

**FURTHERING JUSTICE OR PROMOTING IMPUNITY? A  
CRITICAL ANALYSIS OF THE PROPOSED CRIMINAL  
JURISDICTION IN THE AFRICAN COURT OF JUSTICE AND  
HUMAN RIGHTS**

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS OF THE DEGREE  
LLM (HUMAN RIGHTS AND DEMOCRATISATION IN AFRICA)**

**BY**

**MARTHA BEDANE GURARO**

**PREPARED UNDER THE SUPERVISION OF**

**DR ATANGCHO NDJI AKONUMBO**

**AT THE CATHOLIC UNIVERSITY OF CENTRAL AFRICA  
YAOUNDÉ, CAMEROON**

**29 OCTOBER 2010**

## Plagiarism Declaration

I MARTHA BEDANE GURARO do hereby declare that the dissertation '**Furthering justice or promoting impunity? A critical analysis of the proposed criminal jurisdiction in the African Court of Justice and Human Rights**' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

Student: MARTHA BEDANE GURARO

Student No: 10675567

Signature: .....

Date.....

Supervisor: DR. ATANGCHO NDJI AKONUMBO

Signature.....

Date.....

## **Dedication**

I dedicate this research to my always loving husband, who discovered and helped me to discover what is in me! You are my angel sweetheart! I could not have done it without your non-stop love and encouragement. I love you so much, beyond my heart and that is the place where only YOU can dwell!!

I also dedicate this research to the new baby that is coming to our lives.

I love you so much both and God bless you!

## **Acknowledgment**

First and for most I thank God for his unconditional love, grace, support and blessings throughout my life. It all happened because he said so.

This research and the whole study would have been a dream without the help and amazing support of my family. Particularly my husband, my mom, my sisters and brothers thank you so much. Mom, thank you so much for your non-stop prayers through out of my life.

I am particularly indebted to my supervisor Dr Atangcho for his guidance, valuable comments and patience throughout the writing of this dissertation.

My special thanks is for Prof Hunsungule for sharing his immense knowledge and experience.

Mr. Chacha, thank you so much for reading my earlier draft and sharing your informed ideas.

My best friends Wanji, Betty, Linda and Rumbi the best part of my life during this LLM program, God bless you all! We did it girls!!!

Melody thanks for reading my earlier drafts. Finally, I must say that it was a privilege to be part of this 2010 LLM class.

God bless you all!

## Acronyms

**ACHPR:** African Charter on Human and Peoples' Rights

**ACJ:** African Court of Justice

**ACJHR Protocol:** The Protocol on the Statute of the African Court of Justice and Human Rights

**ACJHR:** African Court of Justice and Human Rights

**AComHPR:** African Commission on Human and Peoples' Rights

**ACtHPR:** African Court on Human and Peoples' Rights

**Assembly:** African Union Assembly of Heads of State and Government

**AU:** African Union

**AUPSC:** African Union Peace and Security Council

**CAR:** Central African Republic

**Constitutive Act:** Constitutive Act of the African Union.

**DRC:** Democratic Republic of Congo

**Genocide Convention:** Convention on the Prevention and Punishment of the Crime of Genocide

**ICC:** International Criminal Court

**ICTR Statute:** Statute the Statute of the International Criminal Tribunal for Rwanda

**ICTR:** International Criminal Tribunal for Rwanda (ICTR) and the

**ICTY Statute:** International Criminal Tribunal for the former Yugoslavia

**ICTY:** International Criminal Tribunal for Yugoslavia

**LRA:** Lord's Resistance Army

**OAU:** Organisation of African Unity

**Rome Statute:** The Rome Statute establishing the International Criminal Court

**SCSL Statute:** The Statute of the Special Court of Serra Leone

**SCSL:** Special Court of Sierra Leone

**UN:** United Nations

**UNSC:** United Nations Security Council

**US:** United States of America

## CONTENTS

Plagiarism Declaration .....	ii
Dedication.....	iii
Acknowledgment.....	iv
Acronyms .....	v
Contents.....	vii
CHAPTER ONE: INTRODUCTION .....	1
1.1. Background.....	1
1.2. Research question.....	3
1.3. Literature Review.....	3
1.4. Importance of the research .....	5
1.5. Scope of the research .....	5
1.6. Methodology.....	5
1.7. Chapter outline.....	5
CHAPTER TWO: INTERNATIONAL CRIMES IN AFRICA AND FORUMS FOR PROSECUTION .....	6
2.1. Introduction.....	6
2.2. Attempted definition of international crimes.....	6
2.2.1. Genocide .....	6
2.2.2. Crimes against humanity .....	7
2.2.3. War crimes.....	8
2.3. International crimes in Africa .....	8
2.3.1. Liberia and Burundi.....	8
2.3.2. Sudan.....	9
2.3.3. Uganda.....	9
2.3.4. Democratic Republic of Congo (DRC).....	10
2.3.5. Central African Republic (CAR).....	10
2.4. Forums to punish international crimes committed in Africa.....	11
2.4.1. National courts.....	11
2.4.2. The <i>Ad hoc</i> tribunal of ICTR.....	12
2.4.3. Special Court of Sierra Leone .....	13
2.4.4. The International Criminal Court.....	15
2.5. Conclusion .....	19
CHAPTER THREE: THE PROPOSED ACJHR CRIMINAL JURISDICTION .....	20
3.1. Introduction.....	20
3.2. Factors that militated in favour of the ACJHR's proposed criminal jurisdiction.....	20
3.3. AU's power to establish criminal jurisdiction under the UN Charter and the Constitutive Act.....	23

3.3.1. The UN Charter and the ACJHR proposed Criminal Jurisdiction.....	23
3.3.2. The AU Constitutive Act and ACJHR’s proposed Criminal Jurisdiction.....	24
3.3.3. The need to punish international crimes and end impunity in Africa .....	25
3.4. Conclusion .....	26
CHAPTER FOUR: ASSESSMENT OF THE PROPOSED CRIMINAL JURISDICTION OF THE ACJHR .	27
4.1. Introduction.....	27
4.2. Advantages of the new proposed criminal jurisdiction of the ACJHR .....	27
4.2.1. Legitimacy.....	27
4.2.2. Access to justice.....	29
4.2.3. Effectiveness .....	30
4.3. Challenges of the proposed criminal jurisdiction of the ACJHR.....	30
4.3.1. Conflict of jurisdiction with the ICC.....	31
4.3.2. Lack of financial capacity and political will.....	31
4.3.3. Non compliance and lack of cooperation by African states.....	33
4.4. The proposed criminal jurisdiction in light of ending impunity in Africa .....	33
4.5. Conclusion .....	35
CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS.....	36
5.1. Conclusion .....	36
5.2. Recommendations.....	37
Bibliography.....	39
Appendices .....	51
Appendix 1: Assembly/AU/Dec.221(XII) DECISION ON THE APPLICATION BY THE INTERNATIONAL CRIMINAL COURT (ICC) PROSECUTOR FOR THE INDICTMENT OF THE PRESIDENT OF THE REPUBLIC OF THE SUDAN.....	51
Appendix 2: Assembly/AU/Dec.245(XIII) Rev. DECISION ON THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC) Doc. Assembly/AU/13(XIII) .....	53
Appendix 3: Assembly/AU/Dec.213(XII) DECISION ON THE IMPLEMENTATION OF THE ASSEMBLY DECISION ON THE ABUSE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION DOC. Assembly/AU/3(XII) .....	56

