

**TOWARDS AN AFRICAN INTERNATIONAL CRIMINAL COURT?
– ASSESSING THE EXTENSION OF THE JURISDICTION OF
THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS TO
COVER INTERNATIONAL CRIMES.**

By



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KEYWORDS

International Human Rights Law

International Criminal Justice

Universal Jurisdiction

International criminal courts and tribunals

International Criminal Court

African Union

African Peace and Security Architecture

African Court of Justice and Human Rights

New International Crimes

Regional Complementarity



DECLARATION

I, Selemani Kinyunyu, declare that “**Towards An African International Criminal Court? – Assessing The Extension Of The Jurisdiction Of The African Court Of Justice And Human Rights To Cover International Crimes**”, is my own work, that it has not been submitted before any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Selemani Kinyunyu



Signed:.....

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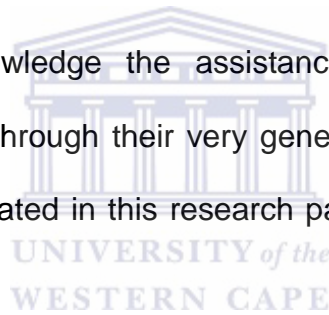
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ABSTRACT

Africa seemingly cursed with instability, conflict and gross human rights violations has been the largest scene of operation of international criminal justice. This understanding led African States to be some of the key proponents in the push for an International Criminal Court. Of late however, mounting policy and operational fluxes between African States and international criminal justice has put Africa's relationship with international justice on ice. This in turn has awoken within the region's geopolitical body, the African Union, the need for an exclusively African response to international criminal justice as it is currently considering extending the jurisdiction of the African Court of Justice and Human Rights to cover international crimes. This Research Paper aims to chart the genesis of this move through the decision-making system of the African Union and within the broader context of the Union's emerging Human Rights, Peace and Security Architecture. It will simultaneously assess the viability of this proposal within the backdrop of recent global developments with a view to identifying key legal and policy ramifications. It aims to show that there may be room for the adoption of an empowered African Court as a regional complement to the international criminal justice system.

ABBREVIATIONS

AU	African Union
ACHPR	African Charter on Human and Peoples' Rights
AComHPR	African Commission on Human and Peoples' Rights
AfCHPR	African Court on Human and Peoples' Rights
ACJ	African Court of Justice
ACJHR	African Court of Justice and Human Rights
APSA	African Peace and Security Architecture
ASP	Assembly of States Parties to the Rome Statute of the International Criminal Court
DRC	Democratic Republic of Congo
EU	European Union
ICC	International Criminal Court
ICD	International Crimes Division of the High Court of Uganda
ICJ	International Court of Justice
ILC	International Law Commission

IRMCT	International Residual Mechanism for Criminal Tribunals
LRA	Lord's Resistance Army
NGO	Non Governmental Organisation
OAU	Organisation of African Unity
PEV	Post Election Violence
PSC	African Union Peace and Security Council
SADC	Southern African Development Community
UN	United Nations Organisation
ICTR	United Nations International Criminal Tribunal for Rwanda
ICTY	United Nations International Criminal Tribunal for the Former Yugoslavia
SCSL	United Nations Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UNSC	United Nations Security Council
USA	United States of America

CHAPTER ONE

TAKING STOCK: THE RATIONALE AND OPERATION OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA

1.1. Introduction to the Study

The last half century has seen Africa ravaged by perpetual cycles of conflict. This protracted state of conflict has made Africa the scene of numerous gregarious human rights violations. Countries like Angola, Burundi, Chad, the Democratic Republic of Congo (DRC), Rwanda, Sierra Leone, Sudan, Somalia, Uganda and Zimbabwe are often synonymous with conflict, dictators, pirates, ethnic cleansing, genocide and other adjectives of ghastly savagery. It is estimated that more than half of the world's ongoing conflicts are played out in Africa, with the Continent hosting the largest number of failed states.¹ Currently, seven of the 16 United Nations (UN) peacekeeping operations are carried out in Africa.²

International criminal law which seeks to hold accountable those most to bear for the commission of mass violations has found relevance as one response to

¹ See 'Africa: Seven Nations Named in Top Ten 'Failed States'' available at <http://allafrica.com/stories/201006240615.html> (accessed 30 October 2011).

² See 'Current Peacekeeping Operations' available at <http://www.un.org/en/peacekeeping/operations/current.shtml> (accessed 30 October 2011).

stymie impunity that has been prevalent on the Continent. Garnered by this understanding, Africans and African States were some of the largest protagonists in the push for the creation of the International Criminal Court (ICC), in what was a watershed moment for international criminal justice.³ The West African nation of Senegal was the first country to ratify⁴ the Rome Statute establishing the ICC and to date, African States Parties represent the largest regional membership bloc to the ICC.⁵

Yet of late, tensions have begun to emerge between African States and international criminal justice actors. The African Union (AU) the region's geopolitical body has queried, and holds serious reservations on the abuse of



³ Mochocko P 'Africa and the International Criminal Court' in Ankumah E & Kwakwa E (eds) *African Perspectives on international criminal justice* (2005) 13.

⁴ Senegal ratified the Rome Statute on 2 February 1999 some six months after the entry into force of the Rome Statute. See 'Senegal' available at <http://www.icc-cpi.int/Menu/ASP/states+parties/African+States/Senegal.htm> (accessed 30 October 2011).

⁵ 33 African States are party to the Rome Statute representing 27% of the total 119 States Parties to the Rome Statute. Of the other States Parties, 17 are Asian States, 18 are from Eastern Europe, 26 from Latin America and Caribbean States and 25 from Western Europe and other States. See 'The States Parties to the Rome Statute' <http://www.icc-cpi.int/Menu/ASP/states+parties/> (accessed 30 October 2011).

the principle of universal jurisdiction,⁶ the (mis)use of United Nations Security Council (UNSC) powers within the context of the Rome Statute,⁷ prosecutorial bias in situations under investigation and cases before the ICC and supposed imposition of western norms in conflict resolution in Africa, which have been branded as a new face of neo-colonialism.⁸ The height of these tensions was palpable in 2009 when the AU Assembly of Heads of State and Government took the decision not to cooperate with the ICC in the arrest of the Sudanese President Omar al Bashir following his indictment by the Court.⁹

In response to these issues and as part of its emerging Peace and Security Architecture and evolving Human Rights System, the AU has begun taking



⁶ See generally Jalloh C 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (2010) *Criminal Law Forum* Volume 21 No. 1 11-54.

⁷ See generally Akande D, du Plessis A & Jalloh C *Position Paper – An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC* (2010).

⁸ See Mandhani M 'Darfur, ICC and the New Humanitarian Order: How the ICC's "responsibility to protect" is being turned into an assertion of neo-colonial domination' available at <http://www.pambazuka.org/en/category/features/50568> (accessed 30 October 2011).

⁹ Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Sirte, 1–3 July 2009, 10.

active steps towards empowering its key judicial organ, the African Court of Justice and Human Rights with an international criminal justice mandate.¹⁰

The main aim of the research is to assess the genesis, development and possible contribution of an empowered African Court within the international criminal justice sphere. In doing so, this Research Paper has been divided into five parts. Chapter one shall set the context by presenting an introduction to the issues, specifically the rationale for the operation of international criminal justice in Africa. Chapter two shall document and analyse the concerns of the AU and some of the emerging tensions between the Union and international criminal justice as detailed in some of the key decisions of the Union. Part three shall introduce the reader to the AU and its emerging Peace and Security Architecture and Human Rights System which are aimed at preventing and managing conflict on the Continent. Chapter four shall discuss the proposed measures to empower the African Court with an international criminal jurisdiction by examining elements of the Draft Protocol to extend the Court's jurisdiction focusing on its salient features specifically the broad range of new regionalised international crimes proposed. This chapter shall also concurrently present a critical analysis of the main issues in the extension process and delve into the viability and possible relevance of the empowered African Court to the international justice sphere. The concluding chapter shall summarise the observations and provide concluding recommendations.

¹⁰ Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Decision Assembly/AU/Dec. 213(XII), Addis Ababa, 1-3 February 2009, 9.

1.2. The Connection between Good Governance, Rule of Law, Human Rights and International Criminal Law

As noted above, Africa has experienced some of the worst conflicts of modern history. Whilst the causes of conflict in Africa can be attributed to an interplay of numerous historic, socio-economic and political factors, its cyclical and protracted nature can be attributed to a few well known causes. These include bad governance, corruption, and the lack of respect for human rights and rule of law.

In an attempt to break with the scourge of conflict and give the Continent a new lease on life, African States voted to transform the Organisation of African Unity (OAU) into the AU. The Constitutive Act of the re-emerged AU which came into force in 2002, identified the need to promote fundamental principles such as the protection of human and peoples' rights, the consolidation of democratic institutions and culture, and entrenching good governance and the rule of law in an effort to prevent conflict and as a prerequisite for the implementation of the Continent's development agenda.¹¹ The Constitutive Act went on to include the novel provision of Article 4(h) which provides for the right of the AU to intervene in a Member State in the case of grave circumstances.

Declaring 2010 as the "Year of Peace", the AU observed that it is only with the promotion the above ideals that true stability can be achieved on the Continent. However, it is not just on basis of political whims or rhetoric that the AU has placed an emphasis on the promotion its fundamental principles. These

¹¹ Preamble to the Constitutive Act of the African Union.

concepts are also relevant at a practical level in relation to the prevention of conflict and the application of international criminal law.

With regard to the respect for human rights, Than C and Shorts E assert, "...there is a clear, visible cross-pollination between international criminal law, international humanitarian law and international human rights law which are essentially different perspectives of the same problem."¹² The assignment of individual criminal responsibility is a direct extension to the individual of obligations that ordinarily would accrue to the state. This concept of individualisation of state responsibility can also be drawn from the history of international criminal law. The Nuremburg Tribunal most poignantly stated, "...crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."¹³

The notion at the heart of the ideal of the rule of law is that nobody is above the law. This means that the process for determining the content of the law should be widely agreed within a given society and the use of force should be exercised in accordance to the law.¹⁴ This is important as "...conflict is often characterized by the misuse or abuse of power, accompanied by the use of

¹² Than C & Shorts E *International Criminal Law and Human Rights* (2003) 12.

¹³ Judgment of 1 October 1946 in The Trial of German Major War Criminals at the International Military Tribunal sitting at Nuremberg, Germany at 447.

¹⁴ Bowden B, Charlesworth H & Farrall J (eds) *The Role of International Law in Rebuilding Societies After Conflict - Great Expectations* (2009) 137.

forceful or deadly means to impose one's own views upon others".¹⁵ In the context of Africa, the arbitrary use of force has led to human rights violations that have in turn fallen under the radar of international criminal law, the events of the 2010/2011 Arab Spring/ Uprisings being case in point.

With respect to good governance, the UN defines good governance as a concept that "...promotes equity, participation, pluralism, transparency, accountability and the rule of law, in a manner that is effective, efficient and enduring."¹⁶ In the context of Africa, good governance is further seen as relating to "...promoting democratic culture and practice, building and strengthening governance institutions and inculcating political pluralism and tolerance."¹⁷ With specific respect to democratic governance, the African Charter on Democracy, Elections and Governance states that "...unconstitutional changes of governments are one of the essential causes of insecurity, instability and violent conflict in Africa."¹⁸

Current trends point to bad governance as a primary cause of conflict. Unconstitutional changes of government and bad governance have been behind conflicts in Côte d'Ivoire , Kenya and Zimbabwe while armed rebellions

¹⁵ Bowden B, Charlesworth H & Farrall J (eds) *The Role of International Law in Rebuilding Societies After Conflict* (2009) 139.

¹⁶ See 'Governance' available at <http://www.un.org/en/globalissues/governance/> (accessed 30 October 2011).

¹⁷ Article 2(6) of the African Charter on Democracy Elections and Governance.

¹⁸ Preamble to the African Charter on Democracy Elections and Governance.

in response to a lack of democracy and political pluralism have been behind conflicts in Uganda and Libya.

The concept of the overlap of the above norms is important to observe in the African context as it has formed part of the conceptual narrative of the AU's response to preventing conflict. However, as will be discussed below where respect for these ideals has been inadequate, international criminal law has intervened.

1.3. The Role of International Criminal Law in Africa

Since Africa does not have a continental criminal tribunal and since most African states are either ill equipped or unwilling to prosecute international crimes, these crimes have often been referred to *ad hoc* courts, the ICC or prosecuted under the principle of universal jurisdiction.¹⁹

1.3.1. The Role of *Ad Hoc* Courts

Two African States Rwanda and Sierra Leone are currently subject to the jurisdiction of *ad hoc* courts, the United Nations International Criminal Tribunal for Rwanda (ICTR) and the United Nations Special Court for Sierra Leone (SCSL) respectively.

¹⁹ Bangamwabo F 'International criminal justice and the protection of human rights in Africa' in Bösl A & Diescho J (eds) *Human Rights in Africa Legal Perspectives in their Protection and Promotion* (2009) 106.

The ICTR was set up under the United Nations Security Council's (UNSC) Chapter VII powers to restore and maintain international peace and security in the wake of the 1994 Rwandan genocide that left close to 1 million dead.²⁰ The Tribunal which has its seat in Arusha, Tanzania²¹ was established to try those most culpable of the commission genocide, crimes against humanity and war crimes of a non international character.²² To date it has indicted 92 individuals and successfully prosecuted 47 although nine accused remain at large.²³ Its operations continue with 20 ongoing trials although it has begun to be wound down in accordance with its Completion Strategy and will be replaced with a branch of the International Residual Mechanism for Criminal Tribunals (IRMCT).

On 22 December 2010 the UNSC adopted Resolution 1966 creating a Residual Mechanism for the ICTR and ICTY in which it urged the completion of all work of the Tribunals by 31 December 2014. The IRMCT is aimed to be a "...small, temporary and efficient structure" that would continue the jurisdiction, rights and

²⁰ UN Security Council Resolution 955, UN Doc S/RES/955 (1994).

²¹ UN Security Council Resolution 977, UN Doc S/RES/977 (1995).

²² See Articles 2, 3 and 4 of the Statute of the United Nations International Criminal Tribunal for Rwanda.

