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The Quest to Prosecute and Punish International Crimes by the African Court of Justice and Human Right: Myth or Reality?**

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Abstract

This paper examines the proposed African Court of Justice and Human Right which is expected to be the main judicial organ of the AU. It looks at the reasons for the establishment of the court which includes but not limited to the failures of the national, hybrid and the ad hoc courts in the region to meet the demands of justice in prosecuting cases of international crimes. The merged court has an expanded jurisdiction covering crimes within ICC's jurisdiction and other crimes peculiar to Africa. This move is seen as ambitious and contentious as it is not favorable to the role of the ICC. The paper further examines the procedures of the proposed court as contained in the courts Statute and observes that there exists some gaps which must be filled if the court will achieve its goals. The paper also observes that the statute of the court makes provision for corporate criminal liability of corporation which is a good innovation as this is one crime that national legislations have not been able to address. The paper also provides a brief overview of national, hybrid and ad hoc international criminal trials in Africa and argues that the Malabo instrument is an important and alternative means of attaining justice in the region to improve on the errors of the earlier courts. It further examines the advantages of the proposed court and possible drawback that the court may face when it is established. Based on the findings, the paper concludes that the proposed court will bring justice nearer home to the victims, but will fail if the AU lacks the muscle to address the challenges noted. Finally, the paper recommends, that the subjecting the practice of universal jurisdiction to the provisions of national immunity and consent of the accused will make prosecution of crimes in Africa ineffective.

Key Words: Prosecution, Punishment, Crimes, Court, Africa, Justice

1. Introduction

The possibility or otherwise of the quest of the African Court of Justice and Human Rights (ACJHR) to prosecute and punish international crimes committed in Africa is the aim of this paper. This is borne out of the fact that some African States and Africans generally perceive the International Criminal Court (ICC) as anti-Africa and this has led to the withdrawal of membership of ICC by Burundi.[1] A critical examination of situations in Africa would reveal that Africa is home to most internal conflicts[2] from Central African Republic, Cote D'Ivoire, Egypt, Kenya, Liberia, Libya, Nigeria, Sierra Leone, Sudan and Tunisia to mention but a few.

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[1] H Goitom 'FALQs: International Criminal Court and Africa', https://www.blogs.loc.gov/law/2016/11/falqs-the-international-criminal-court-and-africa. (accessed 15 August 2020). See also A France-Presse 'Burundi Becomes first nation to leave International Criminal Court', https://www.theguardian.com/law/2017/oct/28/Burundi-becomes-first-nation-to-leave-international-criminal-court (accessed 22 February, 2020).

[2] Internal conflicts are those conflicts that occur within the territory of a State between the State armed forces and rebel groups or with dissident members of the armed force or between two rebel groups. See Art 1 of APII but this excludes situations of internal disturbances and tensions, such as riots, isolated or sporadic acts of violence and other acts of a similar nature which are not armed conflicts. Art 1(2) APII. While the first category will be referred to as internal armed conflict or non-international armed conflict the second would qualify as other situations of violence (OSV).

For over two decades now internal armed conflicts or non-international armed conflict (NIAC) have been taking place in Africa[3] and the other parts of the world.[4] One major feature of conflicts in Africa is that they cannot be pigeonholed into a particular mould. They are usually conflicts of mixed characteristics that contains both international and internal features.[5]

An instance of such conflicts with dual characteristics in Africa can be articulated thus: in 1998-2000 not less than eight States were involved by way of intervention in the non-international armed conflict in the Eastern DRC on one hand, the rebel forces and the government of Laurent Kabila[6] on the other hand. Another feature of conflicts in Africa is that it spans over a long period of time. The conflict in the Central African Republic which started in 2012 is still ongoing.[7] In the North-eastern part of Nigeria, the Boko Haram attacks began in 2008, escalated in 2013 and up to the time of writing, it is still on. In July, 2020, the sect shot down a United Nations Aircraft involved in humanitarian relief operation[8] just a day after the Nigeria Air Force via an airstrike destroyed some of the hideouts of the sect. The conflict in Angola lasted for twenty seven years (1975 – 2002).[9] In Burundi the conflict lasted for twelve years.[10] That of Chad was for five years.[11] Liberia was at war for seven year.[12] In the Darfur region, the war started in 2003 and ended in 2015, a period of twelve years, Uganda's situation lasted for nineteen years.[13] Conflict in Southern Kordofan[14] and South Sudan[15] is still on.

The reasons for these conflicts are as diverse as the parties involved. In Nigeria for instance, it is the issue of religion and rejection of westernization. At some point in Nigeria, it was about marginalization and the quest for equitable distribution of income from natural resources- oil in particular. This is not peculiar to Nigeria.

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[3] UNGA. 'The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa', Report of the Secretary General of the UNSC, UN DOC A/52/80-S/1998/318 (1998), para 4 https/www.securitycouncil/report.org (accessed 6 July 2020).

[4] R, Cryer, 'The Security Council and Article 39: A threat to Coherence?', (1996) *Journal of Armed Conflict,* Vol.1 No. 2, pp161-195, https://wwwjstor.org. (Accessed 6 July 2020). Published by Oxford University Press.

[5] These mixed features are not peculiar to Africa. In Yugoslavia, the court noted this in the case of *Prosecutor v Dusko Tadic*, Decision on the Defence motion for an interlocutory Appeal on Jurisdiction, 13-94 – 1, 2 October 1995, Para 72 and Judgment 17 – 94 – 1 – A, 15 July 1999, para 84 Also in *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States*) ICJ Reports 1986, p14 para 219.

[6] The external actors in support of Laurent Kabila includes Angola, Chad, Namibia, Sudan and Zimbabwe – while Rwanda and Uganda were against his government. See Omorogbe, E. Y. "The Crises of International Criminal Law in Africa: A Regional Regime in Response?" (2019) *Netherland Int'l Law Review,* Vol. 6, p. 287-311 at 297.

[7] "Violence in Central African Republic", https://www.cfr.org/violence-central-afrcan-republic, (accessed 10 July, 2020. See also United States Institute for Peace (USIP), 'The Green Diamond: Coffee and Conflict in the Central African Republic', https://www.usip.org/2020/02/green-diamond-coffee-and-conflict-in-the-central-african-republic/html (accessed 10 July, 2020).

[8] A, Olalekan, "B"Haram attack on UN Helicopter won't be without Consequences" the *Punch Newspapers* (Lagos, 6 July, 2020) p 13.

[9] 'The Angolan Civil War (1975-2002): A Brief History', https//www.sahistory.org.za/article/Angolan-civil-war-1975-2002-brief-history.html (accessed 17 July 2020). The war can be divided into three periods: from 1975-1991, 1991-1994, 1998-2000. These were the periods of major fighting with fragile peace periods. By the time that victory was achieved by the Peoples Movement for the Liberation of Angola (MPLA) in 2002, more than 500,000persons had died and over a million were internally displaced.

[10] Burundi's conflict began from 1993 and ended in the year 2005.

[11] Lasted from 18 December 2005-15 January 2010

[12] 24 December 1989 – 2 August 1997.

[13] 1987 – 2006. The most protracted of the conflicts in Uganda has been the war in Northern Uganda that lasted nearly two decades that had five different rebel groups as actors and caused hundreds of thousands of death in Ajumani Districts up to Soroti. The war also displaced over 1.4 Million people and completely destroyed northern Uganda's economic base-agriculture. See Global Security, 'Uganda Civil War', https://www.globalsecurity.org/military/world/war/uganda.htm (accessed 18 July 2020).

[14]Southern Kordofan conflict began in 2011 and it is still on. This is the ninth year running.

[15]The conflict in Southern Sudan started in 2013. Seven years down the line, it is still on going

In Liberia, it was natural resources, Sudan, Angola and South Sudan's conflict was linked to oil and in Democratic Republic of Congo, Sierra Leone and Angola, and the reason was for minerals.[16]This may also explain the reason behind the inclusion of corporate liability in the Malabo Protocol of the proposed Court.[17]

Another feature of conflicts in Africa is that they are mostly non state conflicts. *Rustad* and *Bakken* noted that non state conflicts in Africa had been on the rise but that the trend stabilized in 2018. They noted in their work that there were about fifty armed conflicts involving non state actors in Africa.[18] This is considered a sharp contrast when one considers that in the same year there were about nine armed conflicts in Africa that had at least a state as a party to the conflict.[19]

Again the involvement of some religious fundamentalist groups (Jihadist) have also exacerbated the conflicts in Africa.[20] The use of child soldiers by both government forces and the rebel armed groups has presented a unique dimension to the conflict. This has a huge impact on the region.[21] The above is not to say that the conflicts in Africa are limited to the points noted above. There is also the ugly trend of gender-based violence in the region which is another characteristic of these conflicts. Armed groups target and abduct girls and women and turn them into suicide bombers or bush wives.[22]

Again, the case of Egypt and Libya was linked to the quest for a change in government which led to the death of so many civilians particularly in Libya. Then President of Libya, Muammar Ghaddafi was indicted by the ICC and a warrant of arrest was issued but was terminated as a result of his death.[23] In Sudan, Omar Al- Bashir was indicted the first time for war crimes and crimes against humanity[24] and the second indictment was on grounds of genocide[25] by the ICC; his arrest warrant is yet to be executed. In Kenya, the conflict was linked to post election violence as well as its efforts to fight terrorism while in Cote D'Ivoire the violence was also linked to elections.

It is also not out of place to state that Africa has remained a continent with various degrees of impunity. National Courts with primacy in African States have failed to investigate, prosecute and punish perpetrators' of international crimes.

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[16]R Kishi, "Resources Related Conflict in Africa ACLED (19 November 2014). https://www.crises .acled.data.com/resources-related-conflict in-Africa/ (accessed 6 July 2020). The author noted that Nigeria consistently exhibits high level of directly-resources-related conflict and has experienced a markedly higher number of these event relative to other African countries since 1997. South Sudan comes second in the list of highest number of explicitly resources-related conflict considering that the country only gained independence in 2011. The conflicts are usually between government force and rebel groups. DR Congo conflicts is fuelled by mining (diamonds, cobalt). The battle in DR Congo is also between government force and rebel groups.

[17]Article 46C, Malabo Protocol.

[18]SA Rustad, and IV Bakken, *Conflict Trends in Africa, 1989-2018*, *Conflict Trends,* 6. (Oslo: PRIO, Peace Research Institute Oslo; 2019) https://www.org>publications (accessed 6th July 2020).

[19]*As above.*

[20]Omorogbe, (n6) at 298.

[21]Coalition to stop the use of Child Soldiers (2015). UNSC /UNGA, report of the Secretary General: Children and Armed Conflict: UN Doc A/72/865-5/2018/465 (16 May 2018) para 9. It was noted in 2016 that 40% of the world's Child soldiers were operating in Africa.

[22]Amnesty International reported that a total of 2000 women and girls were abducted by Boko Haram in Nigeria between 2013 and 2015. From 2015-2020 more women been abducted by the sect in Nigeria.

[23] *Prosecutor v Omar Al Bashir*, ICC-02/05-01/09-3. Decision on the prosecutor's application for a warrant of arrest against Omar Hassan Ahmed Al- Bashir, 4 March 2009, Paragraph 93. https://www.iccc-cpi.int/iccdocs/doc639096.pdf (accessed 15 August 2020).

[24] Situation in Dafur, Sudan, *Prosecutor v Omar Hassan Al Bashir*, https://www.icc.cpi.int/iccdocs/doc639078, (accessed 6 July 2020).

[25] Dissenting Opinion of Judge Usacka who found that there are reasonable grounds to believe that Omar Al-Bashir possessed the genocidal intent and is criminally liable for genocide. Separate and partly dissenting opinion of Judge Anita Usacka, paragraph 1, https://www.icc-cpi:int/icc/docs/doc/doc639096.pdf (accessed 15 August, 2020).

This is the reason why most of the cases investigated or tried by the ICC are those committed by Africans.[26] The ICC by virtue of its statute[27] will not assume the primary jurisdiction which is vested in national courts. It only does so where the national courts have shown unwillingness and genuine inability to prosecute. Thus, the ICC should ordinarily play a complimentary role.[28]

The question then is why would Africa create a regional criminal court? The argument is that this court will provide African solution to African problems and bring justice closer to the victims. Africa is encouraged to take this step considering the lessons learnt from national and hybrid courts which this study will show. To properly articulate the issues that this paper addresses, the paper is divided into seven parts. Part I introduces the subject while Part II gives an overview of international criminal prosecution. This section is important as it evidences the global desire for an international criminal court which consequently found expression in Africa in the form of the Malabo Protocol. It also examines the Cold War era. Part III considers the journey for the prosecution international crimes in Africa. This is to situate the reasons for the quest for a regional criminal court in proper perspective considering that it is often assumed that this quest began with the face-off between the International Criminal Court and Africa. This section also x-rays the practices by national, hybrid and ad hoc courts in Africa noting their successes and challenges showing that the prosecution of international crimes is not strange in and to Africa. Part IV examines the grouse of the African States against the ICC as this is key to the quest for the establishment of a regional mechanism. Part V discusses the principle of universal jurisdiction and how African States have responded to its application in the prosecution of African Heads of States and Government. Part VI presents the discussion on the procedure of the ACJHPR as gleaned from its constitutive document (the Malabo Protocol). This is to identify the gaps and proffer suggestions on how the court can be made more effective. Part VII discusses the benefits to be derived from the establishment of a regional criminal court if AU is able to make the dream come true. Some of the hindrances is discussed in part VIII. Part IX concludes the paper**.**

2. Historical overview of international criminal prosecution

Prior to 1945 only States qualified as subjects of international law and the formulation and enforcement of criminal codes in international law would mean that individuals have to be recognized as crimes are committed by individuals who act as agents of States.[29] So, the need to recognize individuals for purposes of accountability became real. Another hurdle that the international community had to cross was the issue of "non-intervention", an established rule which is in tandem with the principle of sovereignty of States. States have the right to handle their internal affairs without undue interference as enshrined in Article 2 (7) of the UN Charter. Where there are reports of international crimes within the territory of a State; the international community would intervene in order to bring perpetrators to justice. Therefore, the principle of universal jurisdiction[30] will be activated and perpetrators are searched for, investigated and prosecuted. Most times, the affected individuals, often the heads of States and senior government officials and other States sympathetic to the plight of the affected States claim that the process violates States sovereignty and the immunity of the officials involved.

The treaty of Versailles[31] was the first to provide for individuals' accountability in international law. The League of Nations in 1937 introduced a Convention to facilitate the creation of an international criminal court;[32] this Convention was never ratified by any State. The League of Nations could not maintain international peace and security which was its sole aim and this led to its failure to prevent the Second World War (WWII). Other events that led to the World War II includes the impact of the Treaty of Versailles after WWI.

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[26] MK Clarke 'International Criminal Justice Today: Accountability and the Expansion of the Criminal Jurisdiction of the African Court', http://www.international-criminal-justice-today.org/arguedo/accontability-and-the-expansion-of-the-criminal-jurisdiction-of-the-african-court/ (accessed 12 July 2020).

[27] The Rome Statute of the International Criminal Court (ICC Statute).

[28] Art 17 ICC Statute.

[29] G Werle & J Bung 'Summary (Historical Evolution) International Criminal Justice', Humboldt-Universitat zu, Berlin, Sommersemester, 2010, p.1, http://www.werle.rewi.hu-berlin.de/01_History-summary.pdf (accessed 13 July, 2020).