# CHAPTER ONE

## INTRODUCTION

### 1.1. Background

The African Union (AU) was set up in the year 2000 by the Constitutive Act of the African Union (Constitutive Act).<sup>1</sup> Part of AU's objectives for its creation includes; the promotion of peace, security and stability on the continent as well as the protection and promotion of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (ACHPR).<sup>2</sup> As part of fulfilling this objective, the African Court on Human and Peoples' Rights (ACtHPR) was established<sup>3</sup> with a wide human rights protective mandate which allows it to determine cases and disputes concerning the interpretation and application of the ACHPR and other international human rights instruments.<sup>4</sup>

In 2003, the African Court of Justice (ACJ) was established under the Protocol of the Court of Justice of the AU, as the principal judicial organ of the AU.<sup>5</sup> It had the competence over all disputes pertaining to the interpretation and application of the Constitutive Act and all treaties adopted and ratified under the auspices of the AU.<sup>6</sup> In July 2004 the AU Assembly of Heads of State and Government (Assembly) decided that the ACJ should be integrated in to one court with the ACHPR for the reason of financial, logistical constraints and potential areas of common jurisdiction<sup>7</sup> to establish two different courts.<sup>8</sup> Hence, the Protocol on the Statute of the African Court of Justice and Human Rights (ACJHR Protocol) is adopted in July 2008 to merge the ACHPR and the ACJ and to establish the African Court of Justice and Human Rights (ACJHR).

The Merged Court will have jurisdiction<sup>9</sup> to entertain matters arising from the interpretation and application of the Constitutive Act, the ACHPR, instruments that are ratified by the states concerned and other AU treaties adopted within the framework of the Union or the Organisation of African Unity (OAU). In addition, it will have jurisdiction on any matters of international law. This Merged Court as per Article 3 of its Protocol will replace the 1998 and 2003 Protocols<sup>10</sup>

---

<sup>1</sup> The AU Constitutive Act was adopted in Lomé, Togo on 11 July 2000 and entered in to force on 26 May 2001.

<sup>2</sup> As above art 3(f &h).

<sup>3</sup> ACHPR is established under the 1998 Protocol creating the African Court on Human and Peoples' Rights (1998 Protocol).

<sup>4</sup> 1998 Protocol art 3(1).

<sup>5</sup> Protocol of the Court of Justice of the AU adopted 11 July 2003 art 2(2).

<sup>6</sup> As above art 19(1).

<sup>7</sup> M Hansungule 'African courts and the African Commission on Human and Peoples Rights' in A Bosl & J Diescho (eds) *Human rights in Africa legal perspectives on their protection and promotion* (2009) 235.

<sup>8</sup> AU Assembly decision on the merger of the African ACHPR and ACJ of the AU Sirte 2005 + Assembly/AU.Dec.83(V).

<sup>9</sup> Statute of the African Court of Justice and Human rights Annex to the Protocol to the African Court of Justice and Human Rights art 28.

<sup>10</sup> The Protocol to the African Charter on Human and Peoples' Right on the establishment of an African Court on Human and People's Rights adopted on 10 June 1998 in Ouagadougou, Burkina Faso, entered in to force on 25 January

once it comes in to in force<sup>11</sup> and will become the main judicial organ of the AU.<sup>12</sup> The ACJHR Protocol clearly states that the reference in the Constitutive Act to a single Court of Justice<sup>13</sup> is to be read as reference to the ACJHR.<sup>14</sup>

The rationale for the extended jurisdiction on the ACJHR to try international crimes is to try international crimes in Africa as neither the functioning ACHPR nor the ACJHR under the AU system are given the jurisdiction to try massive human rights violations namely genocide, crimes against humanity and war crimes. Apart from the International Criminal Tribunal for Rwanda (ICTR) and the Special Court of Sierra Leone (SCSL) which are specifically established under a special procedure to try international crimes committed in the specific countries during a specific period of time, there is no institution which can try international crimes in Africa.

The idea of widening the mandate of the ACJHR started as early as 2006, when the Assembly adopted a decision<sup>15</sup> to set up a Committee of Eminent African Jurists to study and consider all aspects and implications of the Hissène Habré case.<sup>16</sup> The Committee was also mandated to study means and ways of dealing with similar matters that may arise in future on the continent.<sup>17</sup> The Committee observed that there is a need for the ACJHR to be mandated to try international crimes committed in Africa by Africans.

The push for the extended jurisdiction of the ACJHR was hastened by the indictment and warrant of arrest issued by the International Criminal Court (ICC) for President Omar Al-Bashir of Sudan. Despite the AU's reiteration of its zero tolerance for impunity,<sup>18</sup> it has opted not to cooperate with the ICC on the arrest of President Al-Bashir and has further urged member states not to cooperate with the ICC.<sup>19</sup> The reason for the AU's refusal to cooperate is that the ICC has only targeted African leaders and other African individuals, and as such represents neo-colonial influences.<sup>20</sup> The AU requested the AU Commission in consultation with the African Commission on Human and Peoples' Rights (AComHPR), and the ACtHPR, to examine the implications of the

---

2004 and the 2003 Protocol is the Protocol of the Court of Justice of the African Union adopted on 11 July 2003 in Maputo, Mozambique.

<sup>11</sup> ACJHR Protocol art 9.

<sup>12</sup> J Biegon & M Killander 'Human rights developments in the African Union during 2008' *African Human Rights Law Journal*(2009) 306.

<sup>13</sup> As above (n 1) art 18.

<sup>14</sup> ACJHR Protocol art 3.

<sup>15</sup> Assembly/AU/Dec.103 (VI), January 2006.

<sup>16</sup> Hissene Habre is the former president of Chad, was indicted in Belgium for international crimes of torture and crimes against humanity and currently resides in Senegal.

<sup>17</sup> As above (n 15).

<sup>18</sup> As above para 6; Decision on the Application by the International Criminal Court Prosecutor for the Indictment of the president of the Republic of Sudan Assembly/AU/Dec.221 (XII), adopted on 3 February 2009 Addis Ababa Ethiopia para 6.

<sup>19</sup> Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court Assembly/AU/Dec. 245(XIII) Rev1, adopted on 3 July 2009 Sirte, Libya para 10 .

<sup>20</sup> CB Murungu International Criminal Court, the African Union and prosecution of international crimes in Africa (unpublished article presented in a short course on International law at the University of Pretoria) 18.

ACJHR being empowered to try international crimes of genocide, crimes against humanity and war crimes.<sup>21</sup>

As per its Protocol the ACJHR will have two sections; a General Affairs Section and a Human Rights Section each composed of eight judges.<sup>22</sup> Supposedly, the third section will be for the prosecution of international crimes. A question arises as to the necessity of this extension of jurisdiction in Africa and attempts to answer this question require an analysis of implication that this jurisdiction might create in different aspects. This study hence tries to see the positive and negative implications and tries to answer the question whether it will further justice or promote impunity in Africa.

## **1.2. Research question**

This research endeavours to answer several questions. The main question is; how relevant is the proposed extension of jurisdiction of the ACJHR to try crimes against humanity, genocide and war crimes in light of the ICC's current jurisdiction? Within this broad question, the following sub questions are also addressed:

- How effective are the current jurisdictions of African national courts, ICTR, SCSL and ICC to prosecute and punish international crimes in Africa?
- What are the possible advantages in view of the jurisdictional and financial challenges the proposed jurisdiction might have in light of fighting impunity in Africa?