²³ See 'Status of cases' available at <http://www.unict.org/Cases/StatusofCases/tabid/204/Default.aspx> (accessed 30 October 2011).

obligations of the ICTR.²⁴ It shall have its own trial chambers but share the appellate division, registry and be serviced by a common prosecutor.²⁵ With the Arusha Branch of the IRMCT set to commence operations on July 1, 2012²⁶ and with no new arrests of accused, first instance trials have come to a close at the ICTR in accordance with the transitional provisions of the IRMCT. Notably, the mechanism has no powers to issue fresh indictments,²⁷ meaning any new trials would have to be referred to national courts.²⁸

The SCSL is another *ad hoc* court in operation in Africa similarly set up under the UNSC Chapter VII powers at the request of the Sierra Leonean Government.²⁹ It was established to try those who bore the greatest

²⁴ Preamble to UN Security Council Resolution 1966, UN Doc S/RES/1966 (2010).

²⁵ Article 4 of the Statute of the International Residual Mechanism for Criminal Tribunals.

²⁶ UN Security Council Resolution 1966, UN Doc S/RES/1966 (2010), 1.

²⁷ Article 1(5) of the Statute of the International Residual Mechanism for Criminal Tribunals.

²⁸ Annex 2 of the Statute of the International Residual Mechanism for Criminal Tribunals.

²⁹ This followed the request of Sierra Leonean President Ahmad Tejan Kabbah to the UN Secretary General for help to try those responsible for crimes committed during the Sierra Leonean war. The UNSC 14 August 2000 adopted Resolution 1315 requesting the Secretary General to negotiate an agreement with the government in Sierra Leone to establish an independent special court. An agreement between the UN and the Government of Sierra Leone establishing the court was entered into on 16 January

responsibility for crimes against humanity, war crimes of a non international character, other serious violations of international law and certain crimes under Sierra Leonean domestic law during the Sierra Leone's civil war.³⁰ In this sense the SCSL is notably different as it adopted a both municipal and international law. The SCSL indicted 13 persons for serious violations of international humanitarian law most notably former president Charles Taylor making it the first Court in the history of international criminal law to prosecute a former African head of state.³¹

The *ad hoc* Courts in operation in Africa have contributed greatly to the development of an international criminal justice system. The ICTR for example is credited for the development and expansion the contemporary understanding of genocide law establishing that rape when perpetrated in a particular manner may constitute genocide.³² The Tribunal also successfully prosecuted hate speech and incitement in the famous *Media Trial* against the owners of 'Radio

2002. See Schabas W *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006) 35.

³⁰ See Articles 2, 3, 4 and 5 of the Statute of the United Nations Special Court for Sierra Leone.

³¹ See 'About the Special Court for Sierra Leone' available at <http://www.sc-sl.org/ABOUT/tabid/70/Default.aspx> (accessed 30 October 2011).

³² *The Prosecutor v. Jean Paul Akayesu* (ICTR-96-4-T).

Télévision Libre des Mille Collines,' a Rwandan radio station that broadcast genocidal propaganda.³³

The *ad hoc* Courts have also influenced the approach of international criminal justice towards outreach, victim and community participation. A common critique levelled against international criminal justice is that it is often removed from the theatres of violence. This critique has been levelled against the ICTY and ICC which are both situated at The Hague, far from the states of commission. The SCSL in this sense cut against the grain and was established in Freetown, the capital of Sierra Leone which was often a battleground during the civil war.

The ICTR although seated in Arusha provides for *in situ* proceedings, a concept that has been replicated by the ICC.³⁴ These courts have also extended their reach by opening field offices and conducting outreach programmes.³⁵ These developments have been important in promoting the restorative role of international criminal justice and fostering peace and reconciliation.

³³ *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze (ICTR-99-52-T)*.

³⁴ See Article 3(3) of The Rome Statute of the International Criminal Court. The ICC has twice considered holding part of its proceedings *in situ* in respect of the situations in the DRC and Kenya.

³⁵ Dieng A 'International Criminal Justice from Paper to Practise – A Contribution from the International Criminal Tribunal of Rwanda to the International Criminal Court' (2001) Volume 25 Issue 3 Fordham International Law Journal 700.

1.3.2. The International Criminal Court

Africa has taken stage at the ICC. Currently, all of the seven situations before the Court are from African States namely the Central African Republic (CAR), Côte d'Ivoire, DRC, Kenya, Sudan, Uganda and Libya. The Prosecutor has also opened preliminary investigations in the Republic of Guinea³⁶ and Nigeria.³⁷

Out of the seven situations, the Court has issued 26 indictments, opened 11 cases with four currently on trial.³⁸ The Court has issued warrants of arrest for individuals who remain at large most prominently Sudanese President Bashir,



³⁶ See 'ICC Prosecutor confirms situation in Guinea under examination' available at <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/guinea/icc%20prosecutor%20confirms%20situation%20in%20guinea%20under%20examination> (accessed 30 October 2011).

³⁷ See 'Nigeria' available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Nigeria/> (accessed 30 October 2011).

³⁸ The cases on trial are *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (ICC-01/04-01/07), *The Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05 - 01/08) and *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06). See generally 'Situations and cases' available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed 30 October 2011).

Lord's Resistance Army (LRA) leader Joseph Kony and Saif Gaddafi son of former Libyan leader Muammar Gaddafi.³⁹

1.3.3. Universal Jurisdiction

Universal jurisdiction refers to the powers of courts in states with no traditional link or direct interest to crimes to try international crimes.⁴⁰ Over the past decade universal jurisdiction has been used to try international crimes especially given the inability or unwillingness of African States. To date, no African State has effectively prosecuted a case under universal jurisdiction.⁴¹

This statistic has been most evident in the failure of Senegal to prosecute former Chadian President Hissene Habré after the AU mandated the West African nation to prosecute him on behalf of Africa.⁴²

Prosecutions under universal jurisdiction have mostly been carried out in Western States. They include the successful conviction of Désiré Munyaneza, a Rwandan businessman who was found guilty for war crimes by the Québec

³⁹ See generally 'Situations and cases' available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (accessed 30 October 2011).

⁴⁰ Werle G *Principles Of International Criminal Law* 2 ed (2009) 64.

⁴¹ The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the European Union 8672/1/09 REV 1, 16.

⁴² See Jalloh H & Bensouda F 'International criminal law in an African context' in du Plessis M (ed) *African Guide to International Criminal Justice* (2008) 27.

Superior Court for his role in arming Interahamwe militias during the 1994 Rwandan genocide.⁴³ The prosecution of two other Rwandan nationals Ignace Murwanashyaka and Straton Musoni have also been commenced in Germany for alleged crimes committed in Eastern Congo.⁴⁴

1.3.4. Domestication of International Criminal Law

Recent initiatives such as the creation of domestic courts that apply international criminal law present a new front on the localisation of international criminal law in Africa. One such initiative is the International Crimes Division (ICD) formerly known as the War Crimes Division of the High Court of Uganda.

Uganda has a bloody history that has been marred by violence and a civil war spanning 20 years between the government and the LRA. Part of this conflict was referred to the ICC by the government of Uganda, and arrest warrants are still outstanding for Joseph Kony and three others.

In 2007, the Ugandan government concluded the Juba Peace Agreement which sought to bring an end to hostilities and establish formal and informal

⁴³ See 'R. v. Désiré Munyaneza' available at <http://www.haguejusticeportal.net/eCache/DEF/10/673.html> (accessed 30 October 2011).

⁴⁴ See 'A Test for Universal Jurisdiction War Crimes in Africa on Trial in Germany' available at <http://www.spiegel.de/international/germany/0,1518,760825,00.html> (accessed 30 October 2011).

accountability and reparations mechanisms.⁴⁵ Pursuant to the agreement, in 2008 Uganda created the War Crimes Division of the High Court that would oversee the prosecution of LRA rebels arrested for committing international crimes during the civil war.⁴⁶ Its jurisdiction was expanded in 2011 to include genocide, crimes against humanity, terrorism, human trafficking and piracy and it was subsequently renamed the International Crimes Division.⁴⁷ The ICD derives its source law from domestic criminal law, Hague Law and the Ugandan International Crimes Act, the domesticated version of the Rome statute.⁴⁸

The ICD has recently heard its first case against former LRA commander Colonel Thomas Kwoyelo. After Kwoyelo's defence raised the argument that the accused had been granted an amnesty and was constitutionally safeguarded from prosecution, the ICD referred the matter to the Constitutional

⁴⁵ See 'Frequently Asked Questions on the International Crimes Division of the High Court of Uganda' available at http://www.jlos.go.ug/uploads/ICD_FAQs.pdf (accessed 30 October 2011).

⁴⁶ See 'Frequently Asked Questions on the International Crimes Division of the High Court of Uganda' available at http://www.jlos.go.ug/uploads/ICD_FAQs.pdf (accessed 30 October 2011).

⁴⁷ See 'Frequently Asked Questions on the International Crimes Division of the High Court of Uganda' available at http://www.jlos.go.ug/uploads/ICD_FAQs.pdf (accessed 30 October 2011).

⁴⁸ See 'Frequently Asked Questions on the International Crimes Division of the High Court of Uganda' available at http://www.jlos.go.ug/uploads/ICD_FAQs.pdf (accessed 30 October 2011).

Court for interpretation which ruled in the accused favour and ordered his release.⁴⁹ This decision may have a massive effect on other existing warrants for other ICC fugitives in Uganda who may also be entitled to amnesties.

Similar proposals for the establishment of specialised hybrid domestic courts have been proposed for Burundi⁵⁰ and Sudan.⁵¹ Other African countries such as Benin, CAR, Comoros, Republic of Congo, DRC, Nigeria, and Sierra Leone⁵² are also in various stages of concluding the domestication of the Rome

⁴⁹ See *Thomas Kwoyelo Alias Latoni v. Uganda* Constitutional Petition No. 036/11 in the Constitutional Court of Uganda.

⁵⁰ A UN Assessment Mission to Burundi recommended the establishment of a special chamber within the court system of Burundi. This recommendation was adopted by the UN Security Council via Resolution 1606. See also 'UN mission recommends truth commission plus special chamber in Burundi's courts' available at <http://www.un.org/apps/news/story.asp?NewsID=13784&Cr=burundi&Cr1=> (accessed 30 October 2011).

⁵¹ The African Union High Level Panel on Darfur recommended the establishment of "...a Hybrid Court to deal particularly with the most serious crimes, to be constituted by Sudanese and non-Sudanese judges." See Report of the African Union High Level Panel on Darfur (AUPD) at XIX.

⁵² See generally 'Summary Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)' available at http://www.iccnw.org/documents/Chart_Summary.pdf (accessed 30 October 2011).

Statute which will enable them to prosecute international crimes domestically and enhance the principle of complementarity.



CHAPTER TWO

THE AFRICA POSITION ON INTERNATIONAL CRIMINAL JUSTICE – FROM SYNTHESIS TO ARBITRAGE

As has been noted in the forgoing Chapter, Africa has had a largely synthetic relationship with international criminal justice as has been noted from the role of the *ad hoc* Courts to the ICC. However, of late there has been a remarkable collective shift in that relationship. The following Chapter shall examine these changes.



2.1. Initial Support for International Criminal Justice

Individually and collectively African States have supported international criminal justice. African States with non-permanent seats at the Security Council have readily supported the establishment of *ad hoc* courts including the ICTR,⁵³ ICTY⁵⁴ and SCSL.⁵⁵ Further, following concerns over safety, access and facilities in Rwanda, Tanzania agreed to host the ICTR.⁵⁶

⁵³ Djibouti and Nigeria voted in favour of the establishment of the ICTR. See UN Doc S/PV.3453 (1994) 3.

⁵⁴ Cape Verde, Djibouti and Morocco voted for the establishment of the ICTY. See UN Doc S/PV.3217 (1993).

However, Africa's support for international criminal justice was signified in the push for the first permanent international criminal tribunal the ICC. This support was exemplified in a number of ways.

2.1.1. Ratification of the Rome Statute

The West African nation of Senegal was the first country to ratify the Rome Statute and to date, some 33 African States have signed up to the Treaty.⁵⁷ A further five have fully domesticated the Rome Statute through implementing legislation,⁵⁸ while 12 States have also signed the Agreement on the Privileges and Immunities of the Court.⁵⁹

⁵⁵ Mali, Namibia and Tunisia voted in favour of UN Security Council Resolution 1315, UN Doc S/RES/1315 (2000) that led to the establishment of the SCSL. See UN Doc S/PV.3217 (2000).

⁵⁶ MØse E 'The Main Achievements of the ICTR' (2005) *Journal of International Criminal Justice* 3 (4) 921.

⁵⁷ See 'African States' available at <http://www.icc-cpi.int/Menus/ASP/states+parties/African+States/> (accessed 30 October 2011).

⁵⁸ Namely Burkina Faso, Kenya, Senegal, South Africa and Uganda. See 'Summary Chart on the Status of Ratification and Implementation of the Rome Statute and the Agreement on Privileges and Immunities (APIC)' available at http://www.iccnw.org/documents/Chart_Summary.pdf (accessed 30 October 2011).

⁵⁹ See 'Ratification/Accession and Signature of the Agreement on the Privileges and Immunities of the Court (APIC) by region' available at

AU organs such as the African Commission on Human and Peoples' Rights (AComHPR) have also emphasised the need to ratify the Rome Statute. At its 38th Ordinary Session held from 21 November to 5 December 2005, the Commission adopted resolution ACHPR/Res.87 (XXXVIII)05 urging AU Member States to ratify the Rome Statute.⁶⁰ The AU also adopted universal ratification of the Rome Statute as part of its objectives under its 2004-2007 Strategic Plan in line with an AU Assembly decision in January 2004.⁶¹

2.1.2. Leadership

Several Africans have also taken up senior positions at international courts and tribunals. Justice Richard Goldstone from South Africa had the onerous task of being the first joint Chief Prosecutor of the ICTR and ICTY between 1994 and 1996.⁶² He has since been succeeded by Gambian national Hassan Jallow



http://www.iccnw.org/documents/APIC_EN_chart_updated_October_2011.pdf

(accessed 30 October 2011).

⁶⁰ See Resolution ACHPR/Res.87(XXXVIII)05 on Ending Impunity in Africa and on the Domestication and Implementation of the Rome Statute of the International Criminal Court.