[30] Universal jurisdiction is the legal principle allowing or requiring a State to bring criminal proceedings in respect of certain crime irrespective of the location of the crime and the nationality of the perpetrator or the victim. The reason behind the principle is founded on the premise that "certain crime are so harmful to international interest that States are obliged to bring proceedings against perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim

[31] Art 228, Versailles Peace Treaty of June 28, 1919. http://www.loc.gov/law/help/us-treaties/bevans/m-usto00002-0043.pdf (accessed 2 August 2020).

[32] RMM Wallace *International law*, (2005) at 246.

Germany was mandated by the Allied Powers that were victorious in the war to sign the Treaty of Versailles. Germany had to accept guilt and paid reparations.[33] There was also an economic depression in the late 1920. In 1933, Hitler became the leader of the Germans and promised to restore the German wealth and power. Hitler, began the German militarism by secretly building Germany's army and weapons and in 1936 Hitler made alliances with Italy and Japan against the Soviet Union and these three countries became the Axis Powers.[34]

There was also a failure of appeasement. Appeasement would have meant that nations would agree to the demands of other nations in a bid to avert war.[35] But this did not work. Japan's militarism in 1931 when it was hit by economic depression also led to the war. Japan invaded China. The intervention of the League of Nations did not deter Japan. They continued to occupy China and Korea. Japan also invaded other areas in South East Asia including Vietnam. In August 1939, Hitler and Joseph Stalin, the Soviet Leader signed the German-Soviet Pact. On September 1, 1939, Hitler invaded Poland from the West. Two days after the invasion, France and Britain declared war on Germany and the Second World War began.[36] The World War II witnessed the commission of international crimes of unprecedented magnitude and there was the need to put in place mechanisms that would require accountability from those suspected to have committed international crimes. In 1945, an agreement between the governments of United Kingdom and Northern Ireland, United States of America, French Republic, Union of Soviet Socialist Republic (USSR) (now Russia) to prosecute and punish major war criminals of the European Axis was signed in London on the 8th of August 1945.[37]

This agreement brought the International Military Tribunal for Nuremberg into existence.[38] The Tribunal had the mandate to try and punish individuals acting on their own as individuals or as members of organizations who committed crimes against peace, war crimes or crimes against humanity.[39] The Charter did not recognize the official capacity of the accused.[40]

No one would hide under the guise of acting for the State to escape punishment and that is why the crimes under the jurisdiction of the tribunal demanded individual responsibility and so the tribunal stated that: 'Crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[41] In Addition to Nuremberg, a number of trials were instituted within the Allied-occupied Germany under the authority of Control Council Law No. 10.[42] The International Military Tribunal for the Far East was established in January 1946 to deal with Japanese war crimes.[43] These tribunals re-affirmed Nuremberg's findings of individual responsibility for crimes and the rejection of the defense of superior orders.

The practices by these tribunals firmly established individual criminal responsibility for international crimes. The Yugoslavia and Rwanda Courts followed the same rules. When the International Criminal Court was established in 2002, the Statute of the Court reiterated the position of the earlier courts and tribunals. From 1945 Charter of the IMT to the 2002 Statute of the ICC, no individual had been exonerated on grounds of official immunity. This is apt considering the stance taken by African Union under the Malabo Protocol to grant immunity from trial to persons who have committed international crimes while occupying official positions as Heads of States or Government or senior state officials. Where does this leave Africa on its quest for justice and accountability?

2.1 The cold war period

[33] 'World War II History', https://www.history.com/.amp/tofics/world-war/ii/world-war-ii-history, (accessed 6 July 2020).

[34] 'World War II: Causes (1919-1939)', https://www..lcps.org/lib/domain-world-war-ii-causes-1919-939, (accessed 6 July 2020).

[35] *Ibid.*

[36] World War History, (n33).

[37] Charter of the International Military Tribunal for Nuremberg (IMT Charter) – United Nations, Treaty Series. http://www.un.org/en/genocideprevention/documents/atrocity-cremos/doc.2_charterofIMT1945.pdf (accessed 3 August, 2020).

[38] Art 1 IMT Charter 1945.

[39] Art 6 (a)(b)(c), IMT Charter 1945.

[40] Arte 7 IMT Charter 1945.

[41] Judgment of the IMT as cited by Werle & Bung (n 29).

[42] 36 ILR, p31. See also A.P.V. Rogers, 'War Crimes Trials under the Royal Warrant, British Practice 1945-1949', (1990), 39 *ICLQ*, p780.

[43] Established by a proclamation by General MacArthur of January 1946, so authorized by the Allied Powers in order to implement the Potsdam Declaration. See *Hirota v MacArthur,* 335 US876 and TIAS, 1946, No. 1589, p3; 15 AD, p485.

By the General Assembly Resolution 95 of December 11 1946, the United Nations confirmed the principles established by the Nuremberg Tribunal.[44] Although UN General Assembly Resolutions are not legally binding but they can be presented as crystallizing, formulating, and expressing the views of the international community of States. Attempts to create an international criminal court to aid the development of international criminal law did not yield any positive results until the beginning of the 1990s. Despite this situation, there have been efforts towards criminalizing some acts that are offensive to humanity in general. For instance in 1948, the Genocide Convention to prohibit and punish genocide was developed.[45] Shortly after that, the 1949 Geneva Conventions (GCs) came on board and by 1977; the Additional Protocols (AP I & II) to the Geneva Convention of 1949 were enacted.[46] Protocol I was designed to supplement the Geneva Conventions of 1949 principally for the protection of war victims and applies in situation of international armed conflicts.[47] Protocol II is to supplement common article 3 to the four Geneva Conventions and applies to internal conflicts but not in other situations of violence.[48]

The International Law Commission (ILC) also drafted codes for international crimes and the Statute of an international criminal court which history dates back to 1872 when Gustav Moynier proposed a permanent Court in response to crimes. Worthy of note is the ILC Draft Code of Crimes against the Peace and Security of Mankind.[49] The ILC Draft Code of Crimes under paragraph 2 of the commentary to Article 1 addresses two fundamental principles relating to individual responsibility for the crimes against the peace and security of mankind under international law. The opening clause indicates that international law provides the basis for the criminal characterization of the types of behaviours which constitute crimes against peace and security of mankind. Thus, the prohibition of such types of behaviours and their punishability are a direct consequence of international law. Therefore, the trial by the District Court in Jerusalem in 1961 of Eichmann is in consonance with international practice.[50] As noted earlier, the history of the Statute of an international criminal court dates back to the 19th century in 1872[51] but in 1948 after the adoption of the Convention on the Prevention and punishment of the crimes of Genocide by the United Nations General Assembly,[52] the UNGA invited the International Law Commission (ILC) to study the possibility of establishing a judicial organ of an international character that would try persons charged with the crime of genocide. The effort of the ILC in the early 1950's was hindered by the cold war.[53] At this point the UNGA abandoned the efforts until an agreement on the definition of the crime of aggression and an international criminal code could be reached.[54] Trinidad and Tobago in an effort to combat the menace of drug trafficking is 1989, raised the issue on the proposal to establish an International Criminal Court again.[55] It was at this point that the UNGA asked the ILC to recommence the work on the drafting of the statue.[56]

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[44] Werle & Bung (n 29) at 2.

[45] Art 2 and 3(a) Genocide Convention of 1948. Art 4 ICTY and Art 2 and 3(a) ICTR provides for the same offence and its constitutive elements.

[46] The Geneva Conventions in arts 50, 51, 130 and 147 respectively provides for grave breaches of the Conventions but AP I by Article 85 (5) declared grave breaches as war crimes.

[47] Art 1(3) AP I of 1977.

[48] Art 1(1)(2) of AP II of 1977. Other situations of violence would include: Internal disturbances and tension such as riots, isolated or sporadic acts of violence and other acts of a similar nature which does not qualify as armed conflicts

[49] Werle & Bung (n 29).

[50] As above.

[51] Gustav Moynier proposed a permanent court in response to the crime of the Frano-Prussian war. In 1919, the Treaty of Versailles envisaged an ad hoc international criminal court to try the Kaiser and German war criminals of worlds war I. After World war II, the Allies established the Nuremberg and Tokyo Tribunals to try the Axis Wars Criminal

[52] The UN General Assembly in 1948 called for the trials of criminals by International penal tribunals as may have jurisdiction.

[53] 'History of the ICC: Coalition for the International Criminal Court https://www.lecnow.org/?mod=icchistory &idudctp=21&orde=authorities (accessed 6 July 2020).

[54] As above.

[55] As above.

[56] As above.

The creation of two separate ad-hoc tribunals by the UN Security Council in the 1990's[57] further reiterated the need for an international criminal court. In 1994, the final draft of the Statute of an ICC was submitted to the UNGA by the ILC. It was recommended that a conference of the plenipotentiaries be called to negotiate the treaty and to enact the statute be convened.[58] The UNGA established an ad hoc Committee on the establishment of an International Criminal Court to consider the substantive issues in the draft Statute. This Committee met two times in 1995.[59] Upon the evaluation of the Committees report, the UNGA established the preparatory Committee on the establishment of the ICC to prepare a comprehensive draft text.[60] The Committee settled down to work and produced a draft text. Based on this draft text of the preparatory Committee, the UNGA on its 52nd session decided to commence the UN conference of plenipotentiaries on the establishment of the ICC, to conclude and adopt a convention on the establishment of an international criminal court. Between the 15 June and 17 July 1998 (a period of five weeks) the conference held in Rome Italy with 160 countries taking part in the negotiations while the NGO coalition closely monitored the discussions. At the end of the negotiation which lasted for five weeks, 120 countries voted in favor of the adoption of the Rome statute and seven states voted against the statute.[61] On July 1, 2002 the treaty entered into force having received the 60th ratification instrument on the 11 April 2002. On this strength an International Criminal Court (ICC) of a permanent status became established.

3. History of International Criminal Prosecution in Africa

Before one delves into the history of international criminal prosecution in Africa, it would be worth-while to note the rationale for the support of the establishment of a regional court with jurisdiction over international crimes. The rationales are as follows (a) there was the need to establish a court to prosecute crimes in Africa which the rest of the world would not be interested in prosecuting (b) the need to create a treaty in Africa and (c) there exists in Africa crimes that are peculiar to the region and which international courts such as the ICC would have no jurisdiction over.[62] Most writers on the topic of African Court of Justice and the need to prosecute international crimes believe that the quest was motivated as a result of the problem between the African Union and the International Criminal Court (AU/ICC) over the arrest warrant issued on the former President of Sudan Omar Al Bashir.[63] But the desire predates the event in Sudan and this section addresses the genesis of this desire.

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[57] The courts are the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).These efforts were a direct response to the call for accountability for the crimes against humanity, war crimes and genocide committed during the conflicts in Bosnia-Herzegovina and Croatia as well as Rwanda in the early part of the 90's.

[58]History of ICC, (n53).

[59] As above.

[60]The Preparatory Committee had six sessions from 1996-1998. These sessions held at the UN Headquarters in New York. During these sessions the NGO's made contributions to the discussion and attended meetings under the auspices of the NGO coalition for an ICC (CICC). In 1998 the coordinators and bureau of the preparatory committee meet at Zutphen, Netherlands for inter-sessional meeting to technically consolidate and restructure the draft article into a draft.

[61]The countries that voted against were the United States of America, Israel, China Iraq and Qatar while twenty one (21) states abstained.

[62] ICC Jurisdiction cover four international Crimes-Genocide, Crimes against humanity, War crimes and recently crimes of aggression. See Article 5-8 of the ICC statute. But a study of the Malabo Protocol would show that there are crimes listed therein that ICC would not have jurisdiction over as the crimes are peculiar to the African Region. One of such crime would be Unconstitutional Changes of Government (UCG)

[63]CB, Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Right's (2011) *Journal of International Criminal Justice*, Vol. 5, No. 5, pp 1067 – 1088 at 1060. He noted thus: irked by the ICC decision to carry on with the indictment process in 2009, the AU directed the African Union Community to assess the implication of recognizing the jurisdiction of the African Court to try "International Crimes" that is, as genocide, crimes against humanity and war crimes. The learned author at p1073 stated that 'the origin of an idea or priority to prosecute international crimes in Africa had begun in 2006'. See also Deya, D., 'Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes' (2012) *Open Space on Int'l Criminal Justice*, 22 at 24 as cited by Branch, A., 'The African Criminal Court', (Chapter 7), http://www.cambridge.org/core/books/african-court-of-justice-and-human-peoples-rights-in-context/african-criminal-court/4CA46A0176850D794882623F7C02B02D/core-reader# (accessed 6 July 2020).

Africa's interest towards the establishment of a court to prosecute international crimes began in the 1970's with the discussion on the African Charter on Human and Peoples' Rights.[64] This desire was considered and rejected by the committee of experts responsible for the African Charter. The committee of experts headed by a Senegalese Jurist Keba Mbaye received a number of proposals which they carefully considered before rejecting the idea of a court with criminal jurisdiction.[65] The most significant of the proposals was brought by the Guinea Republic and it suggested that the court to be established should have jurisdiction to prosecute gross violations of human rights which would amount to crime such as crimes against humanity.[66] The proposal from the Republic of Guinea appeared to have been brought to condemn the crime of apartheid taking place in South Africa at the time.[67] The Guinea proposal was rejected as the committee did not seem to be convinced that Africa was ready for such a court rather they recommended the establishment of a human rights commission and postponed the idea of setting up a court with competence to issue binding decisions in that regard to the future.[68]

This decision was based on the fact that the International Convention on the Suppression and Punishment of the Crime of Apartheid already made provision for an 'international penal court'[69] and the United Nations was already giving a thought to the establishment of an international court to repress crimes against mankind.[70] From the above, one can deduce that the crime of apartheids was one of the reasons for the quest for the establishment of a court in Africa with criminal jurisdiction noting that the UN General Assembly in 1966 had labelled Apartheid as crime against humanity.[71] This was affirmed by the Security Council in 1984.[72]

Clarke, *et al* noted that an earlier event that gave rise to the quest for an African court was the '1961 Lagos Conference on Primacy of Law'.[73] In that conference the idea to adopt an African human rights convention that would see to the establishment of an African court of human rights after the European and Inter American court of human rights[74] was muted. Dlamini further noted in his paper that the proposal for the establishment of an African court came up at seminars[75] held subsequently and it was agreed that it was desirable to have a court in the region. He noted that despite the fact that the recommendation was communicated by the Secretary General of the UN to the Organization of Africa Unity (OAU) and all the government of the OAU member States, no action was taken to implement it.[76] The proposal came up again in 1965 at Cairo during the UN seminar on the creation of regional commission on human rights with specific reference to Africa.

The learned author Dlamini further noted that after the Cairo seminar in 1969 and within another period of ten years, several conferences, meetings and seminars were held in various African countries with the help and support of the UN on different issues bothering on human rights. He itemized the meetings thus: Lusaka, Zambia 1970, Addis Ababa- Ethiopia 1971, Yaoundé, Cameroon 1971, Libreville Gabon, 1971, Dar-es-salaam, Tanzania 1973.[77]

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[64]A, Abass, 'Prosecuting International Crime in Africa: Rational, Prospects and Challenges', (2013) *European Journal of International Law*, Vol. 24, 1ss. 3 pp 933 – 946 at 937.