## **1.3. Literature Review**

There exists almost no literature directly related to the focus of this dissertation topic. The AU made the determination to extend the jurisdiction of ACJHR last year (2009) and the proposal along with its implications are still being analysed. However, attempts are made to analyse some literature pertaining to the topic in light of some arguments that have been made by some authors and NGO's.

Aneme argues that the right of the AU to intervene under Article 4(h) of the Constitutive Act<sup>23</sup> of the AU in respect of grave circumstances specifically war crimes, crimes against humanity and/or genocide includes both military and non-military measures in a member state.<sup>24</sup> He also says if Article 4(h) of the act is going to be effective it should be interpreted as allowing non-military measures against international crimes in the state parties.<sup>25</sup> I agree that the AU should

---

<sup>21</sup> Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/AU/Dec.213 (XII), adopted on 3 February 2009 Addis Ababa Ethiopia para 9.

<sup>22</sup> ACJHR Statute art 16.

<sup>23</sup> Art 4(h) states 'the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'.

<sup>24</sup> GA Aneme *A study of the African Union's right of intervention against genocide, crimes against humanity and war crimes* (2008) 106.

<sup>25</sup> As above 116.

resort peaceful mechanisms including prosecuting persons who are responsible for the commission of grave crimes in Africa.

Murungu argues that intervention under Article 4(h) of the Constitutive Act, by itself does not include prosecution of the perpetrators.<sup>26</sup> There must be a clear mandate for the AU to create a jurisdiction for trying international crimes in Africa. Murungu is of the view that the proposed criminal chamber of the ACJHR is the result of several indictments and/or prosecution of African state officials in Europe and that the ICC is targeting African leaders only.<sup>27</sup> Murungu further argues that the proposal of the AU to establish criminal jurisdiction to the ACJHR is a way of avoiding the prosecution of African leaders by the ICC.<sup>28</sup> Furthermore, African NGO's are criticizing this proposal of the AU saying that it is going to face several financial and human resource problems to try the international crimes and as a result it will fail the ultimate purpose of fighting impunity in Africa.<sup>29</sup>

In its 2009 report Amnesty International, reported that Africa hardly needs nor can afford the cost in time, resources and credibility to the regional human rights system and the recent proposal by the AU will offer a truly workable and effective mechanism is highly debatable.<sup>30</sup> It further argued that the proposal would seem to be dictated more by current political exigencies than the need to establish an effective court that is able to confront the many human rights challenges facing Africa.<sup>31</sup>

The Protocol establishing the ACJHR does not give power to the Court to try international crimes in Africa. With this regard African NGO's further argues that any change to the jurisdiction of the Court, can only occur in the context of a re-design or amendment of the institutional architecture of the composite court protocol and will only take effect after the entry in to force of that Protocol.<sup>32</sup> The NGO's further argues that pending this, the existing framework of international norms and institutions, led by the permanent institution of the ICC, remain the only instruments available for enduring accountability for international crimes and combating impunity in Africa.<sup>33</sup> However, it is important to consider that once a decision is made by the AU the Protocol will be amended in such away as to give the ACJHR power to try international crimes. The fact

---

<sup>26</sup> Murungu (n 20) 12.

<sup>27</sup> AU-EU Expert Report on the Principle of Universal Jurisdiction, Council of European Union, 8672/1/09, REV 1, Brussels, 16 April 2009 para 34.

<sup>28</sup> Murungu (n 20) 37.

<sup>29</sup> Coalition for an effective court on human and peoples' Rights (CEAC), Darfur Consortium and other organisations Implications of the African Court of Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity and war crimes (an opinion) 10.

<sup>30</sup> Amnesty international 'International criminal court the contribution Africa can make to the review conference' (2009) 12.

<sup>31</sup> As above.

<sup>32</sup> CEAC (n 29) 10.

<sup>33</sup> As above.

that there exists almost no literature in this area makes this research a new contribution to future studies and researches.

#### **1.4. Importance of the research**

This study intends to analyse the proposal of the AU to create criminal jurisdiction in Africa for Africans. It analyses in terms of both the advantages and challenges of the already existing jurisdictions to try international crimes in Africa. It contributes some arguments to the current debate on ICC's work in Africa. This study is particularly significant as it seeks to explore issues and considerations that need to be seen in order for the proposed jurisdiction of the ACJHR to be effective in fighting impunity in Africa. It is probable that the AU is going to decide on creating this criminal jurisdiction in the ACJHR. This study hopes to contribute in the process of deciding the matters that should not be neglected to be observed.

#### **1.5. Scope of the research**

The scope of this research is limited to analysing the resort that the AU is turned to by proposing an extension of jurisdiction to the ACJHR along with the various implications that it might have to the already existing criminal jurisdictions and the need to fight impunity in Africa. The study does not intend to propose or recommend structural and procedural modalities to be followed for the new proposed criminal jurisdiction. It has been mentioned in the previous section that there is paucity of material on this subject matter and this limits the basis of analysis of in this research. Most of the reflections therefore are based on the researcher perceptions on the subject.

#### **1.6. Methodology**

The study will be based on both primary and secondary sources. Data from the primary source was collected through informal interviews and discussions. Secondary sources include desktop and library research which forms the essential bulk of the data.

#### **1.7. Chapter outline**

This introduction forms chapter one of the study. Chapter two addresses the gravity of international crimes and the need to punish and fight impunity in Africa. Furthermore, it tries to see the available forums to punish the international crimes along with their achievements and challenges. Chapter three will first analyses the immediate causes of AU's resort with regard to extending jurisdiction to the ACJHR in order to try international crimes. It further looks at AU's power to establish a criminal jurisdiction to try international crimes in Africa under UN Charter and the Constitutive Act. Chapter four explores the advantages and challenges of the proposed criminal jurisdiction in light of fighting impunity in Africa. The last chapter concludes the study and give possible recommendations.

## CHAPTER TWO

### INTERNATIONAL CRIMES IN AFRICA AND FORUMS FOR PROSECUTION

#### 2.1. Introduction

There is no unanimously agreed definition of international crimes.<sup>34</sup> However, the international community agrees that international crimes against human kind should be prosecuted and punished pursuant to international law.<sup>35</sup> International crimes are considered to be heinous and crimes against every human kind and their gravity necessitated several forums to prosecute and punish perpetrators thereof.

This chapter attempts to define international crimes briefly as contained in various international instruments and tries to put a background with regard to the massive international crimes that have been committed in Africa. This includes the massive crimes that have been in the last two decades specifically in Sudan, Democratic Republic of Congo, Central African Republic and Uganda. The chapter also looks at available forums for trying international crimes and will include the possibility of prosecuting international crimes through universal jurisdiction and international criminal tribunals such as the ICC, ICTR and SCSL. The achievements and challenges with regard to international criminal justice of these forums will also be discussed.

#### 2.2. Attempted definition of international crimes

International crimes such as genocide, war crimes and crimes against humanity are considered to be core international crimes. They have been defined in several international instruments that most African states are a party to. Instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) the Rome Statute, the Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) and International Criminal Tribunal for the former Yugoslavia (ICTY Statute) as well as the Statute of the Special Court of Serra Leone (SCSL Statute) defined such international crimes and put them as a condition for their subject matter jurisdictions.