⁶¹ Statement by Mr. Ben Kioko, Legal Counsel of the African Union Commission on Behalf of the AU Commission at the Review Conference of the Rome Statute of the International Criminal Court (ICC) Kampala, Uganda 31 May-11 June, 2010 2.

⁶² See 'Justice Goldstone' available at http://www.un.org/News/dh/iraq/richard_goldstone.htm (accessed 30 October 2011).

who currently serves as the ICTR prosecutor and is assisted by South African national Bongani Majola.⁶³ Adama Dieng an eminent international jurist from Senegal also serves as the current Registrar of the ICTR.⁶⁴

African leadership has also permeated the ICC. The current senior leadership at ICC organs include five African judges in chambers,⁶⁵ the Deputy Prosecutor Ms. Fatou Bensouda (Gambia) and Head of the Jurisdiction, Complementarity and Cooperation Division Mr. Phakiso Mochochoko (Lesotho) in the Office of the Prosecutor.⁶⁶ Mr. Didier Preira of Senegal also serves as the Deputy Registrar.⁶⁷ Notably, following the end of the term of current Chief Prosecutor

⁶³ See 'Office of the Prosecution' available at <http://www.unict.org/tabid/104/default.aspx> (accessed 30 October 2011).

⁶⁴ See 'The Registry' available at <http://www.unict.org/tabid/105/default.aspx> (accessed 30 October 2011).

⁶⁵ Judge Fatoumata Dembele Diarra (Mali) who is also the First Vice-President, Judge Akua Kuenyehia (Ghana), Judge Daniel David Ntanda Nsereko (Uganda), Judge Joyce Aluoch (Kenya) and Judge Sanji Mmasenono Monageng (Botswana). See generally 'Chambers' available at <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Chambers/> (accessed 30 October 2011).

⁶⁶ See 'Office of the Prosecutor' <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/> (accessed 30 October 2011).

⁶⁷ See 'Mr Didier Preira newly elected Deputy Registrar of the International Criminal Court' available at <http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20/>

Louis Moreno Ocampo, it is widely tipped that Ms. Bensouda will succeed Mr. Ocampo as the next Chief Prosecutor of the Court after she was shortlisted for the position by the Assembly of States Parties (ASP) Search Committee and endorsed by the AU Executive Council as the sole African candidate for election to the position.⁶⁸

2.1.3. Self Referrals

Out of the seven situations before the ICC, those of CAR, DRC and Uganda made their way to the Court by way of self referrals even though the motives behind these referrals has been contested.⁶⁹ The jurisdiction of the Court with respect to Sudan and Libya was triggered by a referral from the UNSC and the

[2008\)/mr%20didier%20preira%20newly%20elected%20deputy%20registrar%20of%20the%20international%20criminal%20court](#) (accessed 30 October 2011).

⁶⁸ See Decision of the Executive Council on African Candidatures for Posts within the International System, Doc. Ex.CI/673(XIX), Malabo 23 - 28 June 2011, 1(i), Report of the Search Committee for the Position of the Prosecutor of the International Criminal Court ASP/2011/117 and 'ICC's Next Top Prosecutor: In the Bag – AU Endorses Bensouda for ICC Prosecutor' available at <http://justiceinconflict.org/2011/09/02/iccs-next-top-prosecutor-in-the-bag-au-endorses-bensouda-for-icc-prosecutor/> (accessed 30 October 2011).

⁶⁹ See Akhavan P 'Self-Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities' (2010) Criminal Law Forum Volume 21 No. 1 105.

situations in respect of Côte d'Ivoire and Kenya were triggered by the Prosecutor's *proprio motu* powers.

Notably, although the situation in Kenya was initiated by way of *proprio motu* powers, the Prosecutor's decision to commence an investigation was inevitably aroused and assisted to a great extent by the Kenyan government. After the Post Election Violence (PEV) in Kenya in 2007/2008 and the AU led mediation efforts that followed, the Commission of Inquiry on Post Election Violence (CIPEV) recommended the prosecution of persons bearing the greatest responsibility for crimes at a Special (domestic) Tribunal, failure to which a sealed list containing the names of suspects considered most culpable for the PEV would be handed over to the Chief Prosecutor of the ICC.⁷⁰ Following the Kenyan government's failure to set up the Special Tribunal the AU mediator Koffi Annan delivered the sealed list which was subsequently followed up by a letter from the Kenya government in support of the prosecutions.⁷¹ These actions can easily be construed as forming part basis for a self referral.⁷²

⁷⁰ See 'A Tribunal for Kenya: the Waki Commission Report' available at <http://www.factsandarts.com/articles/a-tribunal-for-kenya-the-waki-commission-report/> (accessed 30 October 2011).

⁷¹ See 'How MPs rejected the proposed Special Tribunal for Kenya Bill' available at <http://www.the-star.co.ke/weekend/siasa/17012-how-mps-rejected-the-proposed-special-tribunal-for-kenya-bill-> (accessed 30 October 2011).

⁷² Akande D, du Plessis A & Jalloh C *Position Paper – An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC* (2010) 7.

2.1.4. Recognising the Competence of the ICC

Côte d'Ivoire which was in late 2010 the scene of an outbreak of violence following the closely contested elections and the refusal of incumbent Laurent Gbagbo to step down from power could be another area of focus for the ICC. Although not a State Party to the Rome Statute, Côte d'Ivoire recognised the Court's competence on its territory since 2003.⁷³ On May 2011, President Ouattara wrote to the Prosecutor of the ICC requesting the Prosecutor to open an independent and impartial investigation into the crimes committed on Ivorian territory since 28 November 2010.⁷⁴ Following a submission from the Prosecutor to initiate a *proprio motu* investigation, the Pre Trial Chamber on 3 October 2011 authorised his request to carry out investigations on alleged crimes committed on Ivorian territory since 28 November 2010.⁷⁵



⁷³ See generally 'Côte d'Ivoire' available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/C%C3%B4te+d'Ivoire/> (accessed 30 October 2011).

⁷⁴ See generally 'Côte d'Ivoire' available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/C%C3%B4te+d'Ivoire/> (accessed 30 October 2011).

⁷⁵ Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire ICC-02/11-14.

2.2. Emerging Tensions in the Administration of International Criminal Justice in Africa

The long relationship between international criminal justice and African States has not been without its sour points. For example, Rwanda despite initially requesting the UN to set up a criminal tribunal after the 1994 genocide, voted against its establishment.⁷⁶ Similarly, contrary to the majority of other African States, Libya refused to vote in favour of the establishment of the ICC.⁷⁷ Despite these actions these tensions have manifested themselves at the singular, state level with continued support for international justice at the continental level.

Of late however, African States collectively and under the aegis of the AU have been especially critical about international criminal justice. The height of these tensions was reached in 2009 following the indictment of Sudanese President Omar al Bashir when some African States considered a mass pullout from the Rome Statute.⁷⁸ In a series of AU Assembly decisions the AU has especially been vocal about the following five issues; the abuse of universal jurisdiction,

⁷⁶ Akhavan P 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment' (1996) American Journal of International Law Volume 90 No. 3 5.

⁷⁷ Leigh M 'The United States and the Statute of Rome' (2001) American Journal of International Law Volume 95 No. 1 124.

⁷⁸ See 'African ICC Members Mull Withdrawal Over Bashir Indictment' available at <http://www.voanews.com/english/news/a-13-2009-06-08-voa30-68788472.html> (accessed 30 October 2011).

the role of the UNSC in the context of the Rome Statute, the misuse of discretionary prosecutorial powers, the immunities of heads of state and senior officials and sequencing of peace and justice, each of which shall be considered in detail below.

2.2.1. The Abuse of the Principle of Universal Jurisdiction

The principle of universal jurisdiction asserts that a court can assume jurisdiction for crimes despite the absence of traditional jurisdictional links with the accused or the acts.⁷⁹ The prosecution of international crimes via universal jurisdiction has gained currency of late given the competing needs of balancing the prevalence of impunity and the limited capacity of international mechanisms to deal with large scale violations.⁸⁰

At the AU Assembly meeting in July 2008, the Union issued a series of decisions against what it termed the "...abuse and misuse of indictments against African leaders through the universality principle."⁸¹ It noted that the

⁷⁹ For a detailed discussion of the various perspectives of Universal Jurisdiction see Cassese A 'When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case' (2002) European Journal of International Law Volume 13 No.4 855 – 862.

⁸⁰ Arimatsu L 'Universal Jurisdiction for African Crimes? – Africa's hope for Justice.' (April 2010) Chatham House Briefing Paper IL BP 2010/01 3.

⁸¹ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/14 (XI), Sharm El-Sheikh 30 June – 1 July 2008, 5(iii).

abuse of the principle would negatively impact on the political, social and economic development of African States and their ability to conduct international relations.⁸² The Union also took the decision not effect the warrants issued by courts, requested the AU Chairperson to meet with the European Union (EU) counterparts to discuss the matter with a view to finding a lasting solution.

The matter was also brought to the EU level and discussed at the 10th AU-EU Ministerial Troika in Brussels in September 2008.⁸³ Yet barely two months later, State Chief of Protocol to the President of Rwanda Mrs. Rose Kabuye was arrested in Germany at the request of a French judge. Following increased lamentations from the AU, Regional Economic Communities and Member States at the subsequent 11th AU-EU Ministerial Troika agreed to set up a technical *ad hoc* expert panel to clarify the issue and report back to the Troika.⁸⁴

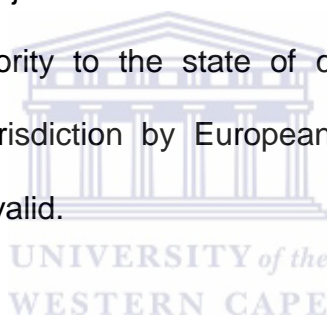
⁸² Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/14 (XI) Assembly/AU/ Dec.199 (XI), Sharm El-Sheikh 30 June – 1 July, 5(iii).

⁸³ See Communiqué of the Tenth Africa – EU Ministerial Troika Meeting Brussels, 16 September 2008.

⁸⁴ Communiqué of the 11th AU-EU Ministerial Troika held on 20 & 21 November 2008, Addis Ababa, 12.

The technical *ad hoc* panel was composed of three eminent representatives from both the AU and EU sides.⁸⁵ They were tasked to provide a description of the legal notion of the principle of universal jurisdiction, outline the respective understandings on the African and EU sides, and make appropriate recommendations to fostering a better mutual understanding and the practice of universal jurisdiction.

The panel concluded their findings and clarified a number of important issues. First, the panel noted that positive international law recognised no mandatory hierarchy of internationally permissible jurisdictions.⁸⁶ Essentially that a state which enjoys universal jurisdiction over international crimes is under no obligation to accord priority to the state of commission: in effect that the exercise of universal jurisdiction by European Courts in respect of crimes committed in Africa was valid.



⁸⁵ The panel was composed of Dr Mohammed Bedjaoui (Algeria and former president of the International Court of Justice), Professor Chaloka Beyani (Zambia and UN Special Rapporteur on the Human Rights of Internally Displaced Persons), Professor Chris Maina Peter (Tanzania and member of UN Committee on the Elimination of All Forms of Racial Discrimination), Professor Antonio Cassese (Italy and former President of the Special Tribunal for Lebanon), Professor Pierre Klein (Belgium, Director of the Centre for International Law – University of Brussels) and Dr Roger O’Keefe (Australia and Deputy Director, Lauterpacht Centre for International Law - University of Cambridge). Members of the group served in their individual capacity.

⁸⁶ The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the European Union 8672/1/09 REV 1, 11.

The panel further noted that European Courts were not targeting African States as universal jurisdiction had only been applied by eight of the 27 EU countries with African personalities constituting less than one third of the total indictees. It also found that proceedings had been instituted against nationals of a variety of states, with African nationals, some 60 of them constituting slightly more than a third of the 26 states. The expert panel also stated that in exercise of universal jurisdiction, states must accord all relevant immunities to which foreign state officials and that states should refrain from prosecuting officials entitled to such immunities.⁸⁷

In order to prevent the breakdown of cordial relations the group also recommended according priority to territoriality as a basis of jurisdiction as serious crimes despite being offensive to the international community were primarily offensive to the state of commission. According preference to the state of commission would also assist in the collecting evidence and accessing witness thereby making the prosecutions easier.⁸⁸

They encouraged African states to adopt national, legislative and other measures aimed at preventing and punishing serious international crimes. To this end, they reiterated the AU Assembly's 2009 decision the recommended that the AU Commission consider the implications of the African Court on

⁸⁷ The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the European Union 8672/1/09 REV 1, 42.

⁸⁸ The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the European Union 8672/1/09 REV 1, 42.

Human and Peoples' Rights being empowered to try serious international crimes.⁸⁹

2.2.2. The Role of the Security Council in the Context of the Rome Statute

The AU has also taken issue over the manner and selectivity in which situations are referred and deferred to the ICC under Articles 13(b) and 16 of the Rome Statute respectively. This issue came to prominence following the referral of the situation in Darfur, Sudan to the ICC on the 31 March 2005 via UNSC Resolution 1593, and the subsequent decision by the ICC prosecutor to apply for the indictment of Sudanese President Omar Al Bashir.

At the February 2009 AU Assembly meeting, the Union expressed its deep concern over the application for indictment of President Bashir, noting that in their view, the application would "...seriously undermine ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur", given the "delicate nature of the peace processes." The Assembly went on to urge the UNSC to defer the proceedings and to request the AU Commission to send a high-level delegation to engage the UNSC.

The Assembly then requested the AU Commission to convene a meeting of African States Parties to the Rome Statute with a view to exchanging views and adopting recommendations on the work of the ICC in Africa. It also endorsed

⁸⁹ The AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of the European Union 8672/1/09 REV 1, 41.

the decision of its Peace and Security Council to form a high level panel of eminent personalities to examine and recommend how accountability, impunity and reconciliation could be achieved in Darfur, Sudan. In the same vein it also requested the Commission to examine the implications of empowering the African Court to try international crimes.