[65] See also Gittleman, R., 'The African Charter on Human and Peoples' Rights': A Legal Analysis https://www.corteidh.or.cr/tablas (accessed 16 July 2020).

[66]KM, Clarke, CC, Jalloh, and VO Nmeheille, "Origins and Issues of the Africa Court of Justice and Human and People Rights, https://www.cambridge.org/core/terms. (accessed 6th July 2020).

[67]As above.

[68]As above.

[69]Abass (n64), p 93.

[70]*As above.*

[71]UN General Assembly Resolution 2202 A (XX I) of 16 December 1966.

[72]Security Council endorsement in Resolution 5565 (1984) of 23 October 1984.

[73]Clarke *et al* (n66).

[74] CRM, Dlamini, 'Towards a Regional Protection of Human Right in Africa's the African Charter on Human and Peoples Rights', XXIV *CILSA* 1991 *https://www/jsfor.org.(accessed 6/2/20) See also Comparative and International Journal of Southern Africa.* Vol. 24, No 2. (July 1991) pp 189-203 at 189.

[75] A UN Seminar on the Creation of Regional Commission on Human Rights with Particular reference to Africa.

[76] Dlamini (n74) at 190 citing Weinstein 'Africa's Approach to Human Rights at the United Nations: an unpublished paper.

[77] As above *at 170.*

He noted that the meetings/ seminars from 1960[78] organized by the UN and International Commission of Jurist (ICJ) in different countries in Africa on the question of rule of law had participants expressing the views on the desirability of establishing a human rights mechanism at the African regional level to help keep alive the quest for the establishment of an African human rights system.[79]

The United Nation at a symposium organized in Monrovia, the capital of Liberia in 1979, adopted a firm position on the necessity to establish such an organ and this influenced the decision of the Assembly of the OAU.[80] Africa also witnessed series of the human rights violations in countries like Uganda, the Central African Republic (CAR) and South Africa. Aside these, there were campaigns arranged/organized to create an African Commission and this made all OAU Assembly at its February 1979 summit to take a decision asking the Secretary General of the OAU to call a meeting of experts that would propose the establishment of relevant institutions for the protection of human right in the African region and that came alive in the form of African Charter on Human and Peoples' Rights.[81] The Charter which endorsed the idea of the task given to the Secretary General of the OAU, was adopted by the Assembly at the OAU Assembly Summit in Nairobi, Kenya in 1981[82] and it came into force in 1986. The African Commission charged with the responsibility of interpreting the Charter as well as helping with the protection and promotion of human rights in Africa was established in Banjul, the Gambia in 1987.[83]

In order to bring to life the provisions of the Charter and to hear and determine cases, the African Court of Human Rights (ACHPR) was established in 2006. The Court was also to complement the mandate of the African Commission on Human and Peoples' Rights. The Court sits in Arusha Tazania.[84] In the year 2000 when OAU became the African Union (AU), the Constitutive Act of the AU created so many organs and one of these organs is the African Court of Justice which was to promote commitment of human rights by condemning impunity in the region. There was a second inter-state court structure which was included in the Constitutive Act of the AU and was developed in the 2003 Protocol of the Court of Justice (ACJ) of the AU and it became known as the African Court of Justice.[85]

ACJ was to be the principal judicial organ of the AU and to have power to rule on disputes bothering on the interpretation of the AU treaties.[86] The ACJ Protocol entered into force in 2010 but has been superseded by the Protocol on the Statute of the African Court of Justice and Human Rights, (the Merger Protocol).[87] The problem associated with proliferation of institutions could be adduced as a reason for the merger bearing in mind also that the issue of funding these institutions in the face of scare resources may hinder their viability or functionality. The merger can also be advanced as a reason for AU to cut cost. The African Court of Human Rights and the African Court of Justice that was merged formally became the African Court of Justice and Human Right (ACJHR).[88] The Protocol for the merged court was adopted in 2008.

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[78] The meetings were held in Lagos (1961) Dakar Senegal (1967), Dar-es-Salaam Tanzania (1976) Dar-es-Salam Tanzania (1976) and Dakar Senegal (1978).

[79] Dlamini (n74) at 191.

[80] Clarke et al (n66) at 4

[81]Dlamini (n74) at 191. See also Clarke et al, As above at 4.

[82]As above.

[83]Article 45 of the African Charter on Human and Peoples' Rights.

[84]The court has the power to issue advisory opinions and may hear petitions from individuals bothering on human rights violations brought before it by the AU Commission. The court also entertains complaints by individuals and African intergovernmental organizations and member States. Clarke *et al* noted that a significant legal limitation to the jurisdiction of the court is that a special declaration by a state is required for the court to have competence to entertain individual human rights complaints against it. p 5.

[85]F, Viljoen, 'A Human Rights Court for African and Africans; *Brooklyn Journal of International Law* (2004), Vol. 30, No. 1, pp1-66 at as cited by Clarke, *et al(n66)* p6.

[86] As above.

[87]African Union Protocol on the Statute of the African Court of Justice and Human Rights 1 July 2008, (Merger Protocol),https://www.au.int/en/treaties/protocol-amendents-protocol-statute-african-court-justice-and-human-right (accessed 6 July 2020).

[88]M, Sirleaf, 'Regionalism, Regime Complexes and International Criminal Justice', *Columbia Journal of International Law* (2016) Vol. 54, No. 699, p721.

The Merger Protocol made provision for the court have two chambers: the first with the general jurisdiction to hear claims on all matters relating to treaty interpretation and question of general international law and the second with civil jurisdiction over human right cases.[89] Prior to the merger protocol getting the fifteen ratification needed for it to come into force,[90] the AU adopted the Malabo Protocol, adding a third chamber with criminal jurisdiction to the African Court of Justice and Human Rights.[91] No State have ratified it except for four countries that have signed.[92] This is a clear case of lack of political will on the continent to see a project to a logical conclusion and if this trend continues, the desire to have a criminal section of the court may not be realized.

The sub sections would articulate Africa's experience with the prosecution and punishment of international crimes.

3.1 **African justice mechanism prior to the Regional Court**

Africa as a region has experimented with accountability mechanisms for crimes committed during conflicts from the 1990's adopting both judicial and non-judicial approaches such as payment of reparations, truth commission and community approaches. This section looks at a number of judicial mechanism that gained prominence in the region prior to the establishment of the regional criminal court as part of efforts to address mass violence in the continent. The fall back on domestic, hybrid and international criminal prosecution prepared the continent for a regional criminal court. Some of the challenges that encumbered the effectiveness of the earlier processes will be highlighted with the hope that the challenges would be addressed before the regional criminal court becomes functional.

3.2. Trials by Domestic Tribunals/Courts

Africa's quest to prosecute and punish international crimes includes the efforts of domestic trials by some countries in the continent. The benefits of national trials cannot be over emphasized. Alvarez notes that it gives room for greater accountability, restores legal systems, produces quicker results and include local sentiments with regard to punishment.[93] Upon assumption of power in Rwanda by the Rwanda Patriotic Front (RPF), it arrested those suspected of having committed serious violations of international law of armed conflict and those that committed genocide and detained them. The imprisonment of hundreds of thousands of people while awaiting trial generated international outcry.[94] The trial was considered as the government way of intimidating political opponents.[95] These trials revealed the weakness of Rwanda judicial system. An alternative mode of accountability was sought for and it gave rise to the establishment of the Gacaca process which led to prison decongestion and social reconstruction.[96]

The Gacaca process had been used in pre-colonial Rwanda to settle disputes relating to property, personal injury and inheritance.[97] The Rwanda legislature adopted a more modern version of the process in the early part of year 2000 and established the Gacaca jurisdiction.[98] The Rwandese government noted that Gacaca process promoted reconciliation, truth telling and eradicated impunity and showed that Rwanda was able to resolve her own problems.[99] There were about 12,000 Community based courts and 169,000 judges.[100]

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[89] *Ibid.* See also Articles 16, 17 and 28 of Merger Protocol.

[90] Article II, Merger Protocol.

[91] Article 16 Malabo Protocol.

[92] Only Kenya, Benin, Guinea Bissau and Mauritania have signed. See W, Menya, 'Only Four Nations have Signed Pact for African Court, *Daily Nation* (April 11 2015) https://www.mobilenations.co.news/only-four-nations-signed-nail-for the-african-court-/19550946/2682996/-/format/xhtml/item/o/-/uuq8ezz/index.html (accessed 26 July 2020. See also KC, Randall, 'Universal Jurisdiction under International Law', (1988) *Texas Law Review*, No 66, pp 785 – 8.

[93] JE, Alvarez, 'Crimes of State/Crimes of Hate: Lessons from Rwanda', *Yale Journal of International Law* (1999), Vol. 25, No. 2, pp 365 – 483, https://www.digitalcoms.laws:yale.edu/yjil/vol.24/1552/2 (accessed 12 July 2020).

[94] Sirleaf, M., 'The African Justice Cascade and the Malabo Protocol' (2017) *International Journal of Transitional Justice,* Vol. 11, No. 1; https://www.academic.oup.com/article/ (accessed 11 July, 2020)

[95] Alison des Forges and Longman, T., 'Legal Response to Genocide in Rwanda'. In Eric Striver and Harvey M. Weinstein (eds.) *My Neighbour, My Enemy: Justice and Community in Aftermath of Mass Atrocity* (Cambridge: Cambridge University Press; 2004) as cited by Sirleaf, M. As above, p.4

[96] Sirleaf, M., (n94), p.14.

[97] As above.

[98] As above.

[99] 'Gacaca Courts Achieved their Objectives: https://www.newtimes.co.rw/section/read/51568 (accessed 12 July 2020).

This accelerated the trials that hitherto had overwhelmed the national judicial process. The Gacaca courts tried and concluded about 2 million cases within the last decade relating to genocide by 2012 with a financial implication of about Rwf30billion about a fraction of the ad hoc tribunal financial requirement for Rwanda.[101]

Despite the achievement of the Gacaca process, it was criticized for not being able to meet international fair trial standards.[102] Scholars[103] noted that the Gacaca process did not provide adequate guarantees for impartiality, defense and equality before law, particularly as most of the people tried were Hutus by ethnicity or dissidents. The process provided uneven result in ensuring justice and reconciliation in some of the communities. This experiment in Rwanda, with the national trials and justice mechanism that is community based brought to the fore some hindrances and this paved the way for a better alternative to accountability – the hybrid tribunal.

The post-election violence in Cote D'Ivoire in 2010 left about 3,000 deaths and over 150 cases of rape in its trail and this pushed the government to set up an accountability mechanism.[104] The government in a bid to realize its objectives set up a temporary mechanism saddled with the responsibility of investigating violent and economic crimes and attacks on State security.[105] This temporary body was made permanent in 2013. Few trials that were targeted at the supporters of former President Laurent Gbagbo held.[106] Structural and financial problems stalled the cases in the domestic courts of Cote D'Ivoire.[107] The credibility of the domestic process came under attack as trials focused on one group of actors. In 2013, upon the request of Cote D'Ivoire,[108] the ICC started the cases against Charles Ble Gourde and the wife of Laurent Gbagbo-Simone Gbagbo but the government refused to surrender Simone Gbagbo to the ICC and insisted on prosecuting her domestically. She was charged with economic crimes and genocide.[109] These failures also ignited the interest of AU to create a permanent criminal court instead of the courts of individual States. The successes achieved with the hybrid tribunals further made the desire of the AU quite imperative.

3.3. Hybrid tribunals/other courts in Africa

Hybrid courts are courts of mixed composition and jurisdiction, encompassing both national and international aspects, usually operating within the jurisdiction where the crime occurred.[110] Hybrid courts can also be referred to as international or mixed criminal tribunals. They are tribunal that are partly national and partly international in charter.[111]

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[100]As above.

[101]This Rwf30billion is equivalent to less than 3% of funds used by ICTR that handled less than 100 cases.

[102]S, Thompson, 'The Darker Side of Transitional Justice: The Power Dynamics behind Rwanda's Gacaca Courts', (2011) *Africa,* Vol. 81, No. 3 p. 373 – 390. https://www.jstro.org/stable/41484994 (accessed 12th July, 2020).

[103] Clark, P. 'The Rules (and Politics) of Engagement: The Gacaca Courts and Post- Genocide, Justice, Healing and Reconciliation in Rwanda.' In Philip Clark an Zachary Kaufman (eds.), *After Genocide: Institution Justice, Post Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (New York: Columbia University Press; 2009) as cited by Sirleaf, M., (n94), p.15

[104] Human Rights Watch, 'Cote D' Ivories: ICC Seeking Militia Leader (2nd October, 2013), https://www.refworld.Org /docid/524ffd694.html (accessed 10th July, 2020). These deaths and rapes by forces on both sides were targeted along political, ethnic and religious lines. Quattara set up a special investigative cell to investigate the post-election crimes and bring perpetrators to justice through trials.

[105] International Centre for Transnational Justice (ICTJ), 'Disappointed Hope: Judicial handling of Post-Election Violence in Cote D'Ivoire (April 2016) https://www.ictj.org/publications/type (accessed 12th July, 2020)

[106]*As above.*

[107]*As above.*

[108] *Prosecutor v Laurent Gbagbo*, Case No. ICC-02/11-01/11 Pre-Trial Chamber 111 (23th November, 2011)

[109] ICTJ (n105). See also Human Rights Watch, Cote D'Ivoire: ICC Seeking Militia Leader, (n104) at p2. Preliminary hearing on the charges against Simone Gbagbo began in Nov 2012.

[110] OHCHR United Nations, *Rule of Law Tools for Post Conflict States: Maximizing the Legacy of Hybrid Courts* (New York: UN 2008) 1. The office of the United Nations High Commissioner for Human Right (OCHR) further noted that the choice of a hybrid court as opposed to an international tribunal is ideal where national system are either non-existent or incapable of addressing mass violation and where a purely internationalized mechanism would not earn local acceptance pp. 3-4 on Rationale for creating hybrid court.

[111] Asser Institute; 'Hybrid Courts', https://www.asser.nl/nexus/international-criminal-law/the history-of-ICL/hybrid-courts/ (accessed 4 July 2020).

This feature can be deduced from some characters that the court exhibits which includes- their mode of establishment (usually based on agreement between the requesting State and the United Nations); their subject matter or jurisdiction covers international and national crimes and the judges and prosecutors are both local and international.[112] Tribunals that are listed as hybrid are the Special Panels and Serious Crimes Unit in East Timor; Regulation 64 Panel in the Courts of Kosovo, Special Courts for Sierra-Leone; Extraordinary Chambers in the Courts of Cambodia; Special Tribunal for Lebanon, the Extraordinary African Chambers in Senegal; and the Kosovo Specialist Chambers and Specialist Prosecutors office.[113]

Judging by the above list there were two hybrid courts in Africa saddled with the responsibility of bringing to justice persons accused/charged for breaches of international law of war crimes, crimes against humanity, genocide or other serious violations of national criminal law. The existing courts in Africa are the Special Court for Sierra Leone and the Extraordinary African Chambers (EAC) in Senegal. A hybrid court for south Sudan may be on its way as the UN[114] has urged the South Sudan government and the African Union to urgently meet to clarify plans to set up a proposed hybrid court for war time atrocities. The proposed hybrid court for South Sudan would bring together Judges and prosecutors from South Sudan and across Africa as the country's domestic court system is not prepared to handle such sensitive complex cases.[115]

On the prosecution of international crimes on the continent the Special Court for Sierra Leone (SC-SL) was established in 2000 by an agreement between the UN and the government of Sierra Leone pursuant to Security Council Resolution 1315 (2000). The court was to prosecute person who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leone committed in Sierra Leone after November 1996 and the civil war in Sierra Leone.[116] The SCSL became operational in 2002. In 2012 Charles Taylor, the former President of Liberia was convicted by the court and made history as the first African head of state to be convicted of war crimes.