##### 2.2.1. Genocide

The Genocide Convention, the Rome Statute, the Statutes of the ICTY and ICTR respectively and the SCSL Statute provide a common definition for the crimes of genocide as defining any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such killing members of the group, causing serious bodily or mental harm to

---

<sup>34</sup> PQ Wright, 'The Law of the Nuremberg Trial,' 41 *American Journal of International Law* (1947) 56; Y Dinstein, 'International Criminal Law' *Israel Law Review* 206 & 221 (1985)

<sup>35</sup> DF Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' 100 *Yale Law Journals* (1991) 2537; M Scharf, 'Swapping Amnesty for Peace,' *Texas International Law Journal* (1996) 1; R Boed, 'The Effect of a Domestic Amnesty,' *Cornell International Law Journal* (2000) 297; C Edelenbos, 'Human Rights Violations: A Duty to Prosecute?' (1994) *Leiden Journal of International Law* 5.

members of the group, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group.<sup>36</sup>

With regard to the status of the crime of genocide and the Genocide Convention several scholars and important sources indicates that an obligation of states to prosecute and punish genocide is a customary international law.<sup>37</sup> In addition, the prohibition of genocide is considered as a peremptory norm (*jus cogens*) under international law by the International Court of Justice and both *ad hoc* tribunals of ICTR and ICTY.<sup>38</sup> Genocide has been committed in Rwanda against the *Tutsis* and allegedly in Sudan against the *Zaghawa*, *Massalit* and *Fur* ethnic groups, with the intent to destroy in whole or in part of such protected groups under international law.

### 2.2.2. Crimes against humanity

Crimes against humanity is defined as crimes amounting to murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried out in execution of or in connection with any crime against peace or any war crime.<sup>39</sup> For crimes against humanity to exist, there must be a widespread or systematic attack against the civilian population on national, political, ethnic, racial or religious grounds.<sup>40</sup>

Crimes against humanity can generally be broken down into four essential elements, namely: (i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health; (ii) the act must be committed as part of a wide spread or systematic attack; (iii) the act must be committed against members of the civilian population; (iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.<sup>41</sup>

---

<sup>36</sup> Genocide Convention art 2; Rome Statute art 6; ICTY Statute art 4(2); ICTR Statute art 2(2).

<sup>37</sup> SR Ratner, JS Abrams & JL Bischoff *Accountability for human rights atrocities in international law beyond the Nuremberg legacy* (2009) 43; Reservations to the Genocide Convention, ICJ Opinion (28 May 1951) (1951) 15, para 23; *Prosecutor v Goran Jelusic*, (Case No.IT-95-10) Trial Chamber, Judgment, (14 December 1999), para 59; *Prosecutor v Musema*, (Case No. ICTR-96-13-A), Trial Chamber, (27 January 2000), para 15; *Prosecutor v Rutaganda*, (Case No. ICTR-96-3). Trial Chamber, (6 December 1999), para 46.

<sup>38</sup> *Kayishema and Ruzindana Trial judgment* Para 88 (quoted in Ratner, Abrams & Bischoff (n 37) 43; Case Concerning Application of the Genocide Convention, *Bosnia and Herzegovina v Yugoslavia Serbia and Montenegro*, ICJ Reports and Judgment (13 September 1993) 325, 440 (Separate opinion of Ad hoc Judge Lauterpacht); *Prosecutor v Kayishema and Ruzindana*, (Case No.ICTR-95-1-T), Trial Chamber, Judgment, (21 May 1999), para 88.

<sup>39</sup> Principles of the Nuremberg Tribunal, 1950 No. 82 Adopted by the International Law Commission of the United Nations, 1950 Under General Assembly Resolution 177 (II), paragraph (a), Principle VI c, also available at <<http://deoxy.org/wc/wc-nurem.htm>> (Accessed 17 September 2010).

<sup>40</sup> *Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva*, Case No. ICTR-98-41-T (Trial Chamber), 18 December 2008 (known as the "Military I" trial), para 2165; *Prosecutor v Zigiranyirazo*, Case No. ICTR-01-73-T (Trial Chamber), 18 December 2008 para 430; *Prosecutor v Bikindi*, Case No. ICTR-01-72-T (Trial Chamber), 2 December 2008 para 428; *Prosecutor v Nzabirinda*, Case No. ICTR-2001-77-T (Trial Chamber), 23 February 2007, para. 20; *Prosecutor v Rwamakuba*, Case No. ICTR-98-44C-T (Trial Chamber), 20 September 2006, para. 1; *Prosecutor v Bisengimana*, Case No. ICTR-00-60-T (Trial Chamber), 13 April 2006, para. 41; *Prosecutor v Simba*, Case No. ICTR-01-76-T (Trial Chamber), 13 December 2005, para. 421.

<sup>41</sup> *Prosecutor v Akayesu*, Case No. ICTR-96-4-T (Trial Chamber), 2 September 1998, para. 578; *Semanza v Prosecutor*, Case No. ICTR-97-20-A (Appeals Chamber), 20 May 2005, para. 268.

### **2.2.3. War crimes**

As opposed to the above international crimes, war crimes can only be committed in the context of war or a conflict which can be either international or non international armed conflict. War crime is defined as violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.<sup>42</sup>

The Rome and the ICTR Statutes defines war crimes in two perspectives. While the Rome Statute lists crimes that can be committed in international conflicts the ICTR Statute concerns an internal armed conflict in the mean time the ICTY Statute permits prosecutions for persons violating the laws or customs of war offering illustrative lists of violations.<sup>43</sup> In light of the jurisprudence of the ICTR, for a war crime to be established, the prosecutor needs to prove at the threshold, the following elements: (1) the existence of a non-international armed conflict on the territory of the concerned state; (2) the existence of a nexus between the alleged violation and the armed conflict; and (3) that the victims were not directly taking part in the hostilities at the time of the alleged violation. If these elements are proven beyond reasonable doubt, the Tribunal will proceed to assess the responsibility the accused.<sup>44</sup>

### **2.3. International crimes in Africa**

Throughout the continent of Africa, international crimes have been and are still being committed. For instance, in Rwanda, within a short period- six weeks time about ten percent of the population was killed.<sup>45</sup> The proceeding subsections will try to look at some selected African countries which are victims of the crimes.

#### **2.3.1. Liberia and Burundi**

Liberia and Brundi are among the first countries to be affected with international crimes in the pretext of conflicts. Liberia in the early 1980's experienced a series of bloody coups and factional fighting which repeatedly flared up during the 1990s. Conflict under the presidency of Charles Taylor left more than 100 000 Liberians dead between 1997 and 2002.<sup>46</sup> In August of 2003, Taylor was indicted by the SCSL for war crimes and crimes against humanity in Sierra Leone, which shares a border with Liberia.

---

<sup>42</sup> Principles of the Nuremberg Tribunal (n 39), Principle VI b.

<sup>43</sup> Rome Statute art 8, ICTR Statute art 4 and ICTY Statute art 3.

<sup>44</sup> *Prosecutor v Kamuhanda*, Case No. ICTR-95-54A-T (Trial Chamber), 22 January 2004, para. 737; *Prosecutor v Semanza*, Case No. ICTR-97-20-T (Trial Chamber), 15 May 2003 paras. 354-371, 512.

<sup>45</sup> C Hauss *Intermtational conflict resolution international relations for the 21<sup>st</sup> century* (2001) 22.