By the time the AU Assembly had met in July some six months later, the situation had gravely deteriorated. On 4 March 2009 Pre Trial Chamber I of the ICC had issued an indictment against President Bashir.⁹⁰ Further, despite diplomatic support for the AU deferral proposal from the Non-Aligned Movement, the Organisation of Islamic Conference and the League of Arab States and from within the UNSC following support from China and Russia, the Security Council failed to meaningfully engage with the AU proposal.⁹¹ At the Assembly meeting, the AU went on to state that it:

“[D]eeply regrets that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, **has neither been heard nor acted upon,** and in this regard, reiterates its request to the UN Security Council;

⁹⁰ See ‘Darfur Sudan’ available at <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0205/> (accessed 30 October 2011).

⁹¹ Akande D, du Plessis A & Jalloh C *Position Paper – An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC* (2010) 10.

Decides that ***in view of the fact that the request by the African Union has never been acted upon, the AU Member States shall not cooperate*** pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan.⁹² (Emphasis mine)

The above decisions clearly show that the main concern of the AU in respect of the work of the ICC has been the irresponsiveness of the UNSC with respect to its request for a deferral of the Darfur situation. It has been argued that failure of the UNSC to respond was caused by uncertainty as to how to deal with the AU request.⁹³ However, this still does not explain why the UNSC has failed to debate the matter and come up with a common position to date, or even further why the Security Council has not responded to a further request for deferral submitted by Kenya and endorsed by the AU.⁹⁴



⁹² Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Sirte, 1–3 July 2009, 10.

⁹³ Akande D, du Plessis A & Jalloh C *Position Paper – An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC* (2010) 10.

⁹⁴ Decision on the Implementation of the Decisions on the International Criminal Court Doc. Ex.CI/639(XVIII) Assembly/AU/ Dec.334 (XVI), Addis Ababa, 30-31 January 2011, 6.

Resultantly, some African States and leaders have criticised the ICC for exclusively targeting Africans.⁹⁵ These allegations are not fully accurate as has been shown above; all except two of the situations currently before the Court have received support by African States. In this sense it unfortunate and regrettable that such an attitude has been adopted.

However, questions still remain over perceived selectivity of the UNSC. Some have queried why the UNSC had not referred international crimes that have take place in Georgia, Myanmar, Palestine and Syria. Others have also raised issue with the fact that three of the permanent five (P-5) members; China, Russia and the United States of America (USA) are not States Parties to the Rome Statute, and that on occasion, some of these states have even sought to undermine the Court. The USA for instance, in what was a legal first “unsigned” the Rome Statute. The USA also successfully bullied its way into obtaining a pre-emptive deferral immunising American peacekeepers in Bosnia and Herzegovina from the jurisdiction of the ICC after threatening to use its veto power to prevent a renewal of the mandate of the UNSC sanctioned United Nations Mission in Bosnia and Herzegovina.⁹⁶ After her attempts to make the deferral permanent failed, the USA went on to conclude 102 Bilateral Immunity

⁹⁵ See ‘ICC accused of ‘exclusively’ targeting African’ available at <http://www.rnw.nl/international-justice/article/icc-accused-exclusively-targeting-africans> (accessed 30 October 2011).

⁹⁶ Jain N ‘A Separate Law for Peacekeepers: The Clash between the Security Council and the International Criminal Court’ (2005) *The European Journal of International Law* Volume 16 No.2 240.

Agreements preventing any possible assumption of jurisdiction over American citizens by the ICC.⁹⁷

The complexities around the role of the UNSC in the context of the Rome Statute are not novel. Even during the negotiations to conclude the Rome Statute, this proved one of the thorniest issues.⁹⁸

It is the author's view that there is still a strong need to maintain the role of the UNSC given its primacy over maintenance of international peace and security. However, it is unfortunate that the undemocratic nature and skewed balance of power at the UNSC has permeated its way into the work of the ICC and this in turn is raising concerns over the legitimacy of prosecutions at the Court. It is also unfortunate that the UNSC seems to have abdicated from its duty to maintain peace in territories outside Africa.

A short term solution to correcting this anomaly can be found in the AU proposal on amending Article 16 of the Rome Statute. Presented at the 8th Session of the ASP the proposal as presented reads:

⁹⁷ See 'Bilateral Immunity Agreements (BIA)' available at http://www.amicc.org/usinfo/administration_policy_BIAs.html (accessed 30 October 2011).

⁹⁸ See Kirsch P & Holmes J 'The Rome Conference on an International Criminal Court: The Negotiating Process' (1999) *American Journal of International Law* Volume 93 No.1 4. See also Wippman D 'The International Criminal Court' in Reus-Smit C (ed) *The Politics of International Law* (2006) 166.

Article 16: Deferral of Investigation or Prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

A State with jurisdiction over a situation before the Court may request the UN Security Council to defer a matter before the Court as provided for in (i) above.

Where the UN Security Council fails to decide on the request by the state concerned within six (6) months of receipt of the request, the requesting Party may request the UN General Assembly to assume the Security Council's responsibility under para. 1 consistent with Resolution 377(v) of the UN General Assembly.⁹⁹ (Emphasis mine)

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The proposal intended to shift the power balance away from the UNSC to the UN General Assembly which is considered a more democratic institution. The proposal was not however considered in substance and has been relegated to the backburner till the next meeting of the Assembly of States Parties.¹⁰⁰

⁹⁹ Akande D, du Plessis A & Jalloh C *Position Paper – An African Expert Study on the African Union Concerns about Article 16 of the Rome Statute of the ICC* (2010) 12.

¹⁰⁰ See 'ICC Assembly of States Parties Discusses Process for Amendments to the Rome Statute' available at <http://iclferment.blogspot.com/2010/12/icc-assembly-of-states-parties.html> (accessed 30 October 2011).

2.2.3. The (Mis)use of Prosecutorial Discretion

Another argument that has been levelled against the ICC in particular is (mis)use of prosecutorial discretion. The AU and proponents alike have argued that the ICC prosecutor seems to be misusing his discretion in targeting Africans to the exclusion of other nationalities. At the AU Assembly meeting in June 2009, the Assembly stated it:

“[E]xpresses concern over the conduct of the ICC Prosecutor and

Further decides that the preparatory meeting of African States Parties to the Rome Statute of the ICC scheduled for late 2009 should prepare, inter alia, guidelines and a code of conduct for exercise of discretionary powers by the ICC Prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute...”

The above decision refers to Article 15(1) of the Rome Statute allows the Prosecutor to initiate investigations on the basis of his *proprio motu* powers. In determining whether to open an investigation the Prosecutor is governed by three criteria set out in Article 53 namely; whether the available information provides a reasonable basis to believe that a crime within the jurisdiction of the court has been or is being committed, whether the case would be admissible under Article 17 of the Rome Statute and finally whether it is in the ‘*interests of justice*’ for the matter to be investigated.¹⁰¹

¹⁰¹ Article 53(1) of the Rome Statute of the International Criminal Court.

As has been mentioned earlier, of the current situations before the ICC only those of Côte d'Ivoire and Kenya have made their way to the Court through the exercise of the prosecutor's *proprio motu* powers and only after significant assistance by the two States. Thus, the Prosecutor cannot be said to have misused his discretion towards African States in this respect. However, what the Union is contending is that the Prosecutor has failed to use his discretion to suspend prosecutions in the interests of justice. Unfortunately as the AU concerns show, there is no set criteria as to what constitutes being in the "interests of justice." The last section in this sub part shall also examine the varying dimensions to justice that may further complicate a decision to suspend a prosecution in the interests of justice.

However, a different tangent to the AU argument is the concern that the Prosecutor has not applied his discretionary powers with respect to situations from outside Africa. The AU Chairperson Jean Ping is quoted on record saying:

"[W]e Africans and the African Union are not against the International Criminal Court. That should be clear...we are against Ocampo who is rendering justice with double standards...Why not Argentina, why not Myanmar ... why not Iraq?"¹⁰²

In response, the Prosecutor often asserts that preliminary investigations have been initiated in territories outside Africa such as Afghanistan, Colombia,

¹⁰² See 'African Union Says Prosecutor is Biased' available at <http://www.rnw.nl/international-justice/article/african-union-says-icc-prosecutor-biased> (accessed 30 October 2011).

Georgia, Honduras, Iraq, Korea, Palestine, Republic and Venezuela.¹⁰³ Whilst true, there seems to be lethargy on the part of the Prosecutor in respect to these territories. For example, the preliminary investigations in Afghanistan, Colombia, Honduras and Palestine have been under examination for several months and in some cases years. This of course is not without reason: in the case of Afghanistan the Office of the Prosecutor has received little in the way of cooperation whilst in respect of Palestine, the office is said to be still making a determination on the issues.

Yet, this does not explain how the Prosecutor has been able to move swiftly to turn preliminary investigations into situations or cases in respect of Côte d'Ivoire and Kenya. The Prosecutor also proceeded with unprecedented speed in respect of the situation in Libya. Following the referral of the UNSC on 26 February 2011, the Prosecutor announced the opening of an investigation five days later on 3 March 2011 and on 16 March 2011 submitted to Pre Trial Chamber I a request for arrest warrants.¹⁰⁴ It took the Prosecutor a meagre 18 days, barely three weeks to carry out a thorough investigation and to prepare a case even though there had been no cooperation from the Libyan

¹⁰³ See 'Communications, Referrals and Preliminary Examinations' available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/> (accessed 30 October 2011).

¹⁰⁴ Decision on the "Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Alsenussi" ICC-01/11-12.

government.¹⁰⁵ It is therefore difficult to understand how situations from outside Africa have moved at snail's pace.

2.2.4. The Immunities of Heads of State and Senior Government Officials

This question first came to the fore following the indictments of senior members of African governments under the principle of universal jurisdiction. At its 2008 Half Summit, the AU Assembly observed that the "...abuse of the principle of universal jurisdiction...is a clear violation of the sovereignty and territorial integrity of these States."¹⁰⁶ Further, following the indictment of President Bashir the AU Assembly requested from the AU Commission in consultation with other African States Parties to the Rome Statute "...clarification on the Immunities of officials whose States are not party to the Statute."¹⁰⁷

The AU therefore has raised two issues: whether state officials who enjoy immunity on the basis of official capacity can be prosecuted under the principle

¹⁰⁵See 'African Union: Members will not cooperate with Gadhafi warrant' available at http://articles.cnn.com/2011-07-03/world/libya.war_1_libyan-leader-moammar-gadhafi-libyan-people-arrest-warrant?_s=PM:WORLD (accessed 30 October 2011).

¹⁰⁶ Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Doc. Assembly/AU/14 (XI) Assembly/AU/ Dec.199 (XI), Sharm El-Sheikh 30 June – 1 July 2008, 5(ii).

¹⁰⁷ Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Sirte, 1–3 July 2009, 8(iv).

of universal jurisdiction and whether officials of non States Parties to the Rome Statute can be prosecuted by the ICC.

The controversy around of immunities of senior government officials is not novel in international criminal law. Sovereign immunity was raised as a defence by several of the accused at the Nuremberg Trials who included senior government ministers and ambassadors. More recently international courts and tribunals such as the ICTY and SCSL have had to deal with the challenge of prosecuting individuals who enjoy sovereign immunity such as Slobodan Milosevic who was the head of the State of the Federal Republic of Yugoslavia and Charles Taylor who was indicted when president of Liberia.

The dilemma around immunities is further compounded by the competing norms of international law such as the established principle of sovereignty and newer principles such as international criminal law which prohibit the commission of international crimes.¹⁰⁸ This tension is reflected in a joint reading of Articles 27 and 98(1) of the Rome Statute. Whilst Article 27 provides that neither official capacity nor immunities shall be a bar to the ICC from exercising jurisdiction, Article 98 directs the Court not to take action that would result in the violation by States of their international obligations to accord immunity to foreign officials. There is also a level of uncertainty about immunities that arise on the basis of official capacity (*ratione personae*) and those that are granted on the basis of official acts (*ratione materiae*).

¹⁰⁸ Simbeye Y *Immunity and International Criminal Law* (2004) 15.

To start with the latter issue, it can be generally agreed that immunities *ratione materiae* are not a bar to international criminal prosecutions for two reasons. First, it is a well established principle of international criminal law as derived through international custom from the Principles of Nuremburg that official capacity does not apply as a substantive defence in international crimes.¹⁰⁹ Further, the very nature of international crimes such as war crimes and specifically aggression are often committed in the context of official capacity as acts of state. Subsequently, the need to prosecute such abuses cannot logically co-exist with immunities *ratione materiae*.¹¹⁰

The first issue as to whether state officials who enjoy immunity *ratione personae* are immune from prosecution for international crimes has been judicially settled by the International Court of Justice (ICJ). In the *Arrest Warrant Case*,¹¹¹ a Belgian judge issued an international arrest warrant against the Congo Minister of Foreign Affairs for war crimes and crimes against humanity under the principle of universal jurisdiction. In its judgement, the ICJ observed:

¹⁰⁹ See Boot M *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (2002) 313.

¹¹⁰ Akande D 'International Law Immunities and the International Criminal Court' (2004) *The American Journal of International Law* Volume 98 No. 3 414.

¹¹¹ *Arrest Warrant of April 2000 (Democratic Republic of the Congo v. Belgium)*, *Judgment, I.C.J Reports 2002*.

“...[i]t has been unable to deduce . . . that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.”¹¹²

The Court further clarified that immunities *ratione personae* are absolute and that any derogation from this principle was a violation of international law.¹¹³

The respect for immunities is considered necessary to allow diplomats to exercise their functions and to prevent deterioration of international relations.¹¹⁴

The decision of the ICJ in the *Arrest Warrant Case* also has ramifications on the second issue as to whether officials of non States Parties to the Rome Statute can be prosecuted. Despite the ICC being a treaty based body with obligations only accruing to member states, the ICC can be used to prosecute nationals from non States Parties. This flows from the provisions of Article 13(b) of the Rome Statute allows the UNSC to refer a situation to the Court. This can include situations from states that are not party to the ICC for two interrelated reasons. The first being the primacy the UNSC has over the maintenance of international peace and security under Chapter VII of the UN

¹¹² *Arrest Warrant of April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J Reports 2002 58.

¹¹³ *Arrest Warrant of April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J Reports 2002 71.

¹¹⁴ Akande D ‘International Law Immunities and the International Criminal Court’ (2004) American Journal of International Law Volume 98 No. 3 410.