The Extraordinary African Chamber (EAC) was established based on an agreement signed between the AU and Senegal on August 2012 to establish a special court with international elements within the Senegalese judicial system.[117] This is also hybrid by trial. It has jurisdiction over persons and crimes of international character.[118] In July 2013, the former President of Chad who ruled form 7 June 1982 to December 1990, President Hissene Habre was charged with war crimes, crimes against humanity and torture. He was placed on partial detention.[119] On May 30 2016, Hissene Habre was convicted of all charges brought against him in addition to the crimes of sexual violence and rape and was sentenced to life imprisonment.

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[112]As above.

[113]As above

[114]L, Schlein, 'UN Investigators Propose Hybrid Court for South Sudan'. https://www.voanew.com/africa. (accessed 8 July 2020). South Sudan scenario fits into the rationale discussed by the OHCHR, hence the proposed hybrid court for South Sudan will be a superior court and independent of the south Sudan judiciary. This proposed hybrid court for South Sudan will have wide temporal jurisdiction over international crimes committed from December 15, 2103 – June 2016 covering a period of 30 months which marked the end of the transition period. The court will not have jurisdiction to look into crimes and atrocities committed before 15 December 2013 especially in Jonglei State that witnessed well organized inter-communal clashes/violence.

[115] Human Rights Watch, South Sudan/AU: Set Meeting on War Crimes Court', https://www.hrw.org/2019/10/09/south-sudan/au-set-meeting-war-crimes-court, (accessed 8 February 2020).

[116] The SCSL also has jurisdiction to try any person who committed crimes against humanity on civilians, violation of common article 3, Additional protocol II, abuse of girls under Sierra Leone's Prevention of Cruelty to Children Act, 1926 or Wanton destruction of property under the Malicious Damages Act 1861. The court lacks jurisdiction to try children that were under 15 years of age at the time they were alleged to have committed a crime. Although the SCSL has concurrent jurisdiction with the national courts, the SCSL takes primacy when there is a conflict of interest.

[117] Asser institute (n111) above

[118] The EAC has jurisdiction to try and prosecute the person or persons most responsible for international crimes of genocide, crime against humanity crimes and torture Art. 4 of the statute of the court. The crimes have been committed between June 1982 and December 1 1990

[119]C, Hicks, 'The Habre Trial: The Future for African Justice? https://www.africanaguments.org/2017/05/02/habre-trial-future-african-justice/ (accessed 10 July 2020).

In July 2016, he was ordered to pay 82 billion francs CFA, approximately US$154 million to the 7,396 named victims of his crime.[120] This is the second African President to be convicted and sentenced.

Aside these two, there is also another court in Central African Republic- the Special Criminal Court.[121] Despite the fact that the court exists, no effort has been made to get the court to become functional. Elise Keppler[122] notes that:

Central Africa has waited so long to see justice for the many killings and rapes, and other atrocities committed in the Central African Republic. The Special Criminal Court holds promise but it's had a slow start and needs to intensify investigation so trials can be initiated based on strong compelling evidence.

The Special Criminal Court is made up of local and international staff and supported by the United Nations. The UN Human Rights office has 'commended the efforts of the Special Criminal Court with the support of the state and interested partners, to seek and reinforce or develop the national/international capacity for investigation and prosecution, as well as to promote an independent, impartial and effective judiciary, ensuring also the means to mount adequate legal defense'.[123] Inadequate fund, capacity and lack of political will have been noted as the hindrance for the effective take off of the court.[124]

Aside the hybrid Courts, there are other tribunal and courts in Africa. They are either Military or domestic in nature that have joined in the fight against impunity in the region. The courts include the Military Court in Democratic Republic of Congo[125] which is part of the efforts towards accountability for international crimes. In 2011 after the incidence in Libya, a domestic tribunal tried AL-Sanusi but the request for the trial of Saif Gaddafi was turned down by the ICC.[126] The ICC cited concerns over Libya's insecure judicial institution thus: 'the Libyan state continues to face substantial difficulties in exercising fully its judicial powers across the entire territory'.[127]

The extent of international crimes committed during conflicts in Africa is quite enormous going by available data but the political will and capacity to bring perpetrators to justice seems to be lacking in the continent.

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[120] Human Rights Watch, 'Hissene Habre Case: Trust Fund for Victims', https://www.hrw.org/news/2018/02/07/hissene-habre-case-trust-fund-victims, (accessed 19 July 2020).

[121] On June 3, 2015 the then President of Central African Republic, Catherine Samba-Penza by Organic Law 15/003 established the special criminal court. It's a hybrid tribunal integrated into Central African Justice System. The court will employ international and national staff and apply a mix of Central African and International Law. Investigation by the court ought to have commenced in 2019.

[122]E, Keppler, 'The Central Africa Republic Special Criminal Court is a Huge Test Case in Balancing Peace and Justice', https://www.reliefweb.int/report/central-african-republic/central-african-republic-s-special-criminal-court-huge-test-case (accessed 8 July 2020). It appears the CAR's government priority is to seek peace through a truth, reparation and reconciliation Commission that ought to be established along with the special court. There is little political will to get the special court or the truth, reparation and reconciliation Commission working. Keppler also noted that "the special criminal court emerged out of the strong, unequivocal desire on the part of Central Africa to break cycles of violence and impunity in the country.

[123] CAR: 'Special Criminal Court Opens, bringing Hope to Victims of Brutal Conflict', October 2018, https://www.reliefweb.int/report/central-african-republic/car-special-criminal-court-opens-bringing-hope-victims-brutals-conflict (accessed 8 July 2020).

[124] The court had a funding gap in 2019 to the tune of US$1 million for its operations and there are no pledges on future funding which is expected to gulp the sum of US$12.4 million a year. This type of challenges will be experienced by the African Court of Justice and Human and People's Rights bearing in mind that it is quite expensive to conduct international trials and the Malabo Protocol did not specifically mention how the Court will be funded neither has the AU put a mechanism in place to ensure that the proposed Court is adequately funded.

[125] This Court was set up by Acts No-023-2002 of 18th November, 2002 on the Code Judiciare Militaire (Military Tribunal Code), No 024-2002 of 18 November 2002 on the Code Penal Militaire (Military Criminal Code)

[126]'ICC Rejects Libya Bid to try Saif-al-Isalm', https://www.aljazeera.com/ news/Africa/ 2013/05/201353116 252995 157/html (accessed 29 June, 2020).

[127]'ICC Rejects Libya Bid to try Gadhafri's Son', https://www.dev.com/icc-reject-bid-to-try-gbahafri's-son (accessed 8 June, 2020).

In order to ensure accountability for the crimes, African States welcomed the initiative to establish the ICC and actively took part in the processes that eventually led to its establishment[128] and became the largest regional bloc to ratify the Rome Statute. Africa has thirty three ratifications out of the 122 States that had ratified the Rome Statutes as at 2016 and up to 2019. Africa was able to achieve this because the organs of the Africans Union made some resolutions and declarations indicating their support for the creation of the ICC.[129] Thus Africa has the highest regional bloc of membership to the ICC Statute[130] as noted above. In addition to their efforts at establishing the ICC, African countries were the first to refer cases to the ICC.[131] This is very important because the ICC has been accused of targeting Africa[132] while turning a deaf ear to crimes being committed by the rich and powerful countries. Aside these courts discussed above, the international Criminal Tribunal for Rwanda (ICTR) played its role in the prosecution of those suspected to have committed international crimes during the war in Rwanda. The next sub head will briefly examine the ICTR.

3.4. The International Criminal Tribunal for Rwanda (ICTR) 1994

The ICTR is the first international criminal tribunal in Africa. The Security Council established an ad hoc tribunal in Rwanda – the ICTR in 1994 in exercise of its power under chapter VII and by Resolution 955 of November 1994. The tribunal was to prosecute and punish persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizen accused of committing international crimes within the territory of Rwanda from 1 January - 31 December, 1994.[133] The tribunal's jurisdiction covers Genocide,[134] crimes against humanity,[135] and violations of article 3 common to the four GCs and AP II.[136] The Statute provides for individual criminal responsibility[137] for the crimes listed and does not allow for immunity.[138] The court was located in Arusha, Tanzania and had concluded its assignment. The court had concurrent jurisdiction with national courts,[139] but had primacy over the national courts.

These courts achieved a lot but there were some challenges which they encountered. For instance, the Rwanda tribunal was situated outside Rwanda and this made it difficult for the Prosecutor to effectively carry out the assignment of investigation and getting witnesses to testify. All the Courts had issue with funding and interestingly, the domestic tribunals were accused of lack of fair trial in line with international standard and were also accused of targeting the oppositions. The lessons learnt from these experiences and the frustration with the ICC ignited the desire for a regional court. The AU has finally created a regional court with criminal jurisdiction to address crimes committed in the continent which may not be of interest to the rest of the world. Having created a court with criminal jurisdiction in the Region, the next section examines the laid down procedure of the African Court of Justice and Human and Peoples Rights.

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[128] "So many African Civil Societies Joined the Coalition for the International Criminal Court'. https://www. Coalihon fortheicc.org/about/who-we-are (accessed 15 August, 2020).

[129] "International Criminal Court: Dakar Declaration on the Establishment of the International Criminal Court, https://www.radioradicale.it/exagora/international-criminal-court-daker-declaration (accessed 16th August, 2020)

[130] Africa has 33 ratifications, Asia 19 Eastern Europe 19, Latin America and the Caribbean 27, Western Europe and others 25.

[131] The Democratic Republic of Congo made self-referral in 2004. This was followed by another self-referral by the Central African Republic in 2004 and the self-referral by Uganda in 2005.

[132] These opinions were expressed by the President of Benin in 2009, Rwanda and Ethiopian Minister in 2003. In 2013, the Parliament of Kenya adopted a motion in 2013 agreeing to withdraw from the Rome statute. Uganda and some political parties in DRC are pushing for the withdrawal of their countries from ICC.

[133] Art 1 ICTR Statute.

[134] Art 2 ICTR Statute.

[135] Art 3 ICTR Statute.

[136] Art 4 ICTR Statute. These are crimes committed in conflicts not of an international character (non-international armed conflict) as common art 3 and AP II were developed for such crimes.

[137] Art 6(1) ICTR Statute.

[138] Art 6(2) ICTR Statute.

[139] Art 8 ICTR Statute.

4. The Grouse of Africa against the ICC

African States welcomed the initiative to establish the ICC and actively took part in the processes that eventually led to its establishment.[140] The organs of the African Union[141] made some resolutions and declarations indicating their support for the creation of the ICC[142] and encouraged African States to ratify the Rome Statute.[143] Africa has thirty three ratifications out of the 124 States that have ratified as at 2016. Thus, Africa has the highest regional bloc of membership to the ICC statute.[144]

In addition to this, African countries[145] were the first to refer cases to the ICC.[146] This is very important because the ICC has been accused of targeting Africa. This is because in the fifteen years of the existence of the ICC, it has investigated over twenty one cases in more than nine situation in Africa involving the Central African Republic, Cote D'Ivoire, DR Congo, Kenya, Libya, Mali, Sudan and Uganda. The court has also issued about nineteen warrants of arrest and nine summonses and they all involve Africans. Based on this, the ICC has been tagged anti-Africa and a tool used by the West as a new form of imperialism with the aim of undermining weak States in terms of economic and political growth while turning a deaf ear to crimes being committed by the rich and powerful countries.[147] These accusations emanated from the African States.[148]

The agitations of the African States climaxed on the 4th March 2009 when the ICC issued an arrest warrant against the current President of Sudan, Omar Hassan Ahmed Al Bashir. Sudan is not a State party to the Rome Statute so; the UN Security Council (UNSC) referred the Dafur conflict to the ICC in accordance to Article 13 (b) and the UNSC's exercise of its powers under chapter VII of the UN Charter. Problem arose when the UNSC refused to take cognizance of the AU's request to defer the matter pursuant to Article 16. Shortly after the issuance of the arrest warrant against Al Bashir by the ICC, the AU Assembly issued a decision urging its members not to cooperate with the ICC as:

In view of the fact that the request by the African Union (to the UNSC to defer the proceedings initiated against President Bashir) 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 Al Bashir of the Sudan[149]...

This led to the call on African States to withdraw en-masse from the ICC.[150] The UNSC referrals did not spare the incumbent President of Kenya-Uhuru Kenyatta and William Ruto his deputy.

In reacting to this, the National Assembly of Kenya subsequently passed a motion indicating its withdrawal from the ICC to protest the prosecution of Uhuru Kenyatta and William Ruto.[151]

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[140] So many African Civil Societies joined the coalition for the International Criminal Court. http://www.coalitionfortheicc.org/about/who-we-are. Accessed 15 August 2020

[141] Formerly known as the Organization of African Unity (OAU).

[142] "International Criminal Court: Dakar Declaration on the Establishment of the International Criminal Court", http://www.radioradicale.it/exagora/international-criminal-court-dakar-declaration. Accessed 16 August 2020.

[143] "27: Resolution on Ratification of the Treaty on the Int'l Criminal Court," by the African Commission on Human and Peoples Right, Meeting at its 24th Ordinary session from 22 to 31 October 1998 in Banjul, Gambia. http://www/achpr.org/sessions/24th/resolution/27/. Accessed 17 August 2020.

[144] Africa has 33 ratifications, Asia 19, Eastern Europe 19, Latin America and the Caribbean 27, Western Europe and others 25

[145] The Central African Republic, the DR Congo and Uganda

[146] The Democratic Republic of Congo made self- referral in 2004. This was followed by another self- referral by the Central African Republic in 2004 and then the self- referral by Uganda in 2005.

[147] "ICC and Africa – International Criminal Court and African Sovereignty", http://www.africaholocaust.net/news_ah/icc_and_africa.html. Accessed 15 August 2020. See Sicurelli, D "The European and African Policies," https://books.google.com.ng/books?id=... Accessed 15 August 2017. See also MK Clark, (n66), p1.

[148] These opinions were expressed by the Presidents of Benin in 2009, Rwanda and Ethiopian Prime Minister in 2013. In 2013, the Parliament of Kenya adopted a motion to suspend links, cooperation and assistance to the ICC. The Namibian Government in 2015 agreed to withdraw from the Rome Statute. Uganda and some political parties in DRC are pushing for the withdrawal of their countries from ICC.

