law review* 2009
- DJ Bederman (Ed) *'International Decisions 'American Journal of International law, 2004*,
- *KD As kin* 'Gender Crimes Jurisprudence in the ICTR: positive developments' International criminal justice2005
- MH Morris '*The Trials of Current Jurisdiction: the Case of Rwanda' Duke Journal of Comparative and International law, 1997*
- HP Kaul 'The International Criminal Court: Current Challenges and Perspectives' *Washington University Global Studies Law Review* (2007) 577 also available at http://law.wustl.edu/WUGSLR/Issues/Volume6_3/kaul.pdf (Accessed 20 September 2016)
- HP Kaul, 'The International Criminal Court: Key Features and Current Challenges, in the Nuremberg Trials International Criminal law *since 1945' (2006)Washington University Global Studies Law Review*
- http://cnsnews.com/news/article/ap-explains-why-african-states-have-started-leaving-icc-Accessed on 12 July 2016
- Amnesty international "The legal and Institutional Implication of the Merged and Expand African Court p, 2014, at http://www.amnesty.org/…/pdffile accessed on July 2016,

- Garth Abraham*, "Africa'sEvolvingContinental Court Structure; at the cross road"?* South Africa Institute of International Affair of African Perspective: Global Insight at Dispace.Africa.portal.org/saia-sop-209 pdf file accessed 23 July 2016
- GhetnetMetiku"TheAfrican Court of Justice and Human Rights "athttp://www.slideshare.net/gmgiorgis/african-court-of-justice-and-human-right accessed on 23 July 2016
- Pierre De vs.UCT Law Faculty statement on suspension of SADC Tribunal. 19 September 2012.Availableonlineat*:http://constitutionallyspeaking.co.za/uct-law-faculty-statement-on-suspensionof-Sadc-tribunal/,*accessed on 19 September 2016
- Sparking J,"The African *commission on human and people right the future ACJHR ;comparative analysis with European courts of human and people right ,south African Journal of law affair*
- Y Beigbeder '*International justice against Impunity progress and new challenges*' 2005 Kenya/post-election violence: *UN Human Rights Chief Calls for Special Tribunal to FightImpunit y*Availableonlinehttp://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/FD956512C98A6469C125773C00545305?OpenDocument(Accessed14October2016); also available on line at<http://blog.marsgroupkenya.org/?p=1076> (Accessed 14 October 2016
- D Kuwali'*The end of Humanitarian Intervention: Evaluation of the African Union DecisionRightofIntervention'*(2010),http://ajol.info/index/php/ajcr/article/view/52l65/4097/accessed 12 July 2016
- T Murtha,' THE African union's transition from non-intervention to non-indifference': an ad

hockapproachtotheresponsibilitytoprotect'a thttp://www.garnetsiencepobordeax.fr/garnet%paperpdf merits% pdf accessed 23 July 2016,

- T.Murithi 'The African Union's Transition from non- Intervention to non-indifference: An Ad hocApproachtotheResponsibilitytoProtect?'114,http://www.garnet.sciencespobordeaux.fr/Garnet%20papers%20PDF/MURITHI%20Tim.pdf (Accessed 04 October 2016 P.23).
- B Kioko 'The Right of Intervention under the African Union's Constitutive Act: From non- interference to on intervention' (2003)812www.cicr.org/Web/eng/siteeng0.nsf/html all/…/IRRC_852_Kioko.pdf (Accessed 04 October 20116
- CB Murungu, International Criminal Court, the African Union and prosecution of International Crimes in Africa (unpublished article presented in a short course on International law at the University of Pretoria
- Charles Solo, "The pros and cons of the Criminal Jurisdiction of the proposed African Court of Justice and Human Rights", policy review no.98 201 at down accessed on 12 July 2016
- TB Nyanduga, '*Reflections and perspectives of the African commission on human and peoples' rights', paper presented at a consultative conference on international criminal justice, 'regional courts and commissions*', 9-11 September 2009, united nations headquarters, new York, 1-8

6. Reports and other documents

- SC Res 995 1994; Report of the Secretary General pursuant to paragraph 5 of the same Resolution, 13 Feb 1995, UN Doc S/1995/134, Para 6 (reasons for creating Tribunal under Chapter VII).
- *Arrest Warrant of 11 April 2000(Democratic Republic of Congo v Belgium)* Judgment I.C.J. Reports

- Submission by the Republic of Kenya on Amendments to Rome Statute of the International Criminal Court for Consideration by the Working Group on Amendments, C.N.1026.2013.TREATIESXVIII.10., 14 March 2014
- Situation in Iraq; http://www.saetlep.com/opinion/266162/, accessed 12 July 2016
- D.H. Cotton & G.O.Odongo, *The magnificent seven: Africa's response to US,*Article 98, African Human Rights Law Journal, 2007
- D.Nsereko, 'Triggering the Jurisdiction if the International Criminal Court' *(2004) African Human Rights Law Journal*
- OAU .DOCAHG/5/XXXV/2006/,Ademol'prosecuting international crimes in Africa ;rationale, prospects and challenges ' the European journal of law of international vol,24 no.3 2013 oxford university ,p,936.aAbass,'prosecuting international crimes in Africa; rational; prospects; and challenges 937 (16) at ejil.oxford journals .org/…/24/…933/accessed 23 July 23,2016
- Hirsh,*Charles Taylor is guilty – but what is the on International Justice?* The guardian 26 April 2012, available at www.guardian.co.uk/comments/free/liberity central/2012/apr/26/Charles -Taylor-guilty-ambulating -war-crimes/accessed on12 July 2016
- Amnesty International, 'International criminal court the contribution Africa can make to the review conference', 2009Coalition for an effective Court on Human and Peoples' Rights (CEAC), *Darfur Consortium and other organizations Implications of the African Court of Human and Peoples' Rights being empowered to try International Crimes such as Genocide, Crimes against Humanity and war crimes*
- C.Heyns,'*African Regional Human Rights system*: *The African Charter*', 2003-4, PSLR679

- A. Smith,*After genocide: Bringing the devil to justice* (2009); the international criminal tribunal for Rwanda spent $1.1 billion US dollars to conclude 45 Trials, an average of some $24.4 million US per case quoted in CEAC)
- U.O.Umozurike, 'The African Charter on Human and Peoples' Rights: Suggestions for more effectiveness' (2007)13 ASICL 179
- G.M.Wachira '*African Court on Human and Peoples' Rights: Ten years on and still no justice*' (2008) Report from Minority Groups International 10.
- T.F.Yerima '*Comparative Evaluation of the Challenges of African Regional Human Rights Courts* (2011) 4(2) *JPL* 120
- Jon Silverman, '*Ten Years, $900m, one verdict: Does the ICC cost too much?*' BBC News Magazine.14 March 2012. Available online at: *http://www.bbc.com/news/magazine-17351946*, accessed on 9September 2016,
- A. Cassese,*'Report on the Special Court of Sierra Leone'*, 12 December 2006

7. Cases:

- The Michelet yogogombaye vs. republic of Senegal, African Court of Human and People Right, 15 December 2009
- *Prosecutor v Taylor,*Case No.SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May2004
- *Prosecutor v Kallon,*Case No. SCSL-04-15-AR 72, Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004