Charter.¹¹⁵ Thus the UNSC can, and should intervene where international peace and security are threatened. The second reason can be attributed to the near universal membership of the UN and the requirement that Member States respect the decisions of the UNSC.¹¹⁶ Therefore where the UNSC issues a resolution all UN Member States are bound to follow it. The ICJ also expressed itself on the matter when it observed:

"[t]he immunities enjoyed under international law... do not represent a bar to criminal prosecution in certain circumstances.... [A]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction."¹¹⁷

2.2.5. The Sequencing of Justice and Peace

One of the most serious contentions against international criminal justice intervention in African is the view that it is seen as prejudicing attempts to secure lasting peace. The AU has specifically expressed its concerns on the timing of indictments by the ICC with respect to situations in Darfur, Kenya and Libya, which in the Union's view complicates efforts at reaching negotiated

¹¹⁵ Simbeye Y *Immunity and International Criminal Law* (2004) 15. See also Article 24 of the Charter of the United Nations.

¹¹⁶ See Article 25 of the Charter of the United Nations.

¹¹⁷ *Arrest Warrant of April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J Reports 2002 61.

political solutions to conflict, achieving peace building, national reconciliation and preventing the resumption of conflict.¹¹⁸

It is worthy to note at this juncture that AU has not taken the view that peace and justice are mutually exclusive or that one should supersede the other. Conversely, in each of the AU's decisions requesting deferrals, the Union has also reiterated its desire to see accountability and an end to impunity in line with Article 4(h) of its Constitutive Act.

Given current practice and the nature of the conflicts in Africa that have received attention of ICC, it can be deduced that the AU seems to favor an approach of sequencing the administration of justice to pursue peace. This concept can also be viewed from the two dimensions of justice in its retributive or restorative forms.

Many scholars have argued that African cultures seem to favor a restorative justice approach¹¹⁹ which seeks to promote societal harmony through quasi-judicial process of truth telling, acknowledgement, reparations, forgiveness,

¹¹⁸ See Decision on the Implementation of the Decisions on the International Criminal Court Doc. EX.CL/639(XVIII), Addis Ababa, 30-31 January 2011, 6 and Decision on the Implementation of the Assembly Decisions on the International Criminal Court Doc. Ex.Cl/670(XIX), Malabo, 30 June - 1 July 2011, 6.

¹¹⁹ Nmehielle V *The African Human Rights System – Its Laws, Practice and Institutions* (2001)250.

healing and reconciliation as opposed to retributive justice which seeks to achieve prosecution and punishment.¹²⁰

Unfortunately, there are no clear (legal) guidelines on when or how to apply a sequenced approach. Within the context of the Rome Statute, sequencing can be achieved via Article 16 which provides for the power of the UNSC to defer a matter while through Article 53(2) (c) the Prosecutor may suspend prosecution when it is "...not in the interests of justice." The challenges of requesting a deferral have already been discussed above while the latter provision is unfortunately vague.

Current practice has showed that there are both benefits and drawbacks to employing a sequenced approach. In the case of Kenya where the AU brokered a political solution to the post election crisis in advance of punitive measures, this enabled the country to address the systemic causes of conflict and engage in necessary reforms which have included the passing of a progressive constitution that established and strengthened institutions to prevent the resurgence of conflict.

On the flipside as has also been witnessed Kenya, efforts to pursue prosecutorial justice and an end to impunity have been complicated by the reluctance of the state to investigate those most responsible for perpetrating

¹²⁰ Murithi T 'Sequencing the Administration of Justice to Enable the Pursuit of Peace: Can the ICC Play a Role in Complementing Restorative Justice?' IJR Policy Brief No. 1, June 2010 1.

PEV. Often, negotiating peace may require the integration of perpetrators into government and the security forces or the issuance of amnesties all of which singularly or collectively may lead to complete inertia of the state in the pursuit of punitive justice.¹²¹

Conversely, initiating retributive justice over peace can be beneficial. Prosecutions or the threat of prosecutions can assist in compelling parties to a conflict to negotiate peace. This has been evidenced in Uganda where ICC warrants for LRA leader Joseph Kony created additional incentives to reach a peace settlement.¹²² Preference of retributive justice models can also be beneficial where the state may not have the capacity or has failed to embrace a restorative justice approach.

An exclusive focus on retributive justice can however have unintended consequences. These have included the expelling of aid organisations in Darfur following the issuance of warrants of arrest for Sudanese President Bashir, the hardening of positions by parties to conflicts as has been witnessed in Libya which led to an escalation of violence and loss of life and the failure of Kenyan authorities to establish a comprehensive national accountability mechanism to try perpetrators of PEV.

¹²¹ Grono N & O'Brien A 'Justice in Conflict? The ICC and Peace Processes' in Waddell N & Clark P (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) 13.

¹²² Grono N & O'Brien A 'Justice in Conflict? The ICC and Peace Processes' in Waddell N & Clark P (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) 15.

In summation, it must be observed that there are no set rules that determine when, how and in which order to choose a sequenced approach. Rather, a careful, balanced determination of all of the issues must be taken in order to ensure that the course of action chosen does not prejudice the need to achieve justice and lasting peace and reconciliation.¹²³

It is also imperative that the international justice actors give peace a chance. This should include on the basis of complementarity, according preference to prosecutions at the national level and where appropriate making use of traditional justice mechanisms.

2.3. Concluding Remarks

Africa's initial congenial relationship has steadily declined following both perceived and existing mistakes in the application of international criminal justice. It has been observed that with respect to the role of the UNSC, the application of universal jurisdiction and especially the sequencing of peace and justice, there is great need for clarification and further improvement in the application of these norms.

In the same light, with respect to the immunities of heads of state and senior officials at the ICC, it appears from the research that the AU position is out of

¹²³ Murithi T 'Sequencing the Administration of Justice to Enable the Pursuit of Peace: Can the ICC Play a Role in Complementing Restorative Justice?' IJR Policy Brief No. 1, June 2010 2.

step. The position of the AU not to cooperate with the ICC in this respect may be viewed as premature.



CHAPTER THREE

CHARTING THE GENESIS AND EVOLUTION OF AN EMPOWERED AFRICAN COURT THROUGH THE AFRICAN UNION SYSTEM

The OAU, the AU's predecessor faced numerous shortcomings in the prevention of conflict on the continent. Preventing conflict and strife was not a priority for the organisation and on most occasions the OAU found itself managing and resolving full blow conflicts as opposed to preventing them due to a lack of adequate structures and political will.

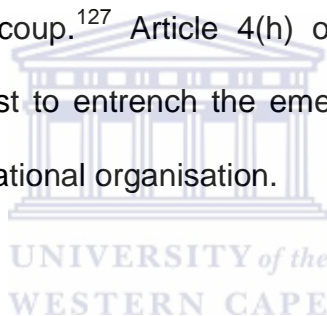
This trend changed however with the rebirth of Africa's geopolitical body, and with it, a shift in focus on priorities. Spurred by the need to reform its response to numerous challenges including conflict, the Constitutive Act of the AU provided for a number of statutory safeguards to prevent and manage conflict. The most prominent feature of the Constitutive Act in this respect is Article 4(h) which provides for:

“[T]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity as well as a serious threat to legitimate

*order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.*¹²⁴

The above provision not only allows the AU to intervene in the case of commission of serious international crimes, but also where the situation given its gravity warrants the intervention.¹²⁵

Article 4(h) is not just rhetoric, but is buttressed by the enforcement of economic or political sanctions in the case of non-compliance.¹²⁶ Article 4(h) sanctions were applied in the case of Madagascar after Andry Rajoelina came to power in a popular coup.¹²⁷ Article 4(h) of the Constitutive Act is also credited as being the first to entrench the emerging Responsibility to Protect (RtoP) Norm to an international organisation.



¹²⁴ Article 4(h) of the Constitutive Act of the African Union as amended by the Protocol creating the Peace and Security Council.

¹²⁵ Kioko B 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) *International Review of the Red Cross* Volume 85 No 852 815.

¹²⁶ See Article 23(2) of the Constitutive Act of the African Union.

¹²⁷ See 'African Union Sanctions Madagascar's Leaders' available at <http://www.voanews.com/english/news/africa/African-Union-Sanctions-Madagascars-Leaders-88262607.html> (accessed 30 October 2011).

3.1. Introduction to the AU's Peace and Security Architecture and Dispute Resolution System

The Constitutive Act which entered into force on 26 April 2001 reformed previous OAU institutions with a view to improving conflict prevention and management. For example, the Assembly of the Union has powers to "...give directives to the Executive Council on the management of conflicts, war and other emergency situations and the restoration of peace."¹²⁸ It can also suspend member states over non compliance with the Constitutive Act including over acts of unconstitutional changes of government.¹²⁹ The Constitutive Act also created and empowered the Court of Justice of the Union as a new organ with a direct mandate over conflict prevention.¹³⁰

Yet despite this, it was felt that it was still necessary to give the AU real teeth to tackle conflict on the Continent. Coupled with the slow pace of implementation of the AU decisions, the Union began and is undergoing an internal set of changes to transform the AU to further devolve service delivery. Part of this transformative process includes transforming the AU Commission into the African Union Authority, developing an African Governance Architecture, Peace and Security Architecture and Human Rights System with the main aim of

¹²⁸ See Article 9(1) (g) of the Constitutive Act of the African Union.

¹²⁹ See Article 23(2) of the Constitutive Act of the African Union.

¹³⁰ Created under article 5(1) (d) of the Constitutive Act of the African Union.

making holistic use of the structures, institutions and processes within the rubric of the AU to prevent, manage and resolve conflicts.¹³¹

3.2. The AU Peace and Security Architecture

The African Peace and Security Architecture (APSA) is one of the most relevant transformative processes as it constitutes the continent's crisis management system. It was set in place following amendments to the Constitutive Act in 2002 creating the Union's Peace and Security Council which has a mandate over maintenance of regional peace and security. The APSA system is composed of five sub-structures namely; Peace and Security Council, the Continental Early Warning System, the Panel of the Wise, a Peace Fund and the African Stand-by Force.¹³²

The PSC was established in 2004 as a standing decision-making organ of the AU with competence over the prevention, management and resolution of conflicts. Feeding from the provisions of Article 4(h) the Peace and Security Council can recommend intervention to the Assembly in the case of international crimes. The PSC recognises the primacy of the UNSC but can

¹³¹ Powell K *The African Unions Emerging Peace and Security Regime: Opportunities and Challenges for Delivering the Responsibility to Protect* (2005) 1.

¹³² Article 2(2) of the Protocol relating to the Establishment of the Peace and Security Council.

also intervene on its own initiative as provided for under Chapter VIII of the UN Charter which recognises regional arrangements.¹³³

3.3. The Dispute Resolution System of the AU

The AU currently has two dispute resolution bodies; the African Court of Justice (ACJ) and the African Court on Human and Peoples' Rights. The African Court of Justice, an organ of the Union is established by Article 5(1) (d) of the Constitutive Act of the African Union and has competence to interpret the Constitutive Act of the Union.¹³⁴ The AfCHPR is an institution of the AU and is empowered to interpret the African Charter on Human and Peoples' Rights and complement the protection and promotion mandate of the African Commission on Human and Peoples' Rights (AComHPR).¹³⁵

In mid 2008, as part of a broader structural reform and in order to shelve ballooning institutional costs and duplicated mandates, African leaders voted to merge the two courts and establish the African Court of Justice and Human

¹³³ See Article 52 of the Charter of the United Nations. The AU reiterated its ability to intervene in urgent situations. See The Common African Position on the Proposed Reform of the United Nations: "The Ezulwini Consensus" Addis Ababa, 7- 8 March 2005, Ext/EX.CL/2 (VII) B(i).

¹³⁴ See Article 19(1) of the Constitutive Act of the African Union.

¹³⁵ See Article 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

Rights to serve as the main judicial organ of the AU.¹³⁶ This process has in effect suspended the operationalisation of the African Court of Justice whilst maintaining the current mandate of the AfCHPR. Therefore, currently, the AU has only one functional court the AfCHPR, as the AU it awaits the completion of the merger process.

The following part shall briefly consider the role and current work of the AU's only functional court as it is a precursor to a proposed empowered African court with an international criminal jurisdiction.

3.3.1. The African Court on Human and Peoples' Rights

The AfCHPR is the apex body in the African Human Rights System.¹³⁷ Prior to its establishment in 2004, it did not originally form part of the AU system under its new Constitutive Act. Promotion and protection of human rights pre 2004 were the exclusive reserve of the African Commission on Human and Peoples' Rights.

¹³⁶ See Article 2 of the Protocol to the Statute of the African Court of Justice and Human Rights.

¹³⁷ The African Human Rights System is composed of a combination of normative human rights instruments and institutional structures. For a further discussion see chapter 2 & 3 in Nmeihelle V *The African Human Rights System – Its Laws, Practice and Institutions* (2001).

The Court which was established by way of a protocol to the African Charter on Human and Peoples' Rights in a move intended to add bite and complement to the protection and promotion work of the African Commission.¹³⁸

The Court is composed of 11 judges nominated from Member States of the AU and who serve in their individual capacity. The judges elect a President who with the assistance of the Vice President heads the Court. The Court also has a registry, headed by a registrar who assists the Court in its general and judicial functions. The Court is meets four times a year with each session lasting two weeks, however, the President of the Court serves on a full time basis. The Court has its seat in Arusha, Tanzania.

The AfCHPR has both contentious jurisdiction over human rights disputes and an advisory jurisdiction over the interpretation of any human rights instrument.¹³⁹ The jurisdiction of the Court can be triggered by the AComHPR, States Parties and African Intergovernmental Organisations. Citizens and non governmental organisations (NGOs) of States Parties may also submit cases before the Court if their respective State Party declaration allowing direct access to the Court.¹⁴⁰

¹³⁸ Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

¹³⁹ See Articles 3 & 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

¹⁴⁰ See Articles 5 & 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights.

The Court has the power to issue binding judgements which include orders for appropriate remedies, payment of fair compensation or reparations. In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court can adopt provisional measures as it deems fit.

Judgements of the Court are to be self executed by States Parties. However, implementation of the judgements is also monitored by the Executive Council.

Currently, only 26 of the 53 member states of the AU are party to the Court. Further, only five states parties have issued a declaration allowing direct access to the Court.¹⁴¹ The low rate of ratification of the AfCHPR Protocol and the failure of States to issue declarations allowing direct access before the Court for individuals and NGOs has limited the Court's functionality. To date, the court has received only 12 cases and one application for an advisory opinion, of which four cases have been disposed of for want of jurisdiction.