[149] As above, p4

[150] African Union calls for 'African Members Mass Withdrawal from ICC over Bashir Indictment", http://www.voanews.com/english/2019-06-08-voazo.cfm, voice of America 08/06/2009. Accessed 16 August 2020

At the special summit of the AU, African States parties to the ICC such as Kenya, Namibia, and Republic of Congo raised the issue of mass withdrawal and this was discussed in response to the trial of Kenyatta and his deputy.[152] While the summit concluded that incumbent Heads of State and Government should not be made to face trial and that the Kenyan case should be deferred, they did not agree to the mass withdrawal proposal.[153]

The African Union Peace and Security Council (PSC) in a communiqué[154] reiterated its commitment to ending impunity and warned on the dangers of ICC prosecutions as it could derail the efforts to establish peace and reconciliation. It also noted the need to conduct international justice in a fair and transparent manner to avoid any iota of doubt or double standard where it would seem that the ICC is not fair in its prosecution by concentrating on the African Continent alone. One of the very significant aspects of the communiqué was the call on the UNSC to defer the case in line with Article 16 of the Rome Statute. Deferral of ICC investigation risks legitimizing political interference with the work of a judicial institution and could set a dangerous precedent, especially when the work of the ICC in Kenya poses no threat to international peace and security.[155] This communiqué was finally endorsed by the AU Assembly being the Supreme Organ made up of Heads of State of all member States.[156]

The discontent against the ICC by Africa grew when the court again issued an indictment against President Muammar Ghaddafi of Libya by virtue of another UNSC referral.[157]

Again, the AU issued a non-cooperation instruction to member States in respect of the warrant of arrest against Gaddafi of Libya in 2011;[158] they requested that the ICC discontinue the practice of beginning or continuing cases against incumbent heads of State; and finally a decision urging mass withdrawal from the ICC.[159] The African Union was not happy when the ICC declined the request of Libya to try Ghaddafi's son on the grounds that ICC was not sure that the trial will be impartial. It was argued that there were no established criteria for determining the competence of a national court.[160]

In line with this, the African Union is seeking to establish a permanent African justice mechanism to replace the ICC[161] through expanding jurisdiction of the merged African Court of Justice and Human Rights to make it possible to handle international crimes.

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[151] "Kenya MPs Vote to Withdraw from ICC", BBC News 5/9/13, http://www.bbc.co.uk/news/world-africa-23969316. Accessed 15 August 2020.

[152] "Africa Union Summit on ICC pullout over Ruto Trial", BBC News 20/09/13, http://www.bbc.co.uk/news/world-africa-24173557. Accessed 15 August 2020.

[153] Fortin, J. "African Union Countries Rally Around Kenyan President, But Won't Withdraw from the ICC", International Business Times, http://www.ibtimes.com/africa-union-countries-rally-around-kenyan-president-wont-withdraw-icc-1423572. Accessed 16th August 2020.

[154] PSC/MIN/Comm. (CXLII), Peace and Security Council 142nd Meeting, 21 July, 2008, Addis Ababa, Ethiopia. http://www.iccnow.org/documents/AU_142-communique-eng.pdf. Accessed 13 July 2020.

[155] D Montgomery, "Article 16 of the Rome Statute: Use and Misuse", http://www.internationallawbureau.com/index.php/article-16-of-the-rome-statute-use=and-abuse/. Accessed 29 January, 2020.

[156] H Goitom, "FALQs: The International Criminal Court and Africa, http://www.blogs.loc.gov/law/2016/11/falqs-the-international-criminal-court-and-africa/. Accessed 15 August 2020, p3. See also http://www/au.int/en/sites/default/files/decisions/a55a-assembly-en-1-3-february2009-auc_twelfth_ordinary_session_decision_declaration_message_congratulations_motion.pdf Accessed 16 August 2020

[157] The UNSC Resolution 1970 made it possible for the intervention in the Libyan conflict and also led to the investigation of crimes committed during the conflict. See http://www.un.org/en/ga/search/view_doc-asp?symbol=s/res/1970%282011%29. Accessed 15 August 2020

[158] "African Union Disregard ICC Arrest Warrant against Gaddafi", http://www.dailycaller.com/2011/07/02/african-union-calls-on-member-state-to-disregard-icc-arrest-warrant-against-libyas-gaddafi/. Accessed 17 August 2017

[159] "African Union Backs Mass Withdrawal from ICC", http://www.bbc.com/news/world-africa-38826073 BBC News 1/02/17. Accessed 17 August 2020. See also "AU Calls for Mass Withdrawal from ICC", https://www.iol.co.za/news/Africa/au-calls-for-mass-withdrawal-frm-icc-7579159. Accessed 29 January 2020.

[160] Human Rights Watch, supra note 35.

[161] The rationale is based on the fact that Africans want African solution to African Problems.

The call for mass withdrawal of AU members did not fall on deaf ears: Burundi, Gambia and South Africa heeded the call. South Africa's notification to withdraw could be linked to the issue that arose in 2015 after Bashir's visit wherein the government of South African chose to ignore the High Court's ruling on the arrest of Bashir. Upon appeal in 2016, the Supreme Court of Appeal reiterated the High Court's position; holding there was a legal duty to execute the arrest warrant against Al Bashir.[162] While the case was awaiting a final decision by the Constitutional Court, the government decided to withdraw from the ICC.[163] South African Opposition party-the Democratic Alliance challenged the actual withdrawal by the government, claiming that it was unconstitutional as withdrawal comes a year after notification unless the notification specifies a later date and that 'South Africa does not want to be lumped with pariah States who have no respect for human rights'. The Court ruled in 2017 that the withdrawal notice without parliament's approval was unconstitutional,[164] and the UN Secretary General announced the revocation of the withdrawal of South Africa from the ICC.[165] Gambia also gave notice of its intention to withdraw from the ICC expressing its disappointment with failure of the ICC to investigate and prosecute crimes committed by some Western countries, including the involvement of the West in Iraq war and the deaths of migrants trying to reach Europe[166] but it revoked the withdrawal notice under the new President Adama Barrow.[167]

5. Universal Jurisdiction and the Prosecution of International Crimes in Africa

Universal jurisdiction has been defined as a legal principle allowing or requiring a State to bring criminal proceedings in respect of certain crime irrespective of the location of the crime and the nationality of the perpetrator or the victim.[168] The reason behind the principle is founded on the premise that "certain crimes are so harmful to international interest that States are obliged to bring proceedings against perpetrators, regardless of the location of the crime and the nationality of the perpetrator or the victim.[169] Furthermore, the preamble to the Statute of the International Criminal Court (ICC) contains the universal jurisdiction principle and it provides:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and the prosecution must be ensured by taking measures at the nation level and by enhancing international co-operation;[170] recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crime. Emphasizing that the international criminal court established under this statute shall be complementary to national criminal jurisdictions.[171]

The effect or import of the above is that the States have primacy over international crimes committed within their territory and by any person whether such a person is a national of the State in question or not. Is this is the rationale behind the principle, why then is it a problem in Africa? The African Union Model National Law on universal jurisdiction over International Crimes provides that:

The Court shall have jurisdiction to try any person alleged to have committed crimes under this law, regardless of whether such a crime is alleged to have been committed in the territory of the State or abroad and irrespective of the nationality of the victim, provided that such a person shall be within the territory of the State.[172] The above provision clearly indicates that the AU is in support of the principle and practice of universal jurisdiction in the region.

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[162] Lizeka, T., "ICC Withdrawal 'Unconstitutional and Invalid' High Court Rules", https://www.News24.com/SouthAfrica/News/icc-withdrawal-unconstitutional-and –invalid-high-court-rules-20170222 (accessed 18 August, 2020.

[163] Goitom, H, (n156) p5.

[164] Lizeka, (n162)

[165] "ICC Withdrawal Revoked after Court Ruling: UN, http://www.aljazeera.com/news/2017/03/ICC-withdrawal-revoked-court-ruling-170308084628230.html. (accessed 15 August 2020).

[166] Goitom, H., (n156).

[167] "ICC Withdrawal Revoked after Court Ruling: UN, supra note 64.

[168]M Robison, *'Foreword' the Princeton Principles on Universal Jurisdiction*, (Princeton: Princeton University Press; 2001) 16.

[169]Para 4 Preamble to the ICC Statute.

[170]Para 6 as above (Principle of Universal Jurisdiction).

[171]Para 10 as above (Principle of complementarity).

[172]Article 4 (1) African Union Model National Law on Universal Jurisdiction over International Crimes, July 2012, Addis Ababa, Ethiopia.

The rule further shows that in the exercise of universal jurisdiction primacy should be given to the court of the State in whose territory the crime is alleged to have been committed.[173] The challenges in the practice of universal jurisdiction comes when the provision of Article 16 of the AU Model National Law is read subject to article 4 (1). Article 16 makes the exercise of jurisdiction subject to national or international law on immunities.[174]

The import of the above is that where the alleged perpetrator of any of the crimes listed under article 8 – 14 of the National Model Law enjoys immunity, he/she shall not be liable to prosecution. So, there appears to be a conflict between national immunity as contained in constitutional instruments and universal jurisdiction. Obviously, the AU Model National Law on Universal Jurisdiction by its express provision in article 16 excludes sitting heads of state and senior officials of government from prosecution while in office. This is further entrenched in article 46Abis. There is an obvious conflict in the application of universal jurisdiction based on the AU Model Law when companied with the application of the same principle from Europe where there have been indictments on sitting heads of states.[175] Further inclusion of immunity in the Malabo Protocol seemed to have worsened the situation for Africa.

It is important to note that the decision to create a regional court by the AU was not only fuelled by the several summonses that African leaders received either as a result of State referrals or referral by the UNSC. One major influence was the practice of universal jurisdiction by the European states as noted earlier. The first was the action of France when it issued arrest warrant for the Chief of Protocol of to the President of Rwanda.[176] Again, a Paris court issued indictments against five serving heads of African States on allegations of corruption.[177] This subsequently led to the established of the AU-European Union expert panel is on universal jurisdiction. This panel recommended that African States should be empowered to try international crimes within their continent.[178] Another factor that influenced the quest to establish a court was the desire to respond to the failure of States to prosecute serious violations of human rights.[179] The issues of summonses on sitting heads of States such as Omar Al Bashir and Ghadaffi also triggered the desire.

Most recently on the list was the intervention of the ICC in Kenya as this also fuelled the desire for the African Court of Justice and Human Rights. Six individuals were indicted for their alleged involvement in the post-election violence in 2007-2008.[180] The President Uhuru Kenyatta and William Ruto his Vice became elected while under ICC indictment[181] While the former Prime Minister and President who were arguably most responsible for the conflicts were not indicted by the ICC.[182] The case against Kenyatta failed in 2014 for lack of evidence.[183] In 2016 the case against Vice President Ruto also failed.[184]

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[173]Article 4 (1) African Union Model National Law on Universal Jurisdiction over International Crimes 9 – July 2012, Addis Ababa,

[174]Article 4 (2) As above. Article 16 – Jurisdiction immunities: the Jurisdiction provided under Article 4 of this law shall apply subject any national or international law on immunities

[175]P Apiko and F Aggad, 'The International Criminal Court, Africa and the African Union: The Way Forward", Discussion Paper, No. 201, November 2016 of the European Centre for Development Policy Management (ECDPM), https;//www.ecdpm.org/dp201_the_international-criminal-court_africa_and_the_african-union-apiko-aggad(0).pdf (accessed 30 June 2020).

[176]*Ibid.*

[177]D Deya, 'Is the African Court Worth the Wait?' Open Society Initiative for Southern Africa (Mar 6 2012), https://www.osisa.org/openspace/regional/a/vican-court-worth-the wait. (accessed 6 July 2020).

[178]CB. Murungu, 'Towards a Criminal Chamber in the Africa Court of Justice and Human Right' (2011), *Int'l Criminal Justice,* Vol. 9, pp 1067, 1069-72.

[179]*As above* p1069.

[180]For instance Belgium originally wanted Senegal to extradite the former Chadian President Hissen Habre so he could be prosecuted for torture and other crimes alleged against him. Senegal did not extradite him to Belgium and argued that they did not have power to try Habre. Upon request by ICT for his trial in Belgium, Senegal they did not have power to try Habre. Upon request by the ICJ for his trial in Belgium, Senegal amended its law for a number of int'l crimes to enable trial.

[181]Situation in the Republic of Kenya, Case No ICC – 01/09. Decision pursuant to art.13 of the Rome Statute on the authorization of an investigation into the situation in the Republic Kenya, 50-54 (Mar. 31, 2010). https://icc-int/ICC-amount/ICCDOC/DOC 854287.pdf (accessed 26 June 2020).

[182]S Marlise and G Jeffery, 'International Criminal Court Drops Case against Kenya William Ruto', *NY Times* (Apr 5, 2016) https://www.mytimes.com/2016/04/word/africa/willaim-ruito kenya- ICCHTML (accessed 26 June 2020).

[183] *Prosecutor v Kenyatta*, Case No. ICC-01/09-02/11. Decision on the confirmation of charges pursuant to art 61 (7) (a) and (b) of the Rome Statute (Jan 23, 2012) https://www..icc-int/iccdocs/doc134503. Pdf (accessed 26 June 2020)

The whole grouse on the principle of universal jurisdiction is hinged on the question of disregard of immunity for sitting Heads of States and Senior Government officials and the disregard for principle of sovereign equality of States. Be that as it may, it is also good to reiterate that not all African countries have the immunity clause in their domestic legislations Burkina-Fasso, Kenya, Mauritius, Senegal, South Africa fall within this category. They also make use of the principle of universal jurisdiction in relation to international crimes. It was based on this that South Africa was challenged nationally for failure to arrest the former Sudanese President Omar Al Bashir when he visited in 2015.[185]

The AU had noted that the principle of universal jurisdiction can be abused and to forestall such instances, they noted that summons to Heads of State to appear in proceedings before the court of another State must be subject to the consent of the head of State concerned and diplomatic confidentiality must kept.[186] This the AU noted will adversely impact on the effective performance of the official functions of such a person[187] in addition to avoiding the dangers of forum-shopping by victims of international who may seek to bring complaints against certain State officials in the hope of being able to institute criminal proceedings against these officials.[188]

This position is being held on to by the AU and some of its members who are opposed to the indictments from ICC on sitting heads of state and government officials albeit in the face of peace process being negotiated. Despite the challenges of the principle of universal jurisdiction, the question of immunity for sitting heads of state and government officials and the AU call for member states to speak with one voice,[189] some African countries have maintained their support for the ICC.[190] In the document containing AU's Decision Assembly/AU/Dec.482 (XXI) the AU deeply requested that:

The request by the African Union (AU) to the United Nation (UN) Security Council to defer the proceeding initiated against President Omar Al Bashir of the Sudan and senior state officials of Kenya in accordance with article 16 of the Rome statute on deferral of case by the UNSC has not been acted upon.[191] Based on the above the AU firmly support the withdrawing member states from the ICC. Some African nations that have not heeded this call include Botswana who is October 2015 hosted the ICC during the high level regional seminar in Botswana on the cooperation between the ICC and states in addition to the connection between cooperation, regional and national capacity building.[192]

The ICC Prosecutor, Fatou Bensouda commended Botswana's leading role in the promotion of the international rule of law and its steadfast support for the IIC from its very inception to the present day.[193] In her opening remarks the Foreign Minister of Botswana-Pelonomi Venson Moitoi urged *inter alia* that participating

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[184] A Holligan, "Uhumu Kenyatta Case: Most High Profile Case Collapse at ICC". BBC News Afr. (Dec. 5 2014) https://www.bbc.com/news/word-africa-30353311. The Kenyatta case is in addition to the three out of the six Kenyan cases that failed in 2013 for lack of evidence.