<sup>46</sup> Genocide and Crimes Against Humanity <http://www.enotes.com/genocide-encyclopedia/amnesty> (Accessed 22 September 2010).

Similarly, Burundi has the sad distinction of having experienced the first genocide recorded in the Great Lakes region of Central Africa. Only in between March and August of 1972 between 100 000 and 200 000 people were taken to their graves in the wake of a Hutu-led insurrection.<sup>47</sup>

### **2.3.2. Sudan**

The war in Darfur Sudan started in February 2003 when a rebel group known as the Darfur Liberation Front destroyed army posts and subsequently capturing the town in response to attacks by government forces and *Janjawiid* militias.<sup>48</sup> In a matter of weeks in 2003, the army and *Janjawiid* captured and killed 172 people in the Deleig area; some had their throats cut and their bodies thrown in the stagnant pools of a river.<sup>49</sup>

In March 2009 the Prosecutor of the ICC made an application to the Trial Chamber requesting an arrest warrant for president Al-Bashir providing evidences for the allegation of the three international crimes<sup>50</sup> in Darfur against the members of the *Fur*, *Masalit* and *Zaghawa* groups in Darfur from March 2003 to July 2008.<sup>51</sup> As well the arrest warrant on those international crimes has been issued.<sup>52</sup>

Worse still, as the conflict in Darfur enters its sixth year from February 2003, conditions continue to deteriorate for civilians. The United Nations (UN) puts the death toll at roughly 300 000, while the former UN Secretary-General puts the number at no less than 400 000 and displaced over 2 500 000 and more than 100 people continue to die each day, 5000 die every month since February 2003.<sup>53</sup>

### **2.3.3. Uganda**

In Uganda, the main conflict started in 1988<sup>54</sup> with at least 20 000 children having been kidnapped and forced into being child soldiers.<sup>55</sup> According to a survey of war affected youth in Uganda, approximately 25 000 children between the ages of three and 17 would travel up to 12

---

<sup>47</sup> <http://www.enotes.com/genocide-encyclopedia/burundi> (Accessed 17 September 2010)

<sup>48</sup> Aneme (n 24) 293-294.

<sup>49</sup> J Flint & AD Waal *Darfur a new history of a long war* (2008) 130.

<sup>50</sup> *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, PTC I, 4 March 2009.

<sup>51</sup> As above.

<sup>52</sup> At first the Chamber was convinced that there are only crimes against humanity and war crimes however recently (July 2010) the charge of genocide is included.

<sup>53</sup> Edith M. Lederer, "UN Says Darfur Conflict Worsening, with Perhaps 300,000 Dead," Associated Press 22 April 2008. Quoted in Genocide in Darfur Briefing paper June 2008 <http://www.savedarfur.org/pages/background/> (Accessed 18 September 2010); also available at Genocide in Darfur Sudan <http://www.darfurscores.org/darfur> (Accessed 18 September 2010).

<sup>54</sup> Save the children Denmark in northern Uganda <http://www.redbarnet.dk/Default.aspx?ID=2199> (Accessed 18 September 2010).

<sup>55</sup> Uganda's forgotten war <http://www.redbarnet.dk/Default.aspx?ID=2199> (Accessed 22 September 2010).

miles a night in order to avoid being abducted by the LRA at the peak of the war. The war put nearly two million civilians in danger.<sup>56</sup>

The 18 - year old rebellion - LRA against the government has forced over 1.6 million Ugandans to flee to squalid and overcrowded camps in order to escape wanton attacks and killings. Since the rebellion began, some 30 000 children have been abducted to work as child soldiers and porters, or to serve as wives of rebels and bear their children.<sup>57</sup> Villages were attacked and destroyed, families burned out and/or killed, and harvests destroyed by an army of abducted children.<sup>58</sup> Furthermore, crimes against humanity especially torture has been also committed on innocent civilian by the military.<sup>59</sup>

#### **2.3.4. Democratic Republic of Congo (DRC)**

In the four year period between 1998 and 2002, approximately 3.3 million people died in DRC in a conflict, largely ignored by the international community.<sup>60</sup> Most of those who died were civilians, killed as a result of war, starvation or disease.<sup>61</sup> During 2008, hundreds of civilians were killed, thousands of women and girls were raped, and a further 400 000 people fled their homes, pushing the total number of displaced persons in North and South Kivu to over 1.2 million.<sup>62</sup> Dozens of other women and girls were reported to have been raped following resumption of combat in August 2008.<sup>63</sup> The situation in the DRC was referred to the ICC on 19 April 2004 and three cases against Thomas Lubanga Dyilo, Bosco Ntaganda and Germain Katanga are being heard before the relevant Chambers of the ICC.<sup>64</sup>

#### **2.3.5. Central African Republic (CAR)**

CAR suffered from a long history of coups and uprisings when General Bozize led an army of insurgents to topple elected President Ange-Felix Patasse in March 2003.<sup>65</sup> Nearly 300 000 people had been driven from their homes according to the UN.<sup>66</sup> Government troops and rebel forces in the CAR continue to clash despite the ongoing talks of a peace agreement. The situation

---

<sup>56</sup> Reintegration of returnees, ex-combatants and other war affected persons in the Communities of Gulu and Amuru districts, Northern Uganda (research Report January 2010) 5 full report available at <http://www.gusco.org/Publications/published/EU%20RESEARCH%20REPORT.pdf> (Accessed 22 September 2010).

<sup>57</sup> UN 10 Stories the world should hear more about Uganda: child soldiers at centre of mounting humanitarian crisis <http://www.un.org/events/tenstories/06/story.asp?storyID=100> (Accessed 19 September 2010).

<sup>58</sup> Another town in Africa – “Lira” Uganda’s Child Soldiers (Joseph kony’s Lords’ Resistance Army <http://kabiza.com/Lira-Children-Kony-Rebels.htm> (Accessed 18 September 2010).

<sup>59</sup> Torture by Ugandan soldiers worse than animals available at [http://www.un.int/drcongo/war/torture\\_by\\_ugandan\\_soldiers.htm](http://www.un.int/drcongo/war/torture_by_ugandan_soldiers.htm) (Accessed 22 September 2010).

<sup>60</sup> Human rights first crimes against humanity + DRC <http://www.humanrightsfirst.org/cah/ij/regions/drc/drc.aspx>

<sup>61</sup> As above.

<sup>62</sup> DRC events of 2008 human rights watch available at <http://www.hrw.org/en/node/79181> (Accessed 22 September 2010).

<sup>63</sup> As above.

<sup>64</sup> <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (Accessed 22 September 2010).

<sup>65</sup> Central African Republic: a silent crisis crying out for help <http://www.un.org/events/tenstories/06/story.asp?storyID=300> (Accessed 21 September 2010).

<sup>66</sup> Conflict in Central African Republic uproots 300,000 UN reports <http://www.un.org/apps/news/story.asp?NewsID=25320&Cr=car&Cr1=unicef> (Accessed 21 September 2010).

in CAR was referred by the Government of the CAR in 2003 to the ICC and Jean-Pierre Bemba Gombo has been charged with war crimes and crimes against humanity.