Despite the infancy of the AfCHPR, its intended role in preventing gross violations and the relationship between human rights and international criminal law has been evident. The first case before the Court, the *Yogogombaye Case* involved an application by Michelot Yogogombaye challenging the proposed prosecution by Senegal on behalf of AU of former Chadian President Hissene Habré. Yogogombaye alleged that the amendment of the Senegalese constitution to allow retroactive application of criminal law to solely prosecute

¹⁴¹ See See 'List of countries which have signed, ratified/acceded to the Protocol on the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights available at <http://www.au.int/en/sites/default/files/992achpr.pdf> (accessed 30 October 2011).

Habré represented a violation of the sacrosanct principle of non-retroactivity of criminal law provided for in the Senegalese Constitution and Article 7(2) of the African Charter on Human and Peoples' Rights. Yogogombaye sought amongst others, orders stopping Senegal from prosecuting Habré and a declaration that Senegal was in violating the principle of universal jurisdiction.

Although the case was not heard on merits for want of a declaration by Chad allowing direct access to the Court, it would have been interesting to see how the human rights Court would approach the issue of non-retroactivity of criminal law when compared against the need of prosecution of international crimes. The decision of the Court, if the case had proceeded to full trial, would also have reverberated across the AU because Senegal was requested to prosecute Habré by the AU on behalf of Africa.

The Court's importance as part of the AU's Human Rights System was also observed in the ongoing case between the African Commission on Human and Peoples Rights and Libya.¹⁴² Filed on the 16 March 2011, the applicants the African Commission on Human and Peoples' Rights alleged that it received communications that the Libyan government used excessive force to suppress peaceful demonstrations in Benghazi and other Eastern cities in Libya in February 2011. The African Commission alleged that Libya was in violation of its human rights obligations under the African Charter and requested the Court to order Libya to set up an exhaustive inquiry and prosecute the perpetrators of

¹⁴² *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya* AfCHPR Application No. 004/2011.

the violations and to amend its laws to be in line with current human rights norms.¹⁴³

In response to the African Commission's request the Court of its own motion issued provisional measures against Libya ordering to desist from the arbitrary use of force against its citizens.¹⁴⁴

The Court may also have a say in determining the rights of sentenced persons following the request by the Republic of Mali for an advisory opinion on issues concerning omissions in the agreement between Mali and the UN regarding the status of prisoners who have completed their prison terms following sentencing by the ICTR.¹⁴⁵



3.3.2. The African Court of Justice and Human Rights

The new "merged Court" will retain the bulk of the features of both the ACJ and AfCHPR save for the fact that it shall have two sections; the general affairs

¹⁴³ *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya* AfCHPR Application No. 004/2011.

¹⁴⁴ See Order for Provisional Measures in the Matter of *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya* AfCHPR Application No. 004/2011.

¹⁴⁵ See 'Request for Advisory Opinion from the Republic Of Mali' available at http://www.african-court.org/fileadmin/documents/Court/Cases/casae_summaries/summary_of_request_for_advisory_opinion_for_the_website.pdf (accessed 30 October 2011).

section dealing with interpretation and application of the Constitutive Act and the human rights section devoted exclusively to human rights matters.¹⁴⁶ The Protocol establishing the Court is now open for ratification although this is usually a lengthy process and the Court is not expected to become operational for a number of years.¹⁴⁷

3.4. Towards An African International Criminal Court

As documented in Chapter Two, the genesis of an empowered court flows from the concerns that the AU has over international criminal justice as reflected in the decisions of the AU Assembly. To date, there have been three references to an empowered African Court. The first mention of the vesting the African Court with an international criminal jurisdiction was the Assembly's February 2009 decision which was in response to the abuse of the principle of universal jurisdiction. The Assembly requested the AU Commission:

“...[i]n consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes.”

¹⁴⁶ See Article 16 of the Protocol to the Statute of the African Court of Justice and Human Rights.

¹⁴⁷ Sceats S 'Africa's New Human rights Court: Whistling in the Wind?' Chatham House Briefing Paper IL BP 09/01, March 2009 2.

In a follow up to the above decision the July 2009 Assembly meeting requested the AU Commission to:

“[I]n consultation with the African Commission on Human and Peoples’ Rights and the African Court on Human and Peoples’ Rights...examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, **which would be complementary to national jurisdiction and processes for fighting impunity.**” (Emphasis mine)

Subsequently at the Union’s June/July 2011 Assembly meeting the AU Assembly requested the AU Commission to:

“...[t]o actively pursue the implementation of the Assembly’s Decisions on the African Court of Justice and Human and Peoples’ Rights being empowered to try serious international crimes committed on African soil.”

It will be noted that the first two decisions make reference to the human rights court while the June/ July 2011 decision refers to the merged court. It can be safely assumed that the first two references to the human rights court were in error as the court is largely transitional in nature and it would be logical that the AU chose to empower its main judicial with an international crimes mandate.

However, further research shows that the AU may have, even before the February 2009 decision sought to create an empowered African court. The deepest insight is Article 25(5) of the African Charter on Democracy Election and Governance which provides: “[P]erpetrators of unconstitutional change of government may also be tried before the competent court of the Union.”

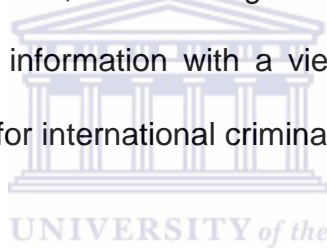
The language of the provision creates the following impressions; first, that the Union would recognise unconstitutional changes of government as a crime, and that individual criminal responsibility would extend to perpetrators of the crime. Second, that a “competent court of the Union” would try that crime. Obviously none of the existing courts of the Union in their current state has the competence to try crimes. It then must be taken that this provision was drafted in reference to an empowered court.



CHAPTER FOUR

ANALYSIS OF THE RELEVANCE, VIABILITY AND POSSIBLE IMPLICATIONS OF AN AFRICAN INTERNATIONAL CRIMINAL COURT

The AU Commission has initiated a process to extend the jurisdiction of the ACJHR through the development of a Draft Protocol. Although the Draft Protocol has not been released for circulation to the wider public as it is still undergoing internal validation, the following Chapter shall examine the process on the basis of existing information with a view to discussing its relevance, viability and implications for international criminal justice.



4.1. Proposed Features of the Empowered Court

4.1.1. Enabling Instrument

The extension of the ACJHR jurisdiction will require a significant overhaul to its current legal framework. An additional protocol would be required to cater for the revised jurisdiction of the Court and the Rules and Procedure of evidence for criminal trials. Article 58 of the Protocol to the Statute of the ACJHR provides that an amendment to the Protocol may be by request of a State Party. However, in this case amendment has been initiated by the Assembly of Heads of State.

The Draft Protocol is currently being considered by Member States, at the level of Government Experts. Thereafter the Draft will be considered by Justice

Ministers/ Attorney Generals before being submitted to the Executive Council and finally the AU summit for adoption¹⁴⁸

4.1.2. Structure and Composition

The Draft Protocol if operationalised will add third international criminal law chamber to the ACJHR. It is proposed that the Court will be serviced by a pool of 16 judges, a Registry and the new organ of Office of the Prosecutor. The Draft Protocol also proposes a first instance division (pre-trial) and an appellate division.¹⁴⁹

4.1.3. Subject Matter Jurisdiction

The main aim of the amendment procedure is to operationalise jurisdiction over core international crimes such as crimes against humanity, genocide and war crimes. However, it is also proposed that the Court adopt jurisdiction over the crimes of piracy, terrorism, mercenarism, trafficking drugs, persons and

¹⁴⁸ See 'The Role and Value Proposition of the Pan African Lawyers Union' available at [http://www.aflsf.org/attachments/article/57/05.Elijah%20Banda%20\(PALU\)%20-%20The%20Role%20and%20Value%20Proposition%20of%20PALU.pdf](http://www.aflsf.org/attachments/article/57/05.Elijah%20Banda%20(PALU)%20-%20The%20Role%20and%20Value%20Proposition%20of%20PALU.pdf) (accessed 30 October 2011).

¹⁴⁹ See Background Document to the Third Roundtable available at <http://www.icj.org/dwn/database/ACC%20DRAFT%20CONCEPT%20NOTE%20FOR%20MOMBASA%20ROUNDTABLE%20.pdf> (accessed 30 October 2011).

hazardous wastes, international corruption and the new crime of unconstitutional change of government.¹⁵⁰

4.2. Analysis of the Relevance, Viability and Possible Implications of Empowering the African Court to Try International Crimes

The creation of an African Court with an international criminal jurisdiction will be subject to both challenges and opportunities. Given the uniqueness of the proposal by the AU, there is a further need to examine the relevance, viability and implications of an empowered African Court. The following section shall examine three aspects namely creation of new regionalised international crimes, design and practical aspects and cooperation, complementarity and competition between the expanded African Court and the ICC.



4.2.1. Creation of New Regionalised International Crimes

International criminal law as a subset of international law has its sources under Article 38(1) of the Statute of the ICJ. These are: international instruments, judicial decisions and distinguished writings of eminent jurists, general

¹⁵⁰ 'EAC: Africa's new tool against war crimes' available at <http://www.ippmedia.com/frontend/index.php?l=28654> (accessed 30 October 2011).

See 'The Scope for International Commercial Litigation and Arbitration in Regional Economic Community Courts in Africa' available at <http://www.aflsf.org/attachments/article/57/04.D.DEYA-The%20scope%20for%20international%20commercial%20litigation%20in%20REC%20Courts.pdf> (accessed 30 October 2011).

principles of law and customary usage which can be drawn from policy statements and recitals in treaties.¹⁵¹ It is generally accepted that the three sources of international law are of equal value and that there is no hierarchy among them.¹⁵²

4.2.1.1. Conceptual Challenges

In practise the creation of new international law is by treaty or by custom. Yet, while it may be relatively easy for the AU through treaty to create a Court with jurisdiction over existing crimes under international law, the inclusion of new international crimes such as international corruption may face structural and material challenges as the proposed new crimes may not have not crystallised into international legally binding norms.

International law distinguishes between crimes under international law and other treaty-based crimes.¹⁵³ Crimes under international law namely genocide, war crimes, crimes against humanity and aggression are composed of three distinct elements namely; they attract individual criminal responsibility, form part of a body of international law and are punishable directly under international law regardless of their incorporation under municipal law.¹⁵⁴ The

¹⁵¹ Brownlie I *Principles of Public International Law* 7 ed (2008) 6.

¹⁵² Schabas W *An Introduction to the International Criminal Court* 3 ed (2007)194.

¹⁵³ Werle G *Principles Of International Criminal Law* 2 ed (2009) 42.

¹⁵⁴ Werle G *Principles Of International Criminal Law* 2 ed (2009) 29.

distinguishing feature of crimes under international law vis-à-vis treaty-based crimes is their character of universality.¹⁵⁵ The international dimension to crimes under international law arises because perpetration of these crimes runs counter to the fundamental values of the international community.¹⁵⁶ Crimes under international law have risen to the level of peremptory norms (*jus cogens*) for which there can be no derogation.¹⁵⁷

Treaty-based crimes on the other hand attract punishment not directly from international law but from domestic implementing legislation.¹⁵⁸

The mere act of creating an instrument and court which deals with “new international crimes” does not make them crimes under international law. While it may be accepted that some of the proposed crimes such as terrorism are offensive to the fundamental values of the international community and are thus evolving towards being crimes under international law, it cannot be said with certainty that these crimes have crystallised into peremptory norms of international law. The African Court may thus have to deal with similar challenges that were faced during the Nuremberg Trials where the accused challenged their prosecution on the basis of *ex post facto* law.¹⁵⁹

¹⁵⁵ Werle G *Principles of International Criminal Law* 2 ed (2009) 32.

¹⁵⁶ Werle G *Principles of International Criminal Law* 2 ed (2009) 33.

¹⁵⁷ Bassiouni C ‘International Crimes: “*Jus Cogens*” and “*Obligatio Erga Omnes*” (1996) *Law and Contemporary Problems* Volume 59 No. 4 64.

¹⁵⁸ Werle G *Principles of International Criminal Law* 2 ed (2009) 42.

¹⁵⁹ Werle G *Principles of International Criminal Law* 2 ed (2009) 10.

A further challenge that will be faced in the creation of new international crimes will be the difficulty to conclude agreed definitions of the crimes. In the case of terrorism for example, the lack of a common definition has resulted in a “thematic approach” to the problem. This in turn has caused the codification of certain criminal acts to be deemed as terrorism for example hostage taking and hijackings.¹⁶⁰

While the AU can draw definitions for the proposed crimes from its existing body of treaty law, most of its instruments have adopted a thematic approach; defining acts that constitute crimes, but not comprehensively defining the crime itself.¹⁶¹ Adopting a thematic approach to crimes increases the risk of exclusion of certain acts as was illustrated following the need to expand the list of terrorist acts to include the financing of terrorism after the events of 11 September 2001.



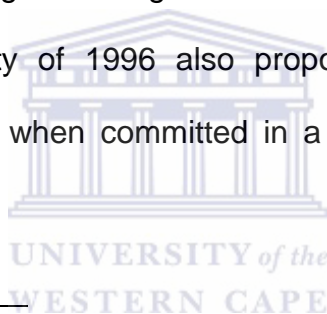
However, the attempt to confer an international court with a broad mandate over new international crimes mandate is not unique. The International Law Commission’s (ILC) Draft Code of Offences against the Peace and Security of Mankind of 1954 which formed part of the foundation of the works of the Rome Statute proposed the inclusion of mercenarism, albeit as part of aggression, as

¹⁶⁰ Bantekas I & Nash S *International Criminal Law* 3 ed (2007) 196.