[185] Southern African Litigation Centre v. Minister of Justice and Constitutional Development and others, (27740/2015) 2015 ZAGPPHC 402. 2016 (1) SACR 161 (GP); 2015 (5) SA 1 (GP); (2015) 3 All SA 505 (GP0; 2015 BCLR 1108 9GP) (24 June 2015), Oct. 2016, https://www.saflii.org/za/cases/ZAGPPHC/2015/402.pdf, (accessed 26 June 2020).

[186] Report of the Commission on the use of the principle of universal jurisdiction by some non-African States as recommended by the Conference of Ministers of Justice/Attorneys General, Assembly of the African Union, Eleventh Ordinary Session,30 June- 1 July 2008, Egypt, Assembly/AU/14 9XI).

[187] As above, para 83.

[188] As above, para 84.

[189] Assembly of the Union, Twenty First Ordinary Session, Decision on International Jurisdiction, Justice and the International Criminal Court (ICC), Assembly/AU/Dec. 482(XXI) May 2013, Addis Ababa, Ethiopia; African Union.

[190] Botswana, Nigeria, CAR, Cote D'Ivoire and Mali firmly supports ICC. Botswana entered a reservation to the entire AU decision as contained in Assembly/AU/Dec. 482 (XXI), May 2013.

[191]Assembly of the Union Twenty first Ordinary Session decision on international jurisdiction, justice and the international criminal court (ICC) Assembly/AU/Dec. 482 (XXI) May 2013. Addis Ababa- Ethiopia: African Union.

[192]Botswana. Nigeria, CAR, Cote D'Ivore and Mali. Botswana entered a reservation to the entire AU Decision as contained in Assembly /AU/Dec.482 (XXI) May 2013.

[193]International Criminal Court, 2015, High-level ICC regional seminar concludes in Botswana, 30 October 2015. The Hague: International Criminal Court. 24 April 2016: https://www.cpi.mt/pageitem.aspex?name = pr 164 (accessed 8 July 2020). Participants at the conference includes representative from Angola, Botswana Comoros, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles and Zambia and regional experts from the UN Office on Drugs and Crime and the Southern Africa litigation center and with official and representatives of the ICC

States should use the seminar platform to 'strengthen relations between African States and the Court by engaging and identifying critical measures that will improve (African States) communication channels with the court.[194]

The situation in Mali involving Ahmed Al Faqi Al Mahdi[195] was referred to the ICC by the government of Mali in July 2012. He was charged for war crimes of directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleum and one mosque in Timbuktu Mali between 30 June 2012 and 10 July 2012. He was found liable on 27 Sept 2016 of the charges and sentenced to nine years imprisonment.[196] He was to make reparations in the tune of 2.7 million Euros.

Gabon in 2016 requested the ICC to initiate investigation for international crimes that occurred in 2016 in the context of the presidential election.[197] After considering the information available the ICC Prosecutor announced that the legal requirement for investigation had not been met. On the part of Cote D' Ivore, they cooperated in the arrest warrant and the surrendering to the ICC of Laurent Gbagbo and Charles Ble Goude[198] Nigeria still maintains support with the ICC. On October 14 2019, the Prosecutor of the ICC, Fatou Bensouda, concluded a two day visit to Abuja. The visit was to discuss the Nigerian Government's support and cooperation with the preliminary examination of the situation in Nigeria that is being conducted by the office of the Prosecutor.[199]

6. Procedure of the African Court of Justice and Human and Peoples' Rights

Shelton and Carozza in their work described the adoption of the Malabo Protocol by the AU as "revolutionary" because it created the first regional criminal court in the world.[200]

The Malabo Protocol provides that the court would have three Chamber- Pre-trial chamber, a Trial chamber, and an Appellate chamber.[201] It further provides that the jurisdiction of the court over crimes will cover those contained in the Rome statutes[202] and other crimes[203] and these crimes include: Unconstitutional Change of Government (UCG),[204] Piracy,[205] Terrorism,[206] Mercenarism,[207] Corruption,[208]

Trafficking of Humans,[209] Drugs,[210] and Hazardous Waste;[211] Money laundering;[212] Illicit Exploitation of Natural Resources;[213] Crime of aggression.[214] The criminal jurisdiction of the Court is wide. It covers eleven additional crimes besides those covered by the ICC which it also has jurisdiction to entertain.

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[194]As above

[195]Situation in the Republic of Mali, the *Prosecutor v. Ahmed Al Faqi Al Mahdi*, ICC-01/12/01-/15. https://www.icc-pids-cis-/mal-01-08/16_Eng. See also https://www.icc.cpi.int/mali/almahdi/documents/Almahdi.eng.pdf (accessed 8 July 2020).

[196]The Time spent in detention since his arrest upon the ICC warrant was deducted from his sentence.

[197]'International Criminal Court Prosecutor in Gabon: The Legal Criteria for this Court to investigate have not been met', (2018), https://www.icc-cpi.int/pges/items (accessed 9 July 2020). See also 'Reports on Preliminary Examination Activities (2017), https://www.icc-cpi.int (accessed 9 July 2020).

[198]Human Right Watch. "Cote D'Ivore: ICC Seeking Militia Leader, 3 Oct 2013, https://www.reword.org/dociid524ffd694.html (accassed 9 July 2020).

[199]ICC, "ICC Prosecutor, Fatou Bensouda, concludes visit to Abuja, Nigeria. http://www.icc.-cpi.int/pages/item.aspx?name=pr1488 (accessed 8 July 2020).

[200]D, Shelton, and PG, Carozza, "Regional Protection of Human Rights" as cited by MVS, Sirleaf, 'Regionalism, Regime complexes and the Crises in International Criminal Justice', (2016), *Columbia J. Transnat'l L,* Vol. 54. p724. https://www.ssrn.com/abstract=2293988 (accessed 28th June, 2020).

[201] Article 16(2) Malabo protocol

[202] Article 28A(1)(2)(3), Articles 28B, 28C, 28D, Malabo Protocol.

[203] Article 28A(4) – (14), Articles 28E – 28M, Malabo Protocol.

[204] Malabo Protocol, Art 28E.

[205] Malabo Protocol Art 28F.

[206] Malabo Protocol Art 28G.

[207]Malabo Protocol Art 28H.

[208] Malabo Protocol Art 28I.

[209]Malabo Protocol Art 28J.

[210]Malabo Protocol Art 28K.

[211]Malabo Protocol Art 28L.

[212]Malabo Protocol Art 28I Bis.

[213] Malabo Protocol Art 28L Bis.

[214]Malabo Protocol Art 28M.

In considering the procedures to be adopted by the Court in exercise of its functions, it would be needful to look at the sources of law that the Court will make reference to in the resolution of dispute brought before it. Article 31 (1) (a)- (f) articulates the sources of law thus: the Constitutive Act; International treaties, of general or particular content, which have been ratified by the contesting States; International custom, as evidence of a general practice accepted as law; General principles of Law recognized either universally or by African States; As subsidiary means for the determination of the rules of Law, judicial decisions, the writings of the most highly qualified publicists but also the regulations, directives and decisions of the AU; and Any other law relevant to the case under consideration. Furthermore, Article 31 (2) provides that the sources above will not prejudice the power of the court to decide a case *ex aequo et bono* if the parties agree to it. A careful examination of Articles 31 (1)-(2) would reveal that it is very similar to that of the ICJ in Article 38 (1)-(2) of the ICJ statute. The discussion will focus on the areas of difference between these two instruments noting that the Malabo Protocol is a regional instrument.

The Protocol provides that the court must have regard to the Constitutive Act. This is quite in order as the Constitutive Act is the constituent instrument of the AU. It is observed that the Constitutive Act must not be applied in disregard of Article 103 of the UN Charter which recognizes the primacy of the Charter over other international legal instruments. Consequently, in the face of conflict between the AU Protocol and the UN Charter, the UN Charter would prevail. The international treaties referred to in Article 31 of the Protocol must of necessity include all treaties ratified and adopted under the umbrella of the OAU/AU, other UN treaties that have been ratified and other treaties in addition to the multilateral human rights instruments.[215]Article 31 also includes customs[216] which accommodates the relevant rules of *Jus cogens,*[217] judicial decisions,[218] general principles of law and any other law that may be relevant to the case.

It is commendable that the ACJHPR will have an unlimited discretion to determine the source (s) of law it would refer to and this should be very well utilized. It is worthy to note that the court is directed to take cognizance of the general principles of law accepted in Africa but this does not suggest that regional customary laws should be excluded.[219] It is also advised that the ACJHPR could rely on the general principles of law that are recognized and accepted by certain Member states and not by the entire African Continent.[220]

Article 46E (1) reveals that the Courts temporal jurisdiction becomes effective after the entry into force of the Protocol. It has no mandate to prosecute cases or crimes committed before the entry into force of the Protocol. This is very similar to the procedure of ICC in respect of temporal jurisdiction. The court can prosecute cases that occurred before a state became a party to the Protocol provided the Protocol had already come into force then, Article 46E (2).

This is quite unsatisfactory as the essence of the clamor for the court was to ensure accountability in the region. If the court lacks retrospective right to investigate cases committed before it's coming into effect there may be no reprieve for victims of alleged crimes in Africa in the nearest future.

This can only be mitigated if hybrid courts/tribunals are set up to investigate and prosecute existing alleged crimes and the ones that will be committed before the entry into force of the court. If this does not happen there may be no end to impunity in the region as the willingness to fully co-operate with ICC is lacking and the will to bring the proposed Court into existence seems absent as the Malabo Protocol is yet to receive the required numbers of signatures.

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[215] *Purohit and Moore v. The Gambia*, African Commission on Human and Peoples' Rights, Communication No. 241/2001, 16th Activity Report 2002/2003, Annex VII, para. 76

[216] See *Zimbabwe Human Rights NGO Forum v Zimbabwe, African Commission on Human and Peoples' Rights,* Communication No. 245/2002, 21st Activity Report 2005-2006, para 180. Customs should be as expressed by the Universal Declaration of Human Rights (UDHR) 1948.

[217] For example the prohibition on Torture. See *Prosecutor v Furundzija*, (1999), International Legal Materials, p317, para 153.

[218] Article 46 (1) of Malabo Protocol does not recognize the principle of judicial precedent as judicial decisions have no binding force except as between the parties to the case. But to maintain certainty in the law, the Court may have to make reference to its earlier decisions.

[219]GJ, Naldi, and KD, Magliveras, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg' (2012) *International Organization Law Review*, Vol. 9, Pp 383-449 at 426.

[220] As above.

On the issues of eligibility to submit cases before the court, the Malabo Protocol notes that States Parties,[221] the Assembly of Peace and Security Council,[222] staff member of the African Union on appeal,[223] and the office of the Prosecutor[224] can submit cases. The court's jurisdiction can only be exercised when a State accepts its jurisdiction; or when the crime was committed on the territory, on board a vessel or aircraft of a State or the victim is a national or where the vital interest of the State is threatened by the extra-territorial acts of a non-national.[225] Where a State fails to accept the Court's jurisdiction, the crimes alleged will not be prosecuted by the Court. This ought not to be so in the mind of the writer.

The jurisdiction of the Court does not extend to persons who were under eighteen years as at the time of the alleged crime. This provision although commendable may encourage the use of child soldiers in the conduct of armed conflict as the child soldiers will not be made accountable for the crimes they commit in the conduct of hostilities. There may be need for a provision in the laws to cater for those who engage in hostilities as children. Aside this, the Protocol has provision for individual and corporate criminal responsibilities. This paper would discuss corporate criminal responsibility as it is considered novel in criminal accountability.

A novel addition in the Malabo Protocol[226] is the provision for corporate criminal liability.[227] This is not contained in any existing international criminal court/tribunal statute. African Court of Justice on Human and People's right will be the first to exercise jurisdiction over such crime, a peculiar African situation. Multinational corporations involved in the extractive industries have been fingered as the powers behind the conflicts in the regions where they operate[228] and some of the affected countries domestic legislations are not so must in content to enable the effective prosecution of these corporations.[229]

With respect to hearing of cases, the Protocol provides that hearing shall be public unless the Court on its own motion or upon application by the parties decides that the session shall be closed.[230] Public hearing is common practice with all courts. The only gap with this is that the Protocol did not provide the circumstances that would warrant closed sessions by the Court *suo motu* or upon the application of the parties. The rule needs to be clear on this. In Nigeria, criminal cases involving children and young persons are held in closed sessions.

Another gap exists with references to the provision regulating procedure before the court.[231] The Protocol provides that: the procedure before the court shall be laid out in the rules of court taking into account the complementarity between the Court and other 'treaty bodies' of the Union. A look at article I[232] of the Malabo Protocol would reveal that there is no definition of what the "treaty bodies" should be and no reason was also provided on why the question of complementarity will only be with regard to the issue of procedure.

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[221] Malabo Protocol Art 19(1)(9)

[222] As above, Art 29(1)(b)

[223] *Ibid* Art 29(1)(c)

[224] *Ibid* Art 29(1)(d)

[225] See preconditions to the exercise of jurisdiction under Art 46Ebis(1)(2)

[226] Malabo Protocol Art 46D

[227] Malabo Protocol Art 46C

[228]In Sierra Leone, Liberia, the Democratic Republic of Congo, Sudan, Angola the actors found the natural resources readily available for self-financing of their conflict. In Angola, the Multi-National Companies were alleged to have played a great role in perpetuating the civil war by acts that were both direct, indirect and sometimes unintended. The Angolan war that lasted for over three decades was fuelled by exploitation of natural resources. See J, Banfield, and P, Champain, 'What Role for Oil Majors in Supporting Sustainable Peace and Development in Angola?: A Survey of Stake-Holders Perspectives', (2004), *International Alert*, p11, http://www.international-alert.org/publications/getdata.php?doctype=pdf&id=24, (accessed 10 July 2020).

[229] In Nigeria for instance, it has been difficult to successfully prosecute the multinational oil companies for gross abuse of human rights and environmental pollution. Issues of *locus standi*: expert evidence have stalled most proceeding involving multinational companies in the Niger Delta Region of Nigeria .Even where it is treated as a strict liability offence, it has not been easy bringing the Multi-Nationals to justice.

[230]Article 39 Malabo Protocol.

[231]Malabo Protocol Art 38.

[232]This section is titled definition of Terms

One need to understand whether this relate to the core international human rights bodies[233] negotiated and elected under the UN mechanisms.[234]

When one consider Art 8 of the 1998 Protocol, it would seem that the Rules of the Human Right Court considered the complementarity between it and the African Commission.[235] If this is the case, then one can conclude that the Protocol of ACJHR refers to the human rights bodies established under the relevant OAU/AU instrument – The African Commission and the Committee of Experts. Much emphasis need not be placed on the Human Rights section because the rules will be common to both sections.