## **2.4. Forums to punish international crimes committed in Africa**

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

### **2.4.1. National courts**

International law recognises four bases for state's jurisdiction to apply its domestic laws and prosecute international crimes.<sup>67</sup> Particularly the 'universality principle' is the most important basis of jurisdiction in cases of massive human rights violations as it permits states to prosecute international crimes considered to be heinous or harmful to mankind, regardless of any nexus the state may have with the offense, the offender or the victim.<sup>68</sup> Every government has a duty to investigate and prosecute international crimes under customary international law.<sup>69</sup> It is highly believed that domestic courts shall maintain the primary jurisdiction to try international crimes<sup>70</sup> for example the Lubanga case before the ICC is considered to be better if it remained in the DRC.<sup>71</sup> This is for several reasons such as enhancing government legitimacy, to provide the people of the DRC with the benefits of national prosecution, to encouraged domestic legal changes and for the availability of sufficient police and legal force to hold the case.<sup>72</sup>

Although the international legal process has elaborated a corpus of law providing individual criminal responsibility for various atrocities in peace and war, domestic legal systems remain the primary fora for rendering individuals accountable for these acts.<sup>73</sup>

Both treaties and customary law have envisaged domestic courts as the primary arena for the trials of those accused of acts incurring individual responsibility under international law.<sup>74</sup> Genocide, crimes against humanity and war crimes are subject to universal jurisdiction.<sup>75</sup> Some African countries used their national jurisdictions such as Rwanda<sup>76</sup> (both under national courts

---

<sup>67</sup> KC Randall, 'Universal jurisdiction under international law' (1998) *Texas Law Review* 785 -89 quoted in Ratner, Abrams & Bischoff (n 37) 178; These are territorial, nationality, passive personality and the universality principles.

<sup>68</sup> As above.

<sup>69</sup> GA Aneme 'Apology and trials: The case of the Red Terror trials in Ethiopia' (2006) *African Human Rights Law Journal*75.

<sup>70</sup> J Stigen *The relationship between the International Criminal Court and national jurisdictions the principle of complementarity* (2008) 20.

<sup>71</sup> R Bowman 'Lubanga, the DRC and the African Court: lessons learned from the first international criminal court case' (2007) *African Human Rights Law Journal*420.

<sup>72</sup> As above.

<sup>73</sup> Ratner, Abrams & Bischoff (n 37) 177.

<sup>74</sup> As above 180.

<sup>75</sup> See *Demjanjuk*, 776 F. 2d at 582-83; *Eichmann*, 36 ILR at 299-303 (Isr. S. Ct.); *Arrest Warrant Case*, joint sep. Op . Higgins, Kooijmans, and Buergenthal. Paras. 51-61 quoted in Ratner, Abrams & Bischoff (n 37) 181.

<sup>76</sup> By 2008 more than 10000 had been tried in the ordinary courts and the *Gacaca* proceedings are much faster than ordinary trials and have already disposed of over 70000 cases.

and under the traditional justice system called *Gacaca*) and Ethiopia,<sup>77</sup> to try international crimes in their domestic courts. Recent practice shows that bystander states that are willing to exercise universal jurisdiction over international crimes can be successful, provided that a number of practical cumulative requirements are met.<sup>78</sup> These include sufficient resources to carry out the investigation, the prosecution, and the trial, that is the state should, for instance, be able to conduct on - site investigations and to fly in witnesses for trial.<sup>79</sup> It should also be able to have access to the crime scene in the territorial state. Cooperation of the latter state is crucial as lack of access will normally translate into lack of evidence to support the case against the presumed offender. If these cumulative requirements are not satisfied, there is reason for caution and even distrust of national proceedings under the universality principle.<sup>80</sup>

#### **2.4.2. The *Ad hoc* tribunal of ICTR**

There are two *ad hoc* tribunals that are established by the United Nations Security Council (UNSC) under Chapter VII of the UN Charter. These are the ICTY and ICTR. In light of international crimes in Africa it is relevant to talk about the ICTR. After the violence that devastated Rwanda in 1994,<sup>81</sup> the UNSC passed a series of resolutions expressing its alarm at violations of international law and determining that the conflict represented a threat to international peace and security.<sup>82</sup>

On 8 November 1994, the UNSC established the ICTR<sup>83</sup> which is based in Arusha Tanzania. Its establishment marked the first time an international tribunal had adjudicated the law of genocide. The Rwandan government initially objected to the ICTR principally because of its inability to order the death penalty, its limited temporal jurisdiction and concerns that its seat would be far from Rwanda.<sup>84</sup> The ICTR has limited jurisdiction to certain international crimes committed in Rwanda or committed by Rwandan nationals in the neighbouring states between 1 January 1994 and 31 December 1994.<sup>85</sup> The subject matter jurisdiction of the ICTR extends to genocide (including conspiracy, incitement, and attempt to commit genocide), crimes against humanity and war crimes in light to the specific nature of the conflict.<sup>86</sup>

---

<sup>77</sup> By 2008 the government had charged over 5000 individuals for offenses including genocide. The offenders are leaders of the past regime of the Dergue which is considered as repressive including the ex-president Mengistu Haile-Mariam in absentia.

<sup>78</sup> C Ryngaert 'The international criminal court and universal jurisdiction: a fraught relationship?' *New criminal law review* (2009) 505-506.

<sup>79</sup> As above.

<sup>80</sup> n 78 above.

<sup>81</sup> DJ Bederman (Ed) 'International decisions' *American journal of international law* (2004) 325.

<sup>82</sup> SC Res 912,918, 925 (1994).

<sup>83</sup> SC Res 995 (1994); Report of the Secretary General pursuant to paragraph 5 of the same resolution, 13 Feb 1995, UN Doc S/1995/134, para 6 (reasons for creating tribunal under chapter VII).

<sup>84</sup> Ratner, Abrams & Bischoff (n 37) 224.

<sup>85</sup> ICTR Statute arts 1 & 7.

<sup>86</sup>As above arts 2-4

The ICTR had a considerable impact on the development of international criminal law especially the law on genocidal and sexual offenses.<sup>87</sup> However, the ICTR had its own challenges. One of such challenges facing the Tribunal from its inception has been its delicate relationship with the Rwandan government.<sup>88</sup> Despite their shared interest in bringing authorities to justice, it has also caused friction between them.<sup>89</sup> Other challenges include the Government's decision to suspend cooperation to the Tribunal specifically its refusal to grant documents to witnesses to travel to Arusha and withholding documents from investigators to investigate crimes.

### **2.4.3. Special Court of Sierra Leone**

Since the year 2000, hybrid or internationalised judicial structures have been set up in a number of places like East Timor, Sierra Leone, Cambodia, Kosovo, Bosnia, Serbia, and Iraqi<sup>90</sup> to prosecute persons suspected of committing serious crimes in the territory concerned having seats in that location.

Sierra Leone's 1991 - 2000 civil war was marked by unmitigated cruelty and barbarism.<sup>91</sup> The war erupted when rebels calling themselves the Revolutionary United Front (RUF) invaded from Liberia with the support of Charles Taylor, then Liberian rebel leader who would later become president of that country. 75 000 civilians were killed and ten thousand more were raped, kidnapped and subjected to amputation of limbs.<sup>92</sup> Crimes against humanity and war crimes were committed during a non - international armed conflict between rebel forces and the regular government forces from 1991 to 2002. By Resolution 1315 of 14 August 2000, the UNSC decided to establish the SCSL on the basis of an agreement between the UN and the Government of Sierra Leone<sup>93</sup>

The SCSL, a *sui generis* - unique institution is independent of the Sierra Leonean system as the court conceives itself as an international institution with attributes similar to those of the ICTY and ICTR.<sup>94</sup> However, unlike the ICTR and the ICTY, the SCSL was established under Chapter VI of the UN Charter. The SCSL is a hybrid criminal court even though it has characteristics that may classify it as 'an international criminal tribunal'. It is composed of international and national judges, lawyers, and other appointed staff and applies both international law and domestic law.<sup>95</sup> It is neither a national court of Sierra Leone nor part of the judicial system of Sierra

---

<sup>87</sup> KD Askin 'Gender crimes Jurisprudence in the ICTR: positive developments' *International criminal justice* (2005) 1007.