¹⁶¹ See for example the definition of corruption in the Preamble to the African Union Convention on Preventing and Combating Corruption.

a crime sanctionable under international law¹⁶² Further, a key moment in build-up to the creation of the ICC was the request by Trinidad and Tobago to the UN General Assembly in 1989 to create a court to deal with drug trafficking and other transnational criminal activities.¹⁶³

The ILC which was tasked to work on the proposal of Trinidad and Tobago eventually developed the Draft Statute of the International Criminal Court of 1994.¹⁶⁴ The Draft Statute proposed the inclusion of "...exceptionally serious crimes of international concern."¹⁶⁵ These crimes under the Draft Statute included acts of terrorism such seizure of aircraft, marine vessels and hostage taking while also including trafficking.¹⁶⁶ The ILC's draft code of crimes against the peace and humanity of 1996 also proposed the inclusion of acts of terrorism as war crimes when committed in a conflict of a non international character.¹⁶⁷



¹⁶² See Article 2 (4) of the Draft Code of Offences against the Peace and Security of Mankind of 1954.

¹⁶³ Arsanjani MH 'The Rome Statute of the International Criminal Court' (1999) American Journal of International Law, Volume 93 No. 1 24.

¹⁶⁴ Cassese A *International Criminal Law* 2 ed (2008) 328.

¹⁶⁵ Article 20 (e) of the Draft Statute of the International Criminal Court of 1994.

¹⁶⁶ See Articles 2, 6, 8 and 9 respectively of the Annex to the Draft Statute for an International Criminal Court of 1994.

¹⁶⁷ See Article 20(f) (iv) of the Draft Code of Crimes against the Peace and Humanity of 1996.

Others have argued that frequent use and reference to some of the proposed new crimes has led them to acquire customary status through state practice and *opinio juris*. Cassese observes with respect to terrorism that the ratification of international instruments, the passing of UN General Assembly Resolutions and the decisions of various courts have all contributed to the crystallisation of the international crime of terrorism.¹⁶⁸

Recently, the Special Tribunal for Lebanon (STL) even though not an international court, handed down a decision in which it argued terrorism had become a crime under international law.¹⁶⁹

The same may hold for the crime of unconstitutional changes of government which seems to fulfil the three criteria for crimes under international law.

The African Charter on Democracy Elections and Governance is an international instrument that sets out rights and obligations for its States Parties. Article 25(5) of the Charter states: “[P]erpetrators of unconstitutional change of government may also be tried before the competent court of the Union.” Article 25(7) goes on to provide that the AU Assembly may apply sanctions to perpetrators including punitive measures. Article 25(8) further requires States Parties not to harbour or give sanctuary to perpetrators of unconstitutional changes of government while article 25(9) requires states to

¹⁶⁸ Cassese A *International Criminal Law* 2 ed (2008)163.

¹⁶⁹ See Ambos K ‘Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?’ (2011) *Leiden Journal of International Law* Volume 24 No. 3 665- 675.

“...bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition”¹⁷⁰

The above provisions of the Charter clearly establish individual criminal responsibility for the crime of unconstitutional changes of government by its reference to trials and punitive sanctions for perpetrators. The Charter also enables the African Court to prosecute the perpetrators directly whilst creating a ‘prosecute or extradite’ rule for States Parties.

4.2.1.2. Jurisdiction Over the Crime of Aggression?

It is unclear at this stage whether the expanded Court will be given jurisdiction over the crime of aggression especially given its political overtones. However, may it is safe to assume that most States will be in favour of this proposal given their previous support as part of the “Like-Minded Group” which was in favour of giving the ICC jurisdiction over the crime of aggression during the drafting process of the Rome Statute.¹⁷¹ The AU and a number of African States were also in favour of gradually operationalising the jurisdiction of the ICC over the crime of aggression at the Rome Statute Review Conference.¹⁷² The recent

¹⁷⁰ Article 25(9) of the African Charter on Democracy, Elections and Governance.

¹⁷¹ Leonard KE *The Onset of Global Governance: International Relations Theory And the International Criminal Court* (2005) 92.

¹⁷² Statement by Mr. Ben Kioko, Legal Counsel of the African Union Commission on Behalf of the AU Commission at the Review Conference of the Rome Statute of the International Criminal Court (ICC) Kampala, Uganda 31 May-11 June, 2010 5.

events of the Arab Spring/Uprisings specifically the alleged aggression by NATO forces in Libya may also tilt the scale in favour of prosecuting aggression.

Should the drafters choose to include the crime of aggression, they may be guided by the AU's definition of the crime of aggression which is contained in the Union's Non-Aggression and Common Defense Pact which in many respects resembles the Kampala Consensus.¹⁷³

4.2.1.3. Necessity for Jurisdiction of New International Crimes

There may be justification in expanding the African Courts jurisdiction over some new crimes especially given the current challenges being faced by the region. Research by the Financial Action Task Force (FATF) shows that maritime piracy activities off the coast of Somalia are escalating to dangerously high levels. Between January and March 2011 alone, 33 vessels had been seized, 711 hostages held seven fatalities incurred.¹⁷⁴ In 2010 it was estimated that between US\$ 180 – 238 million were paid out in ransoms.¹⁷⁵ The global ramifications of piracy activity are estimated to cost between US\$ 7-12 billion per annum. The seriousness of the matter and its relevance to international

¹⁷³ See Article 1(c) of the African Union Non-Aggression and Common Defense Pact.

¹⁷⁴ FAFT Report - Organised Maritime Piracy and Related Kidnapping for Ransom (2011) 6.

¹⁷⁵ FAFT Report - Organised Maritime Piracy and Related Kidnapping for Ransom (2011) 6.

peace and security was evidenced when it was seized upon by the UNSC as evidenced by Resolution 1918 (2010).

In response to this problem, several jurisdictions have attempted to bring about prosecutions of pirates most notably Kenya. However, the Kenyan judicial system has been overwhelmed by the sheer number of accused¹⁷⁶ and is also viewed as ill equipped to deal with the complexity of the trials especially on jurisdictional issues and intricate matters of international maritime law.¹⁷⁷ This has led some to float the idea of the prosecution of pirates at the International Tribunal for the Law of the Sea in Hamburg or at an extraterritorial court in Arusha that would make use of the facilities of the wound up ICTR.¹⁷⁸

Due to its proximity to the crimes, evidence and witnesses and its ability to provide an appropriate forum for prosecution of other pirate attacks across Africa, it is submitted that an African Court with an international criminal jurisdiction could be a useful tool in the prosecution of piracy. This matter may

¹⁷⁶ Since 2008, more than 2000 suspects have been detained over suspicion of piracy while currently over 100 are awaiting trial in Kenya. See Pemberton B 'The International Tribunal for the Law of the Sea as a High Court of Piracy' One Earth Future Foundation Working Paper (2010) 9 and Mwangi W 'Developments in international criminal justice in Africa during 2010' (2011) African Human Rights Law Journal Volume 11 No. 1 278.

¹⁷⁷ Pemberton B 'The International Tribunal for the Law of the Sea as a High Court of Piracy' One Earth Future Foundation Working Paper (2010) 12.

¹⁷⁸ Mwangi W 'Developments in international criminal justice in Africa during 2010' (2011) African Human Rights Law Journal Volume 11 No. 1 276.

also draw the support following the UN Secretary General's Report to the UNSC on the matter which proposed the establishment of an international or regional tribunal to deal with maritime of piracy.¹⁷⁹

4.2.2. Design and Practical Aspects

The creation of a new international criminal jurisdiction for the African Court faces overwhelming design and practical challenges. The two most prominent of these challenges are resource constraints and practical and technical difficulties that will be faced.

4.2.2.1. Resourcing the Empowered African Court: Finances

International criminal law practise is an expensive endeavour given nature of the crimes being prosecuted and the high standards required to sustain fair trials. To illustrate, the 2011 budget of the ICC was € 103,607,900¹⁸⁰ while the budget of the ICTR for the period 2010- 2011 was US\$245,295,800.¹⁸¹ To date, the ICTR and ICTY have each spent over US\$ one billion and the ICC more

¹⁷⁹ See Report of the Secretary-General UN Doc S/2010/394 4.

¹⁸⁰ See Resolution ICC-ASP/9/Res. of the Assembly of States Parties Adopted at the 5th plenary meeting, on 10 December 2010, by consensus.

¹⁸¹ See 'General Information' available at <http://unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (accessed 30 October 2011).

slightly more than half a billion Euros.¹⁸² To put that in perspective, the current budget of the AfCHPR is US\$ 6,478,071 while the current budget of the AU for the year financial 2011 was pegged at US\$ 256,754,447.¹⁸³

This indicates that the sheer scale of resources required to finance the international criminal trials will require an exponential increase in current budgetary support for the African Court from the AU.

Insufficient funding can hinder and affect the hiring of competent staff, the carrying out of effective investigations, raise challenges of inequality of arms, legal aid, prevent victim and witness participation and hinder witness protection. The funding challenge is may also lead to questions over the legitimacy of the proceedings themselves as was witnessed with the SCSL. It has been argued that the shoestring budget given to the SCSL affected the number of indictees the prosecutor brought, the SCSL's outreach activities and equality of arms.¹⁸⁴

The funding challenge will not be unique to Africa as even supranational courts like the ICC are facing serious financial problems. In 2011 the ASP against the recommendations of the Committee on Budget and Finance approved a "zero

¹⁸² Wippman D 'The Costs if International Justice' *American Journal of International Law* (2006) Volume 100 No. 4 861.

¹⁸³ See Decision on the Budget for the African Union for the 2011 Financial Year - Doc. EX.CL/622(XVIII), Addis Ababa, 24 - 28 January 2011, 2.

¹⁸⁴ Jalloh C 'Special Court for Sierra Leone – Achieving Justice?' (2010) *Legal Studies Research Paper Series Working Paper No. 2010-31* 428 and 441.

growth” budget by retaining the same budgetary amount that was accorded to the Court in 2010.¹⁸⁵

Another challenge is that international criminal law is a reactive and evolving field of international law. Many of the requirements and standards of international criminal law that are currently in place may be expanded or replaced by others therefore requiring increased resources to sustain them. For example, the introduction of formal legal representatives for victims and witnesses is a creation that did not exist at the formation of the *ad hoc* courts but has since been enshrined in the Rome Statute. Similarly, the provision by the Lebanon Tribunal of an independent organ for the defence might have an impact on how future courts and tribunals are structured.¹⁸⁶

The planners behind an empowered African Court must keep in mind such developments and the general trend toward escalating costs of trials.



4.2.2.2. Resourcing the Empowered African Court: Human Capital

Creating an international criminal mandate for the African Court over and above its current structure will necessitate the appointment and recruitment of judges, prosecutors, investigators, additional legal staff, registry officers, translators,

¹⁸⁵ See ‘Press Release by the Coalition for an International Criminal Court “Global Coalition Calls on States to Maintain Financial Commitment To The ICC” available at [http://www.iccnw.org/documents/CICC_PR_Budget_FINAL_08072011_\(1\).pdf](http://www.iccnw.org/documents/CICC_PR_Budget_FINAL_08072011_(1).pdf) (accessed 30 October 2011).

¹⁸⁶ See Article 7(d) of the Statute of the Special Tribunal for Lebanon.

interpreters and countless other professionals. This staff outlay could run well into the hundreds. To illustrate, the ICTR currently employs some 628 individuals.¹⁸⁷

The cost of recruitment and retention of competent and highly skilled staff is usually high. At the same time, the AU will be competing with other international organisations for the same talent. The AfCHPR has acknowledged that human capital component is currently insufficient and that there is "...an acute shortage of staff for the effective functioning of the Court."¹⁸⁸

4.2.2.3. Amendment Procedure

As was observed in the Chapter above, the activation of criminal jurisdiction of the African Court would be by way of amendment of the current Protocol on the Statute of the African Court of Justice and Human Rights. For the amending protocol to come into force, it will need to be ratified by States Parties. Current AU practise requires 15 ratifications before the entry into force of a treaty. This

¹⁸⁷ See 'General Information' available at <http://unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx> (accessed 30 October 2011).

¹⁸⁸ Presentation by Honorable Justice Augustino S.L. Ramadhani on Opportunities and Challenges for the African Court On Human And Peoples' Rights during the Third Meeting of Legal Advisors of the African Union and the Regional Economic Communities, 11-13 July 2011.

presents a significant challenge within the membership of the AU as ratification practise is very poor.

To illustrate, despite the adoption of the ACJHR Protocol at the AU Assembly on July 2008, there have only been three ratifications of the ACJHR Protocol to date.¹⁸⁹ In the case of the AfCHPR it took five years to receive the 15 ratifications necessary to operationalise the Court.¹⁹⁰

Even in respect to some of the novel crimes that the AU is proposing, support for the relevant instruments is still low. The African Charter on Democracy Elections and Governance which creates the crime of unconstitutional changes of government has received 10 ratifications¹⁹¹ while the Protocol to the OAU Convention on the Prevention and Combating of Terrorism which gives the

¹⁸⁹ See 'List of countries which have signed, ratified/acceded to the Protocol on the Statute of the African Court of Justice and Human Rights' available at http://www.au.int/en/sites/default/files/9999Protocol_on_Statute_of_the_African_Court_of_Justice_and_HR.pdf (accessed 30 October 2011).

¹⁹⁰ See 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' available at <http://www.au.int/en/sites/default/files/992achpr.pdf> (accessed 30 October 2011).

¹⁹¹ See 'List of countries which have signed, ratified/acceded to the African Charter on Democracy, Elections and Governance' available at http://au.int/en/sites/default/files/Charter_on_Democracy_and_Governance.pdf (accessed 30 October 2011).

PSC primacy over dealing with terrorism in Africa has received 12 ratifications.¹⁹²

Thus even if the AU were to proceed with creating an empowered African Court, it would require improved ratification standards, not just for the protocol to expand the Court's jurisdiction, but also for the existing corpus of AU law.

4.2.2.4. Diplomatic Aspects and Political Will

There will also need to be sufficient political and diplomatic resolve required in finding a permanent residence for the empowered African Court.

As has been illustrated above, the seat of the current African Court on Human and Peoples' Rights is Arusha, Tanzania. The AU also saw it fit to host the ACJHR in the same city in an effort to ease the transition to a merged court.¹⁹³

Although Arusha is aptly styled as the "Geneva of Africa" hosting international institutions such as the ICTR, the East African Community and the East African Court of Justice, the AfCHPR has struggled to find a permanent home in the city. Tanzania agreed to host the Court and entered into a host agreement with

¹⁹² See 'List of countries which have signed, ratified/acceded to the Protocol to the OAU Convention on the Prevention and Combating of Terrorism' available at http://au.int/en/sites/default/files/Protocol_on_Terrorism.pdf (accessed 30 October 2011).