On representation of parties before the proposed court, the Protocol provides that agents with the assistance of counsel or advocates shall present state parties before the ACJHR if necessary.[236] The organs of the Union possessing the *locus standi* will be represented by the Chairperson of the Commission.[237] The African Commission, the Committee of Experts, other African intergovernmental organization and the national human rights institutions shall be represented by any person they choose.[238] Individuals and NGO's may be represented by any person of their choice.[239] Naldi and Magliveras[240] noted in their work that "there is no provision for the possibility of free legal representation in the interest of justice".[241]

The learned authors also perceived this as a "disturbing omission" when it is compared with Article 10(2) of the 1998 Protocol. The positions of the learned authors do not present the correct position on this. Article 46A dealing with the rights of accused made proviso for legal aid.[242] Article 46A (d) must be read in conjunction with Article 36 in order to cover what *prima facie* appears to be a gap. It should also be noted that the provision of legal aid is common practice in Africa.[243] Furthermore on the issue of representation of parties before the Court, their Counsel, witnesses or other persons required to appear before the ACJHR shall enjoy privileges and immunities.[244] This would enable them perform their duties without fear and for the seamless functioning of the Court. The above article presumably has made provision for witness protection and this is quite commendable as witnesses are known to either disappear, detained or ill-treated once they are known in Africa.[245]

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[233] There are nine core International human rights treaties; the most recent is on enforced disappearances which entered into force in December, 2010. There are currently ten human rights treaty bodies, which are committee of independent experts, nine of these treaty bodies monitor implementation of core international human rights treaties while the tenth treaty body is the subcommittee on prevention of torture. There are other UN bodies and treaties involved in the promotion and protection of human rights.

[234]GJ, Naldi, and KD, Magliveras, 'The African Court of Justice and Human Rights: A Judicial Curate's Egg' (2012) *International Organization Law Review*, Vol. 9, Pp 383-449 at 427. See also Office of the High Commission for Human Rights (OHCHR). "Human Rights Bodies" https://www.ohchr.org/EN/HRBodies/Pages/HumanityRights.Aspa (accessed 11 July, 2020).

[235] Rule 29 African Court on Human and People's Rights "Rules of Court" https://www.en.african-court.org/mal-court-publication-after-harmonisation-final-english-3-ses-1 (accessed 10 July, 2020).

[236] Article 36(1)(2) Malabo Protocol

[237] Article 36(3) Malabo Protocol

[238] Article 36(4) Malabo Protocol

[239] Article 36(5) Malabo Protocol

[240] Naldi, & Magliveras, (n234), p.428

[241] Rule 42 of the European Court Rules states that legal aid will be granted only if it is necessary for the proper conduct of the case, and the applicant has insufficient means to meet all or part of the costs.

[242] Article 46A (d) provides thus: to be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; *to be informed; if he or she does not have legal assistance of his rights and to have legal assistance assigned to him or her, in any case where the interest of justice so require and without payment by him or her in any such case if he or she does not have sufficient means to pay for it*.

[243] Section 46 (4)(b) of the Nigerian Constitution of 1999 as amended provides legal aid for accused persons who are not able to afford a counsel in order to ensure justice and no person can be tried of a crime without legal representation. In South Africa, Section 35 of the Constitution makes provision for legal aid for the poor people and vulnerable groups such as women, children and the rural poor. Ghana has the scheme under Article 294 of the 1992 Ghana Republican Constitution and the Legal Aid Scheme Act 1997 (Act 542).

[244]Article 36(7) Malabo Protocol

[245]A, Holligen, 'Uhuru Kenyatta Case: Most High-Profile Collapse at ICC' (2014), https://www.bbc.Com/news /world-africa-303533" (accessed 8 July 2020). The ICC Prosecutor was reported to have said that "her efforts has been hampered by an unprecedented effort to intimidate and interfere with witnesses'. She noted "the social media campaign to expose the

The AU can strengthen this guarantee by the Court if it creatively uses its creativity uses its power under Article 35 to enumerate provisional measures that will be adopted to achieve the guarantee. The Court may provide that States that fail to protect witnesses will be held responsible for the breach of their obligation and would pay compensation.[246]

The Malabo Protocol empowers the Court to give judgment in a case in default of appearance where a party fails to appear or defend the case against him[247] but the Court must ensure that it has jurisdiction[248] and the case is well founded in law and the party duly notified.[249] The jurisdiction of the International Court of Justice shows that the absence of a party would not lead to a default judgment where the party has submitted legal argument in support of its case.[250] The AU Court may adopt this practice of the ICJ. It should be pointed out that where a party fails to appear, his case may be prejudiced so parties must endeavor to appear in court. Judge Jennings in his dissenting judgment in the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* noted *inter alia* that:

…it is true that a great volume of materials about the facts was provided to the Court by the United States during the earlier phase of the case. Yet a party who fails at the material stage to appear and expound and explain even the material that it has provided, inevitably prejudices the appreciation and assessment of the facts of the case.[251]

The import of the above is that appearance in court is a prerequisite as the success of one's case is hinged on this element despite the provision of Article 53[252] of the ICJ statute. The Malabo Protocol should also make provision for the determination of the case based on the documents that the defaulting party may have submitted before the Court.

The Malabo Protocol gives the party who failed to appear a right to object to the judgment. This must be done within 90 days of being notified of the default judgment.[253] The last arm of the provision is to the effect that the Court will not stay the execution of its judgment because of the objection except it decides so.

This may appear harsh because a party who failed to appear may have reasonable grounds for the non-appearances as this may change or upturn the Courts' decision. One thing that is missing is that the Protocol did not provide the grounds upon which an objection may be raised. This may be deliberate as the Court may not want to review its judgment/decision thereby giving the defaulting party an undue advantage over other parties by allowing him to lodge an appeal on a judgment that was not in his favor. Articles 43 of the Protocol provides for judgment presumably for contentious cases because delivery of Advisory Opinion is aptly captured in Article 55. On judgment, the Protocol notes that all judgment must state the reason on which they are based[254] and to be

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identity of protected witnesses" along with concerted and wide ranging efforts to harass, intimidate and threaten individuals who would wish to be witnesses". See also Opinion; "International Justice weakened by Kenyatta Trial Collapse" where it was noted that "as time passed, more and more witnesses disappeared, changed their minds or simply refused to give testimony'. https://www.dw.com/en/opinion-international-justice-weakened-by-kenyatta-trial-collapse/a-18112784 (accessed 8 July 2020).

[246] This can be held to be failure of State Parties to observe treaty provisions that they signed up to. The due diligence mechanism to respect and ensure respect of the Protocol by all Parties thereto

[247]Article 41(1) Malabo Protocol

[248]Article 41(2) Malabo Protocol. The issue of jurisdiction is very key to all trials. This is because, no matter how beautifully well a trial is conducted, in the absence of jurisdiction, the trial is a nullity. It's good that the Court has to first determine that it has jurisdiction before proceeding with the trial.

[249]This presupposes that the courts registry must have evidence to show that the party was duly notified.

[250]See for instance the cases of *US Diplomatic and Consular Staff in Terhan case* (*United States of America v Iran)* 24 May 1980, ICJ Report, 1980, p.3; *Fisheries Jurisdiction Cases (United Kingdom v Iceland)* I.C.J Reports, 1974, p.3

[251] ICJ Reports 1986, Dissenting Opinion of Judge Jennings, p. 544. The Judge further stated that 'there are limits to what the Court can do, in accordance with Article 53 of the Statute, to satisfy itself about a non-appearing party's case; and that is especially so where the facts are crucial. If this were not so, it would be difficult to understand what written and oral pleading are about. https://www.ICJ-cji.org/files/088-1998022.01-09-en.pdf (accessed 11 July 2020).

[252] Article 53 ICJ statute reads: (1) whenever one of the parties does not appear before the court, or fails to defend its case, the other party may call upon the Court to decide in favor of its claim (2) the Court must before doing so satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.

[253] Article 41(3) Malabo Protocol.

[254] Article 43(2) Malabo Protocol. This is in tandem with the principle of *ratio decidendi*, which is an established standard in practice and procedure of Courts.

read in open court.[255] A separate or dissenting opinion is allowed,[256] and the judgment to be delivered must be by the majority.[257] Furthermore, the Protocol provides that judgment shall be delivered within 90 days after the completion of the courts deliberations.[258] This is quite commendable as the facts and evidence presented before the Court will still be fresh in the minds of the judges. Again, to protect human rights guarantees, the earlier the judgments are delivered, the better the assurance and faith in the judicial mechanism of addressing abuses of human rights.

The Protocol notes that parties to the case shall be notified of the judgment but did not state how this will be achieved.[259] The judgment is to contain the names of judges who have taken part in the case.[260] Finally on judgment, Article 46 provides that the judgment of the Court shall be binding on the parties and shall be final.[261] The reason behind this is that judgment will be delivered by the full Court. But in the case of International Criminal Law Section, the decision of the Pre-trial and Trial Chambers may be appealed on the grounds set forth[262] and the appellate chamber may affirm, reverse or revise the decision appealed against.[263]

The Court also has the power to revise its judgment based on the discovery of new facts that has a decisive nature that was unknown to the Court when judgment was given.[264] The application for revision must be made within 6 months of the discovery of new facts[265] and may not be made after ten (10) years from the date of judgment.[266] Article 46(3) provides that parties shall comply with the judgment of the Court and must also ensure the execution of such judgment. Where a party fails to comply with the above stipulation, the Court will refer the matter to the Assembly of the AU and the Assembly will decide on the measures to be taken to ensure that the judgment is given effect.[267] The Protocol also failed to stipulate how non-compliance will be monitored.

Article 46A itemizes the right of the accused person before the Court.[268] There is also the rule on presumption of innocence.[269] Individual criminal responsibility is covered in the Protocol to the effect that a person who commits an offence under the Statute shall be held individually responsible for the crime.[270] It further provides that the official position of any accused person shall not relieve such person of criminal liability nor mitigate punishment but this must be applied subject to Article 46A biz which grants immunity for serving Head of State/government and senior state officials based on their functions. An acceptable interpretation of this would be that no criminal proceeding can be commenced against a sitting Head of State or government official until the leave office. This research is of the view that the immunity clause should also consider national legislations as some national laws do not recognize the immunity of Heads of State and government officials.

What exactly is the purpose of immunity? It has been canvassed that removal of immunity will open doors for litigations which would distract the officials from carrying out their functions. On the other hand, immunity shield government officials from prosecution and many of them in Africa perpetuate themselves in office and continue to commit heinous crimes using their offices. It is the view of this research that the immunity clause in the Malabo Protocol should be looked at again as it is surrounded by controversy and the argument that impunity in Africa may never end may find justification on this ground. The Rome Statue does not recognize immunity based on officials capacity.[271]

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[255] Article 43(4) Malabo Protocol.

[256] Article 44 Malabo Protocol.

[257] Article 42(1) Malabo Protocol.

[258] Article 43(1) Malabo Protocol.

[259] See Article 31 Rules of Procedure of the Inter American Court of Human Right (IACHR).

[260] Article 43(3) Malabo Protocol; See also Article 59(a) IACHR Rules of Procedure.

[261] Article 46(1)(2) Malabo Protocol.

[262] Article 18(2) (a) – (c) The grounds include: a procedural error; an error of law; an error of fact.

[263] Article 18(4) Malabo Protocol.

[264] Article 48 Malabo Protocol.

[265] Article 48(4) Malabo Protocol.

[266] Article 48(5) Malabo Protocol.

[267] Article 46(4) Malabo Protocol.

[268] This follows the fundamental guarantee rules laid down in other statutes.

[269] Article 46A Malabo Protocol.

[270] Article 46B Malabo Protocol.

[271] Article 27 Rome Statute of the ICC, also Art 7(2) ICTY.

Articles 56B also envisage responsibility for superior where such a superior failed to take reasonable measures to prevent or punish perpetrators.[272] This applies to superior and subordinate relationship.

Article 46B (3) on superior criminal responsibility imports the element of 'if he or she "knew or had reasons to know" that the subordinate was about to commit crime….' This is also provided for in other Criminal Court Statutes[273] and jurisdiction aside the ICC. This element implies that the superior must be alert and conscious of his environment. He must not close his eyes and ears to information about the activities of his troop. In fact, constructive knowledge is required in this case rather than actual knowledge as the requirement of actual knowledge will let a lot of superiors out of the hook of responsibility for the actions of their subordinates that they failed or neglected to prevent or punish.

The provisions of Art 46B have captured defenses that would be inadmissible but there is no clear provision for admissible defenses as can be gleaned from the Rome Statue of the ICC.[274] Malabo Protocol did not also make room for mental element of intent (*mens rea*) and that the person desired to cause the consequences of his act or is aware that such a consequence will occur in the ordinary course of events.[275] This, the research believes is a gap or should one presume that the consequences of every act of the accused was intended by him/her. This is the reason this research believes that the absence of what constitutes admissible defenses is a gap in the law.

The official language of the African Court of Justice and Human Rights is not known. The Statute of the Court merely states that 'the official and working languages of the Court shall be those of the Union.[276] This is ambiguous. Is it the drafters' intention that all the languages in Africa should be the working language of the Court? This is rather to wide and a silent gaps that need to be addressed.[277] It is better to state the languages to be adopted by the Court rather than giving room for various interpretations.

On sentencing, the Court can impose a sentence of imprisonment which will be served in a State designated by the Court.[278] This obviously means that this is no death penalty. This may not be considered a stiff enough punishment to deter others from committing such crimes in the future. Death penalty is still practiced by some States in Africa[279] as some victims believe that justice can only be served when a death penalty is pronounced. Be that as it may, it is a step in the right direction as death penalties are becoming very unpopular globally.

7. Benefits of a Regional Criminal Court

There are lots of prejudices on the validity of the African Court of Justice but there are schools of thoughts that believe the proposed Court have some benefits.

It has been noted that the African Court of Justice and Peoples and Human Rights would encourage forum shopping in Africa and this would enable the litigants to make a choice between the ICC and the ACJHPR.[280] It is believed that this is a healthy development as Africans would prefer to have their disputes settled in a familiar terrain. Another advantage that has been put forward is the fact that ACJHPR has the capacity to function alongside the ICC. This they can do by determining the cases that could be tried by the African Court

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[272] Article 46B (3) statute of the Malabo Protocol. See article 28(b) (i) – (iii) of the Rome Statute.

[273] Art 7(3) Statute of the International Criminal Tribunal for the former Yugoslavia, Art 6(3) Statute of the Special Court for Sierra Leone.

[274] Art 31-32 Rome Statute of the ICC – Grounds for excluding Criminal Responsibility.

[275] Art 30 Rome Statute of the ICC.

[276] Article 32 Official Language.

[277] The official languages adopted by the ICC are English and French. The special court for Sierra Leone is Art 24 of its statutes provides that the official language shall be English at the ICJ it is English and French. ICTY- French and French. There are so many languages in Africa, it would be wise to limit the working language of the court to two – English and French.

[278] Article 46J, Malabo Protocol

[279] Nigeria, Egypt, Botswana, Somalia, Sudan, South Sudan. Most continent countries still have death on the law book and judges continue to pass such judgment. They are however not enforces

[280] Sirleaf (n94) p759

and those that can be tried by the ICC.[281] By so doing the two courts would synergize to bring justice to victims.[282] African domestic courts will also be encouraged to amend their domestic criminal legislations. This would afford them the opportunity of being courts of first instance while the regional court will play a complimentary role in prosecution. Despite the aforesaid, the paper would examine some other benefits of having a regional criminal accountability mechanism.

7.1 The ACJHPR as a Gap-Filler

As observed earlier in this study, the desire of the African Union to create a regional court with criminal jurisdiction was influenced by the experience the region had with international criminal trials. The African Court of Justice and Human and Peoples Right can bridge the gap existing between national institutions that violate or fail to enforce human rights and the international mechanism that may not have the capacity to provide redress to all the victims. The inability of the ICC to address all forms of violations of international law creates an obvious gap. ICC can dedicate its resources for the prosecution of heinous crimes and the regional court will address the other crimes not covered by the ICC.