<sup>88</sup> Ratner, Abrams & Bischoff (n 37) 228.

<sup>89</sup> MH Morris 'The trials of current jurisdiction: the case of Rwanda' *Duke journal of comparative and international law* (1997) 349.

<sup>90</sup> As above 246-247.

<sup>91</sup> n 89 above 249.

<sup>92</sup> n 89 above 249-250.

<sup>93</sup> UNSC Res. 1315(2000) of 14 August 2000, (UN Doc.S/RES/1315).

<sup>94</sup> *Taylor immunity appeal decision*, Para 38, 42, 53.

<sup>95</sup> SCSL Statute Art 14(1) & (2).

Leone, and is not governed by the Constitution of Sierra Leone.<sup>96</sup> The Trial and Appeals Chamber of the SCSL have however, held that the SCSL is 'truly an international tribunal.'<sup>97</sup> It has characteristics like those of the ICC, the ICTY and ICTR in terms of personal and subject matter jurisdictions.<sup>98</sup>

The SCSL consists of two trial chambers with two international and one sierra Leonean judges each; an appeal chamber with three international and two sierra Leonean judges; an international prosecutor and sierra Leonean deputy prosecutor.<sup>99</sup> SCSL has jurisdiction over war crimes, crimes against humanity and several specified domestic crimes committed in Sierra Leone and concurrent jurisdiction with the ordinary domestic courts but enjoys primacy over them.<sup>100</sup> Since 2002, the Court has produced a significant body of case law heavily influenced by the ICTY and ICTR.<sup>101</sup> Since the statute mandates the SCSL to focus on those who bear the greatest responsibility for the atrocities in Sierra Leone,<sup>102</sup> the prosecutor has indicted only Taylor and major leaders of the rebels groups which amounts to nine current defendants. While its work has lasted longer than anticipated, the court represents a qualified success, due in no smaller part to continuous infusion of technical expertise from well trained international legal staff.<sup>103</sup> SCSL's jurisprudence has grappled with a number of novel issues in international criminal law.<sup>104</sup> The Prosecutor strictly interpreted the Court's mandate and confined himself to issuing, within a year of his arrival; thirteen indictments against those who were believed to 'bear the greatest responsibility' and accused were taken into custody immediately.<sup>105</sup>

As briefly discussed international crimes are being committed throughout the continent and some proposals were made to establish *ad hoc* or special tribunal after massive human rights violations. For instance proposals were made to establish special courts to try the 2007 post election violence in Kenya<sup>106</sup> and the situation in Darfur Sudan.<sup>107</sup> However, this cannot be an

---

<sup>96</sup> *Prosecutor v Kondewa*, Case No.SCSL-03-12-PT, Decision on the Urgent Defence Application for Release from Provisional Detention, 21 November 2003, para 27; *Prosecutor v Norman, Kallon and Kamara*, Case Nos. SCSL-2004-14-AR 72(E), SCSL-2004-15-AR 72(E), SCSL- 2004-16-AR 72(E), *Decision on Constitutionality and Lack of Jurisdiction* 13 March 2004, paras 81-82; *Prosecutor v Kallon and Kamara* Case Nos. SCSL-2004-15-AR 72(E), SCSL-2004-16-AR 72(E); *Prosecutor v Norman*, Case No. SCSL-04-14-AR 72, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 13 May 2004, paras 25, 53-55.

<sup>97</sup> *Prosecutor v Taylor* Case No.SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004, paras 40-42; *Prosecutor v Kallon* Case No. SCSL-04-15-AR 72, Norman (Case No. SCSL-04-16-72AR, Kamara (Case No. SCSL-04-16-AR72), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para 55.

<sup>98</sup> As above (n 97) para 40.

<sup>99</sup> <http://www.sc-sl.org/ABOUT/CourtOrganization/Prosecution/tabid/90/Default.aspx> (Accessed 19 September 2010)

<sup>100</sup> SCSL Statute arts 2-5, 8, 11-12, 15.

<sup>101</sup> Ratner, Abrams & Bischoff (n 37) 250.

<sup>102</sup> SCSL Statute Art 1(1).

<sup>103</sup> Ratner, Abrams & Bischoff (n 37) 250.

<sup>104</sup> A Cassese 'Report on the special court of Sierra Leone' (12 December 2006) 8.

<sup>105</sup> As above 18.

<sup>106</sup> Kenya/post-election violence: UN human rights chief calls for special tribunal to fight impunity < [http://www.unog.ch/unog/website/news\\_media.nsf/%28httpNewsByYear\\_en%29/FD956512C98A6469C125773C00545305?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/FD956512C98A6469C125773C00545305?OpenDocument) > (Accessed 14 October 2010); also available at <<http://blog.marsgroupkenya.org/?p=1076>> (Accessed 14 October 2010).

everlasting solution as it will be inconvenient and expensive to establish such tribunals all over the continent whenever there are such massive violations. Comparing to a permanent regional criminal court the efficacy of deterring persons from committing international crimes through special tribunals is minimal as these tribunals are usually established after the massive violations took place.

#### **2.4.4. The International Criminal Court**

The ICC is a permanent international court established for the prosecution and punishment of persons most responsible for international crimes i.e. crimes of genocide, war crimes, crimes against humanity and the crime of aggression.<sup>108</sup> Its temporal jurisdiction is on international crimes that have been committed after the Rome Statute entered in to force, that is, 1 July 2002.<sup>109</sup> When a state becomes a party to the Rome Statute it immediately accepts the jurisdiction of the ICC over crimes that will be committed by its nationals<sup>110</sup> or any one in its territory.<sup>111</sup> The ICC is governed by the Rome Statute which places the elements of the crimes, the rules of procedure, evidence and regulation of the Court. The principle of complementarity, which is one of the principles on which the ICC's regime is founded on, renders the case inadmissible if the state having jurisdiction over the crime is investigating or prosecuting the case, unless the state is unwilling or genuinely unable to carry out the instigation or prosecution.

A new system of international criminal jurisdiction consisting of two levels which complement each other is created under the ICC. The first level is constituted by states and their national criminal law systems and the second level is constituted by the ICC.<sup>112</sup> As confirmed by the principle of complementarity, states continue to have the primary duty to exercise their criminal jurisdiction over those responsible for international crimes.<sup>113</sup>

There are three triggering mechanisms for the Court to exercise jurisdiction. Firstly, when a situation in which one or more of the crimes appears to have been committed has been referred to the ICC prosecutor by a state party.<sup>114</sup> Secondly, when a situation in which crimes appears to have been committed is referred to the prosecutor by the UNSC acting under chapter seven.<sup>115</sup> The third is when the prosecutor himself initiates investigation acting in his *proprio motu* powers

---

<sup>107</sup> Report of the African Union high-level Panel on Darfur (AUPD) Peace and Security Council 207th meeting at the level of the heads of state and government 29 October 2009 Abuja, Nigeria psc/ahg/2(ccvii) 86-87.