¹⁹³ Article 25(1) of the Protocol on the Statute to the African Court of Justice and Human Rights provides that the seat of the Court "...shall be same as the Seat of the African Court on Human and Peoples' Rights."

the Court in 2007. Under the terms of the agreement the government of Tanzania would to provide working premises for the Court. Yet for the past five years progress on finding a permanent residence for the Court has been slow as it is currently temporarily housed at a government property as it awaits construction of permanent premises.¹⁹⁴

The Court would also require diplomatic support to conclude detention agreements for the accused after they have served their sentences, and asylum agreements for the acquitted who may not be able to return to their state of origin. This has been major challenge for existing courts such as the ICTR.¹⁹⁵

However by far, the political will to respect and enforce the decisions of an empowered African court will be its greatest test. Judging from current practise, full state compliance with decisions of the African Commission on Human and Peoples' Rights lies at an appalling 14%.¹⁹⁶ The lack of political will in complying with decisions of regional courts in Africa is also very low. After passing a series of critical decisions against Zimbabwe, the Southern African

¹⁹⁴ See 'Institutional Background' available at <http://www.african-court.org/en/court/about-the-court/institutional-background/> (accessed 30 October 2011).

¹⁹⁵ See Heller KJ 'What Happens to the Acquitted?' (2008) *Leiden Journal of International Law* Volume 21 No. 3 665- 674.

¹⁹⁶ Louw L 'An Analysis of State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights' (2005) Unpublished LL.D Dissertation University of Pretoria iv.

Development Community (SADC) Tribunal's jurisdiction was frozen at the request of Zimbabwe and the Tribunal was disbanded indefinitely by the SADC Summit of Heads of State.¹⁹⁷ The East African Court of Justice also suffered a similar fate after it issued several taunted decisions against the Kenyan government. Judges were recalled, the composition of the court was reshuffled and its rules of procedure amended to limit as much as possible litigation by citizens against the state.

Political resolve is also required to adequately fund the Court. Current funding practise within the AU and its membership in this respect is wanting. To illustrate, after requesting Senegal to prosecute former Chadian President Habré on behalf of Africa, the AU then faced funding difficulties in meeting the proposed budget of the trial which has meant Habré has still not been tried since 2006.¹⁹⁸ It is also difficult to explain why the AU chose to reduce the budget of the AfCHPR from US\$ 7,939,375 in 2010 to US\$ 6,478,071 in 2011 at a time when the Court is required to scale up its operations.

African States would need to prove and improve their commitment to complying with current mechanisms otherwise expanding the African Court's jurisdiction may be a worthless exercise.

¹⁹⁷ See 'SADC Tribunal Suspended for a Further Year' available at <http://allafrica.com/stories/201105230449.html> (accessed 30 October 2011).

¹⁹⁸ Decision on the Hissene Habré Case Doc. Assembly/AU/9(XVI), Addis Ababa, 31 January – 2 February 2010, 3.

4.2.3. Cooperation, Complementarity and Competition Between the Empowered African Court and the National and International Courts

The most significant test for the African Court will be how it fits into the international criminal justice system. With respect to national jurisdictions, the decision of the AU assembly in 2009 stated that the Courts criminal jurisdiction would be complementary to that of national courts.¹⁹⁹ This matter is fairly straight forward as it would, as is currently the case with the ICC, allow national courts to first assume jurisdiction over crimes. This would then require states parties to incorporate within their domestic jurisdiction laws providing for the prosecution of all new crimes under the empowered court. The real challenge for the court however will be at the international level.

As has been observed above, the genesis of the creation of an empowered African Court has much to do with the tensions that exist between the AU and the ICC. Some analysts have therefore concluded that the AU is creating an empowered African court as parallel process to the ICC in Africa. Others have argued that once the African Court is empowered with an international crimes mandate, this may signal a mass exodus from the Rome Statute by African States.²⁰⁰

¹⁹⁹ Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc Assembly/AU/13 (XIII), Sirte, 1–3 July 2009, 5.

²⁰⁰ See 'Africa Plots Mass Walk Out from ICC' <http://www.capitalfm.co.ke/news/2011/03/africa-plots-mass-walkout-from-icc/> (accessed 30 October 2011).

Whilst there is circumstantial evidence in support of the above arguments, the veracity of these claims cannot be empirically ascertained. The AU in its official communications has maintained a more tempered and nuanced approach to the problem reiterating its concerns about the ICC while maintaining its resolve to fight impunity. The AU's continued focus on the ICC has been signalled by its support for African candidatures for the positions of Chief Prosecutor and judge. The AU in July 2011 also held a joint seminar with the ICC which intended to discuss amongst others, "...developing a permanent system of exchange and communication between the ICC and the African Union."²⁰¹ This could signal a softening of the AU's July 2010 decision denying the request of the ICC to open up a Liaison Office at the AU Commission.²⁰²

Notwithstanding, even if African states choose to walk out of the ICC, this will not serve to alleviate the bulk of their existing concerns. As members of the UN, African States will still be subject to the selectivity of UN Security Council.

²⁰¹ See Concept Paper ICC – AU Joint Seminar on the technical aspects of the Rome Statute in Addis Ababa available at [http://www.au.int/en/dp/legal/sites/default/files/Joint_seminar_ICC_AU_Concept_paper_clean_version_-_Final\[1\]_1.pdf](http://www.au.int/en/dp/legal/sites/default/files/Joint_seminar_ICC_AU_Concept_paper_clean_version_-_Final[1]_1.pdf) (accessed 30 October 2011).

²⁰² Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC) Doc. Assembly/AU/10(XV) Kampala, 25 – 27 July 2010, 8.

A mass walk out of the ICC will also not serve to halt existing trials or indictments by the Court.²⁰³

If the AU chooses to empower the African Court's mandate whilst maintaining its current support for the ICC, this may give rise to concurrent or overlapping jurisdiction between the courts. It is therefore possible that the two courts may compete to investigate and prosecute crimes which may give rise to duplicity of work, wastage of resources and divergent jurisprudence.

It is also possible that the two courts may investigate or prosecute the same individuals on the basis of the same facts but in relation to different crimes. This can arise for example where one court investigates the crime of murder as genocide and the other the crime of murder but as a crime against humanity. This, apart from raising practical challenges such as securing the presence of the accused before the respective courts may also lead to a breach of the *ne bis in idem* principle therefore leading to double jeopardy.²⁰⁴

4.2.3.1. The Argument for Regional Complementarity

On the other hand, a strong argument can be made for supporting overlapping jurisdiction between the AU Court and the ICC in a form of 'regional complementarity.' The ICC's role as a Court of last resort has meant that it applies a high threshold when deciding whether to prosecute crimes. This threshold requirement is provided for under Article 17(d) of the Rome Statute

²⁰³ See Article 127(2) of the Rome Statute of the International Criminal Court.

²⁰⁴ Werle G *Principles Of International Criminal Law* 2 ed (2009) 248.

which requires the crimes under the jurisdiction of the Court to be of significant gravity. The decision of the ICC not to prosecute on the basis of this threshold requirement should not be viewed as implying that those acts did not constitute international crimes *per se*, but rather that they did not meet the Court's jurisdictional requirement of prosecuting the most serious crimes of international concern.²⁰⁵

Where the ICC may choose or in fact be unable to prosecute on the basis of this threshold standard, the African Court should, as a regional complement have the option to intervene on the basis of its 'concurrent' jurisdiction over certain crimes but at a lower threshold.

The argument for regional complementarity is also bolstered by the fact that despite Africa's claim to be the largest regional bloc to the Rome Statute, 25 African States are still not party to the Court due to political and other factual constraints. Non states parties to the Rome Statute in Africa include Zimbabwe, Sudan and Somalia States which have all seen or are still facing situations of gross human rights violations. The inability of the ICC to act in these situations coupled with the unlikelihood of prosecutions at the domestic level may mean victims of grave violations may not receive justice.

An empowered African Court which would apply territorial jurisdiction over the entire Africa could serve to prosecute perpetrators of crimes in these countries.

²⁰⁵ See generally the Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang" ICC-01/09-01/11.

It would do so on a Continent where the need for further prosecution of international crimes is necessary and without some of the challenges facing other international courts such as proximity to evidence, victims and witnesses, thereby reducing the cost of international trials. In addition, the possible presence of two courts that could assume jurisdiction over perpetrators of crimes in these and other countries may have an increased deterrent effect.

The broader range of new crimes proposed for the African Court and their relevance to the core crimes of international law under consideration by the ICC can lead to the casting of a wider net against impunity. Unconstitutional changes of government which have occurred in Côte d'Ivoire for example have also given rise to the commission of other crimes under international law. Transitioning states may choose make use of both courts to achieve justice for interrelated crimes under such situations.

As has been illustrated above, the creation of an African international criminal court need not prejudice the work of the ICC. Rather, the two courts' can work hand in hand in a regionally complementary manner to achieve justice for victims and an end to impunity. It may therefore be necessary for the AU and ICC to consider how both courts could cooperate and collaborate in the sharing of materials, evidence, jurisprudence, staff and even in the transfer of suspects between the courts.

4.3. Concluding Observations

The preceding part has clearly showed that are both firm prospects and challenges for an empowered African Court.

Whilst the empowered African Court will have the ability to prosecute a broader range of crimes in closer proximity to conflict situations and have an increased the deterrent effect, the challenge of its funding and political will remain serious obstacles to be overcome.

It has also been pointed out that there is space for both the African Court and ICC to function in a mutually beneficial manner. However, the challenge of concurrent on overlapping jurisdictions may require the African Court to serve as 'regional complement' to the existing jurisdiction of the ICC recognising it as the apex court in the international criminal justice system. The development this form of regional complementarity would also be in line with Chapter VIII of the UN Charter which provides for regional arrangements for the maintenance of international peace and security.²⁰⁶ It is also for this reason the AU membership should not opt out of its current obligations and continue to support the ICC.

²⁰⁶ Article 52 of the Charter of the United Nations.

CHAPTER FIVE

SUMMARY OF KEY FINDINGS, RECOMMENDATIONS AND CONCLUSION

5.1. Summary of Key Findings

This Research Paper has established that despite the initial support by Africa toward international criminal justice, there has been shift in the collective perception of African States towards the system. While some of the concerns of African States may be misplaced or overstated, others remain relevant although unfortunately remained unaddressed.

The tensions between the UNSC and the application of universal jurisdiction in particular have led the AU to consider empowering the African Court of Justice and Human Rights with an international crimes mandate.

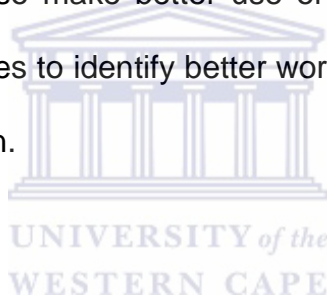
While this process is still in its tentative stages, should the AU choose to proceed in vesting the Court with criminal jurisdiction, it will face many legal and practical challenges especially given the related resource inputs required and the current low rates of compliance with decisions of African institutions. Notwithstanding, an empowered African Court serving as a regional complement to the ICC may serve to widen the impunity net especially given the host of new crimes proposed under its jurisdiction.

5.2. Recommendations

5.2.1. Recommendations With Respect to the Work of the International Criminal Court

The author recommends, with respect to the continued uncertainty around the jurisdiction of the ICC with respect to non states parties that the AU or its members make use of the dispute settlement mechanism provided for under Article 199 and Rule 195 of the Rome Statute and the Rules of Procedure and Evidence of the ICC respectively. An advisory opinion of the International Court of Justice on this issue would be useful in clarifying the matter.

African States should also make better use of their dominant position at the Assembly of States Parties to identify better working guidelines for the exercise of prosecutorial discretion.



5.2.2. Recommendations With Respect to the Role of the United Nations Security Council

The AU proposal for amendment of Article 16 of Rome Statute to allow the UN General Assembly to assume the mandate of the UNSC where it has abdicated in its duties will serve to ensure that the Security Council is compelled to at minimum consider requests for deferral. Given the progressive nature of the proposal, AU Member States should coalesce with other members of the Like Minded Group ensure that the proposal is passed at the ASP.

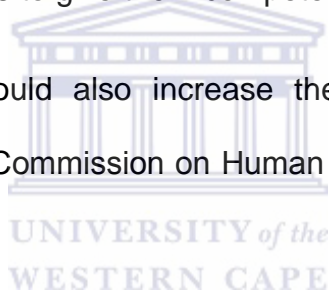
However, in the long term, AU member states should work towards general reform of the UNSC as there is a need for the organ to be more representative

and democratic. The current *status quo* is beginning to undermine the legitimacy of international justice especially in the context of the ICC's work.

5.2.3. Recommendations in Respect to Empowering the African Court

While the idea of an empowered African Court as a regional complement is welcomed, the endeavour should not be rushed on the sole basis of existing tensions between the Union and international criminal justice actors. Given the need to make adequate arrangements with respect to resourcing the Court, in the short term the AU should encourage and assist Member States to upgrade their respective judiciaries to give them competence over international crimes.

AU Member States should also increase their resolve in complying with decisions of the African Commission on Human and Peoples' Rights and other Union organs.



5.3. Conclusion

International law is a rapidly advancing field and Africa has much to contribute. Africa's role as one of the largest actors in international criminal justice is likely to substantially affect and shape the development of international criminal law.

Despite the existing tensions and pressures existing between the AU and international justice actors, the international community as a whole must focus on the need to end impunity and securing justice for victims of international crimes. This will inevitably involve reflecting on the current progress down the path of international justice and correcting the course where necessary.

With respect to the ambitions of the AU to extend the jurisdiction of the African Court, for this process to be a successful, the AU and its Member States must continue to foster through their actions commitment to end impunity. Further, in as much as the development of an international crimes mandate for the African Court as a regional complement to the jurisdiction of the ICC will be beneficial, African States must also ensure that the Court is sufficiently capacitated to effectively deliver its mandate.



Word Count: 20,099.

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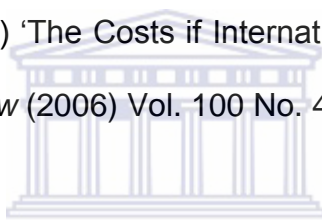


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