While it is observed that the regional mechanism cannot address all the shortfalls from the trials of the domestic courts and tribunals, it will be dangerous to wait for the creation of domestic and hybrid courts before the region can address international crimes and abuses of human rights in the region. The regional court in this regard will be a gap filler by prosecuting the crimes that the international criminal court, domestic and hybrid courts will not prosecute. The regional court can also investigate crimes that the other courts will not cover and indict persons that may not have been within the contemplation of these other institutions. Again, decisions of a regional court is likely to be accepted with little or no resistance than a pronouncement from an international court.[283]

Matiyas[284] is of the opinion that the establishment of an African Court would not undermine the ICC's jurisdiction or its importance but only fills the gap created due to the ability to have recourse to a regional mechanism before resorting to an international court.[285] Jalloh, also noted that regional problems of criminality requires a regional approach in addressing same.[286]

7.2. Proximity of the Court

One of the drawbacks with the international criminal tribunal for Rwanda was the location of the court at Arusha, Tanzania. This made investigation difficult; conveying witnesses from Rwanda to Tanzania was quite herculean and it never offered a sense of ownership to the Rwandese.[287]

In essence, it will be of great benefit to allow trials to be carried out in the place where the crimes were committed. The closeness or proximity to the *locus in quo* has great advantages for investigation by the prosecution as the evidence and witnesses will be accessible. The State and victims will also have a sense of ownership and this will enhance interests, participation and reconciliation.[288]Its proximity also can boost its legitimacy and credibility in the continent. Due to the similarity in culture and law among African States, a regional Court is more suited to

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[281] G, Mattioli–Zeltner, 'Taking Justice to a New Level: The Special Criminal Court is the Central African Republic', *Jurist* (July 9, 2005) https://www.junst.org/hotline/2015/07/G%C3%Adraldine-mattiolic-zelter-CAR-special-court. php (accessed 11 July, 2020).

[282] As above. This is the first time that national international crimes have created a hybrid court to try serious international crimes committed in their own country and to work alongside ICC.

[283] Sirleaf (n94), p30. The author also notes that because the court is linked to the regional political bodies of the AU, it may give room for effective oversight. He cited the intervention of the AU in Darfur, Burundi and Somalia. He further pointed out that the AU had earlier suspended Mauritania and Togo from membership for unconstitutional Changes of government. Although these interventions have nothing to do with international criminal law accountability, it shows that the AU can challenge sovereignty and the principle of non-interference when there is enough political will.

[284]E, Matiyas, "What Prospects for an African Court under the Malabo? May 31 2018, https://www.Justiceinfo.net/en.other/37633-what-prospects-for-an-african-court-under-the-Malabo-Protocol.htm (accessed 6 July, 2020).

[285] As above.

[286]CC, Jalloh, 'Regionalizing International Criminal Law?', (2009) *International Criminal Law Review*, Vol. 9, No. 3, Pp 445-499.

[287] The courts proximity to victims can also increase its legitimacy and credibility with Africans. Regional bodies may be better placed to respond to human rights violations because of their ability to develop more familiar systems of redress – Sirleaf, (n94) .p.700.

[288] Matiyas, (n284), p.2.

answer to human rights violations in the region because the systems of redress[289] will not be new to the region. For instance, besides the forfeiture of property[290] and imposition of sentences[291] upon conviction, the court can also make provisions for reparations and compensations[292] to the affected persons.

8. Drawbacks to the Courts Effectiveness

In as much as one would like to see the establishment of an international criminal court in Africa, which is an assurance that the continent is ready to be reckoned with in the prevention and punishment of impunity, it is trite to note that this is not a venture that would be undertaken in a hurry. Some fundamental issues that would ensure the success of the proposed court must be addressed by the stake holders. There are myriads of political, financial and other challenges that may hinder the effective take off of the court. The court may also face accusation of bias during trial where a party to the suit is not African and most essentially, its credibility will be questioned when it comes on board. Some of the problems include but not limited to:

8.1 Attitude of African States to treaty obligations

As earlier noted the number of ratifications to bring the ACJHR into existence is fifteen but at the time of writing the number of signatures stands at five. This leaves much to be desired and at this rate it appears that the court will take a long time to come into force. African States clamoring for the court have failed to ratify the Statute of the proposed court. Clarks et al[293] noted that African States have a long history of not abiding by their obligations under International Human Rights Law and questioned whether Member States would be willing to investigate, conduct trials and enforce judgments as indicated in the Statute of the Court as part of their duties under the Statute. The concern raised is quite valid as the commitment of some African States to fight impunity is more rhetoric than real. It is believed that the culture of disregard for human rights, bad governance, and intolerance must be brought to an end if the International Criminal Jurisdiction will succeed.

There is doubt on the minds of people on how ready the African Continent is to tackle international crimes as one would have assumed that the signatures would follow the speed at which the Protocol was concluded. Again, that thirty three African States are still members of the ICC. South Africa and Gambia's intention to withdraw had been revoked. Burundi is the only African State that has withdrawn from the ICC. If thirty three African States are still members of the ICC, the possibility of having fifteen ratifications for the new court may not be in the nearest future. This is not the first time the issue of non-ratification will be discussed. The Merged Protocol for the ACJ did not receive the required ratification. Some States signed but never ratified same.

Sirleaf has noted that there is yet no evidence that there will be sufficient political will to ensure that the Malabo Protocol comes into effect. The learned author posit that the almost exclusive focus of the ICC jurisdiction in Africa should have given the region the political will to bring an African regime on board.[294] The learned author's concern is with respect to enforcement of regional human rights decisions, noting that observers estimate the rate of States' full compliance will AU Commission decisions at 14%. Invariably, the inclusion of the regional criminal court may likely not address the structural and normative weakness of the African human rights system.[295]

8.2 Introduction of unfamiliar crimes to international law

Reading through Article 28A of the Protocol, one would observe that some crimes introduced are not known in international law. The crimes include: Unconstitutional Change of Government (UCG),[296] Corruption,[297] and Illicit Exploitation of Natural Resources.[298] These crimes are not yet settled in international law. A crime is an international crime if the constitutive or substantive elements are known and generally agreed

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[289] GW, Mugwanya, 'Realizing Universal Human Rights Norms through Regional Human Rights Mechanisms: Reinvigorating the African System', (1999), *Ind. Int'l & Comp. L. Rev.*, Vol. 10, p41.

[290] Malabo Protocol, Article 43A(5).

[291] Malabo Protocol, Article 46F

[292] Malabo Protocol, Article 45.

[293] Clarke, K *et al*, (n66), p.44

[294] Sirleaf (n94) at 724

[295] Clarke, K., *et al*, (n66), p.45

[296] Art 28A (4) Amended Protocol of the ACJHR.

[297] Art 28A (8) Amended Protocol of the ACJHR.

[298] Art 28 A (13) Amended Protocol of the ACJHR.

on by the parties to be bound.[299] There is no indication that all the African States are in agreement with the definitions and elements of these crimes. Consensus is very important in this regard as it would prevent the issue of lack of support by some States. It would be recalled that the drafters of the ICC statute while putting it together agreed that the crimes to be under the court's jurisdiction must be those that depicts current or extant customary law rules and not entirely new laws.[300]

This in essence helps to settle controversies relating to the definition and the elements of the crimes. There are so many complexities that member States have to deal with. The first is the problem of amending their domestic laws in line with both the ICC and ACJHR crimes particularly the ACJHR crimes which do not exist in domestic laws. For instance Unconstitutional Change of Government (UCG) is new as is mercenarism. It is also not clear how member States will cope given that legislative processes are quite demanding.

One would wonder how the crime of UCG became an international crime in the Malabo Protocol. In the recent past, Africa had to grapple with cases of UCG and how it affects the stability of the region.[301] Consequently, the AU adopted the African Charter on Democracy Election and Governance (ACDEG) in 2003 which came into force in February 2012,[302] to promote the rule of law and reduce the incessant cases of internal armed conflict. Article 23 of the ACDEG articulates and criminalizes acts that constitute UCG, including any refusal by an incumbent government to relinquish power following free, fair and regular elections.[303] On what basis then did the UCG become an international crime? The answer may be found in Article 4 (h) of the AU's Constitutive Act which gives the AU the right to intervene in grave circumstances. The current situation in Mali is a perfect example of unconstitutional change in government. In August 2020, a military junta sacked an elected government. African States have intervened and given a mandate to the Military junta to relinquish power to an elected government. Although promises have been made but the promises are yet to be actualized.

To be able to intervene in grave circumstances, the Preamble of the Protocol establishing the AU Peace and Security Council (PSC) notes that the AU can establish an operational structure for the effective implementation of the decisions taken in the areas of conflict prevention, peace-making, peace support operations and interventions as well as peace building and post conflict reconstruction, in accordance with the authority conferred in that regard by Article 5(2) of the Constitutive Act of the AU. Again, Article 7(e) of the Protocol gives the PSC power to recommend to the Assembly, pursuant to Article 4(h) of the Constitutive Act, interventions, on behalf of the Union, in a member State in respect of grave circumstances, namely war crime, genocide and crimes against humanity as defined in international conventions and instruments. The AU Constitutive Act in Article 4(p) condemns unconstitutional change of government and would intervene in a member State in respect in grave circumstances. For instance, if in the course of unconstitutional change of government war crimes, genocide and crimes against humanity occurs, Article 4(h) allows AU to intervene.

8.3. Budgetary Implication of the ACJHPR

Another concern shared by all is the inability to the Malabo Protocol to make provision on how the court will be financed. Prosecution of international crimes is expensive. ICC's proposed budget for year 2020 is €1540.52 million.[304] The trial of Habre Hissene the former President of Chad conducted by the Extra-Ordinary African Chamber in Senegal gulped a whooping US$9.7 million in 2015.[305] This is one major concern that must be addressed with all sense of responsibility before the proposed Court finally comes in to force.

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[299] M. Du Plessis, "Implication of the AU decision to give an African Court Jurisdiction over International Crimes", Institution for Security Studies paper, No. 235, June 2010, pp7-8 http://www.issafrica.s3,amazonaws.com/site/uploads/paper235-africacourt.pdf. (accessed 20 July, 2020).

[300] Kirsch 'Foreword' in K Dorman *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, 2003; see also Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, Proceedings of the Preparatory Committee during March, April and August 1996, UN General Assembly Official Records, UN Doc. A/51/22, 13 September 1996 at 54.

[301] Some examples can be drawn from the cases of Gbagbo of Cote D'Ivoire, Kenya's Kibaki, Mugabe of Zimbabwe and the latest in Gambia and Ghana.

[302] Assembly/AU/Dec.147 (VIII) (2007) as cited by Abass (n 64) 939.

[303] Art 28E (d) of the Amended Protocol of the ACJHR.

[304] Mahdi, (n236), p.2

[305] As above.

There is a huge gap in budgetary allocations between the ICC and the current African Court on Human and Peoples' Rights, even without a criminal jurisdiction. Not forgetting the ICC only investigates and prosecutes three out of the fourteen crimes listed for the ACJHR. If the above is anything to go by, it is an indication that international criminal prosecution is expensive and raises concern over where the funds for running the new court will come from. The AU has been heavily dependent on Algeria, Egypt, Libya, Nigeria and South Africa for funds[306] with these five countries each accounting for 13.272 percent of the AU's budget. 66.36 percent of the total AU budget.[307] Consequently, a failure on the part of these five countries to meet their financial commitment to the AU would spell financial doom. Yet the success of the court would greatly depend on donations. However, most countries in Africa are not economically buoyant and wealthy countries like Nigeria are grappling with corruption, which is threatening to collapse her economy.[308] Additionally, some donors that have been supporting the AU may no longer be willing to do so due to the inclusion of immunity clause in the amended Malabo Protocol.[309] For example, the European Union has made its stand known on this matter when in November, 2015 at the African Judicial Dialogue; the representative of the EU stated that:

Regarding the matter of an expanded African Court, I can reconfirm that the EU is not in a position to support the Malabo Protocol creating the additional criminal Chambers as it includes the provision of immunity for sitting Heads of State and Senior State Officials and lacks complementarity with the ICC.[310]

This would mean that Africa may receive support funding from Europe and this will not augur well for the continent as most of the countries in Africa are poor and also grappling with the issue of corruption.

9. Recommendations and Conclusion

Taking the step to establish an African Criminal Court with an expanded jurisdiction to provide African Solution to African problems is an ambitious exercise but whether the region is ready to face the enormous challenges is a different question altogether. Presently the ACJHR only exists on paper and bringing it into operations would require fifteen African Union Member States to deposit instruments of ratification which remains doubtful due to the issues which have arisen from the Malabo Protocol. The provisions of the Malabo Protocol for the African Court of Justice and Human and Peoples' Rights is designed to provide solutions to Africa's peculiar problems which is lacking at the international accountability mechanism.

The Protocol, in addition to crimes regulated by the ICC jurisdiction, made provision for the criminalization of regional crimes and expanded the actors that can be held liable for crimes to include corporations. The proposed court is an improvement on the inefficiencies noticed form trials conducted by national and hybrid courts in the region. The proposed court have a lot of benefits to offer to the region with regard to criminal accountability while there are also some challenges to overcome. Some of these challenges bothers on the attitude of African States to honour treaty obligations and the independence of the Prosecutor to conduct investigations and bring perpetrators to justice. The AU and its Member States must demonstrate commitment in realizing the objective of this bold step.

There are also some gaps in the Malabo Protocol as highlighted in the study. Despite the gaps, it's a bold step by the region to offer an alternative to criminal justice that better suits the regions peculiarities. This effort has brought about a regional mechanism.

The gaps noted in the procedures of the court should also be addressed to bring the practices in line with international standards. Most importantly, the independence of the Prosecutor should not be on paper alone but must be secured by all means if justice must be served. The office of the Prosecutor must enjoy financial autonomy. If the AU fails in this regard, the Court will remain a myth as it will be absolutely difficult to breach the impunity gap in the region or to prevent atrocities. On the other hand, if the AU provides the necessary political support and resources for the court, then there is hope that the court will make success of its duty in checking impunity and atrocities in the region thereby making the quest a reality that is worthwhile.

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[306] As above.

[307] Amnesty International (n 22) 31.

[308] 'Challenges of fighting corruption in Nigeria' http://www.thetidenewsonline.com/2015/06/03/challenges-of-fighting-corruption-in-nigeria-2 (accessed 9 August 2020).

[309]Amnesty International (n 22) 31.

[310] 'EU statement at the African Judicial Dialogue, 6 November 2015, Arusha, Tanzania'. http://ww w.eeas.uropa.eu/delegations/African_union/documents/press-corner/eu-statement-judicial-dialogue-06-11-2015_en.pdf (accessed 13 July 2020).

It would be more sensible for the AU to strive and strengthen the African Court on Human and People's Right to fight and address cases of gross violations of human right in the region. When this is done and justice is served assuaging victims of human rights violation then the region will be reckoned with. Presently, with the myriads of problems articulated in the paper, one can say that the quest of the AU to establish the International Criminal Law Section of the African Court of Justice and Human Right to prosecute and punish international crimes is a myth and not reality.