<sup>108</sup> As above art 5.

<sup>109</sup> As above (n 107) art 11.

<sup>110</sup> As above (n 107) art 12(b).

<sup>111</sup> As above (n 107) art 12.

<sup>112</sup> HP Kaul 'The international criminal court: current challenges and perspectives' *Washington University Global Studies Law Review* (2007) 577 also available at [http://law.wustl.edu/WUGSLR/Issues/Volume6\\_3/kaul.pdf](http://law.wustl.edu/WUGSLR/Issues/Volume6_3/kaul.pdf) (Accessed 20 September 2010).

<sup>113</sup> HP Kaul, 'The International Criminal Court: Key Features and Current Challenges, in the Nuremberg trials international criminal law since 1945' (2006) 66 *Washington University Global Studies Law Review* 245-246.

<sup>114</sup> As above (n 1) art 14.

<sup>115</sup> As above (n 1) art 13 (b).

i.e. on his own motion/initiation.<sup>116</sup> As of 2010, three African States Parties to the Rome Statute, Uganda, DRC and CAR, have referred situations occurring in their territories to the ICC. In addition, the UNSC has referred the situation in Darfur, Sudan.<sup>117</sup>

The establishment of the ICC has been hailed as ‘the most innovative and exciting development in international law since the creation of the UN’.<sup>118</sup> As opposed to other international criminal tribunal statutes, the ICC Statute sets forth detailed procedural and evidentiary principles in the Statute itself.<sup>119</sup> However, the ICC like the other tribunals and special court is not without any challenges and problems as briefly discussed below.

### ***Challenges of the ICC***

In the past eight years of its operation the ICC faced several challenges including implementation problems of the Rome Statute at the domestic level, non existence of wide jurisdiction, the high need of states cooperation, structural and practical problems.

Implementation problems in the domestic level can be the primary issue that can be raised as a primary challenge of the ICC. As of 2008 the number of states parties stood at an impressive 106, including heavy representation from Latin America, Western Europe and Africa.<sup>120</sup> The principle of complementarity clearly highlights the need for state parties to adopt measures for the domestication of the Statute. Domestication, evidently, is an obligation that all state parties assume upon ratifying the Rome Statute.<sup>121</sup> It has been said that implementing legislation can also open spaces for innovative approaches to accountability.<sup>122</sup> While African states have been largely at the forefront in ratifying the Rome Statute the progress on domestic implementation of the Statute is very slow.<sup>123</sup> In fact, currently, 30 African states ratified the Rome Statute however, only South Africa, Mali, Kenya and Senegal have domesticated the Statute.<sup>124</sup> This is a major challenge as implementation of the Statute is the base to effectively use the complementarity principle as state parties must, wherever possible, be allowed to deal with all the international crimes within their domestic legal systems.

Another challenge is that the ICC has no primary jurisdiction over international crimes as opposed national courts. Under the Rome Statute the ICC has no universal jurisdiction over

---

<sup>116</sup> As above (n 1) art 15 (1).

<sup>117</sup> <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (Accessed 20 September 2010)

<sup>118</sup> W Schabas *An introduction to the international criminal court* (2004) 25.

<sup>119</sup> Ratner, Abrams & Bischoff (n 37) 237.

<sup>120</sup> As above.

<sup>121</sup> BK Murungi “Implementing the international criminal court statute in Africa: Some reflections” *East African Journal of Peace and Human Rights* (2001) 137.

<sup>122</sup> OK Kambala International justice in Africa Debate: International Criminal Court in Africa [http://www.csls.ox.ac.uk/documents/Kambala\\_jul2010\\_Final.pdf](http://www.csls.ox.ac.uk/documents/Kambala_jul2010_Final.pdf) (Accessed 20 October 2010).

<sup>123</sup> O Bekou & S Shah ‘Realising the potential of the International Criminal Court: The African experience’ (2006) *Human Rights Law Review* 499 & 501.

<sup>124</sup> Draft domesticating legislation exists in about 20 African countries [http://coalitionfortheicc.org/documents/Africa\\_and\\_the\\_ICC.pdf](http://coalitionfortheicc.org/documents/Africa_and_the_ICC.pdf) (Accessed 17 March 2010).

international crimes.<sup>125</sup> Accordingly, the application of its jurisdiction over non state parties is highly limited, thereby affecting its universal effectiveness over prosecution of international crimes. The Rome Statute relies on the consent to jurisdiction either by the act of becoming a state party or by special consent under Article 12, paragraph 3. Even in the case of member states it is only in the events where states are unable or unwilling to prosecute international crimes in their territory that the ICC can step in. Hence, the ICC is a court of last resort as the Rome Statute itself recognizes the primacy of national prosecutions. There exists a high potential of states in the pretext of prosecuting international crimes in their courts actually helping the perpetrator to evade prosecution.

The Rome Statute requires states parties to cooperate fully with the Court including arrest and surrendering of the accused.<sup>126</sup> In a situation where states are not cooperating with the ICC, its effect in light of prosecuting international crimes will be undermined. The ICC will be a toothless dog without states full, effective and timely cooperation.<sup>127</sup> For example, DRC a state party to the ICC has been unable to control or contain the myriad of rampaging militias already inside its borders;<sup>128</sup> which highly undermined the work of the ICC. The other instance that can be mentioned here is that despite decades of war with the LRA, the Ugandan army has been unable to capture Kony, who at the time was in South Sudan. Sudan had not signed the Rome Statute and is under no legal obligation to lift a hand against Kony. The ICC has no prison facilities or police forces of its own and is relying on the cooperation of States Parties to the ICC Statute for the acceptance of prisoners, relocation and protection of witnesses. The readiness of states to open their prisons to prisoners sentenced by the ICC and their willingness to provide sanctuary to witnesses is crucial to the success of the Court.<sup>129</sup>

Among the three triggering mechanisms for the Prosecutor of the ICC to start investigations in a given country; one is a referral by the UNSC. However, of the members of the UNSC with a veto power, Russia, China and the United States of America (US) are not state parties to the Rome Statute. Yet, they can refer cases to the ICC on both member states and non member states to the Rome Statute. In fact, the US is a primary state to oppose the creation of the ICC claiming that the US nationals can only be tried in the US courts. At the same time it made a bilateral treaty with member states of the ICC not to submit any national of the US to the ICC. The concern here is clear. The Darfur situation has been forwarded to the ICC through this triggering mechanism yet

---

<sup>125</sup> Rome Statute art 12; DN Nsereko 'Triggering the jurisdiction of the international criminal court' (2004) *African Human Rights Law Journal* 258; D Scheffer 'International Criminal Court : The challenge of jurisdiction (1999) <http://www.iccnw.org/documents/DavidSchefferAddressOnICC.pdf> (Accessed 20 September 2010).

<sup>126</sup> Rome Statute art 86 and the following.

<sup>127</sup> JK Cogan 'International Criminal Courts and Fair Trials—Difficulties and Prospects' (2002) *Yale Journal of International Law* 111, 119.

<sup>128</sup> P Kaul (n 119) 578.

<sup>129</sup> P Eichstaedt *First kill your family child soldiers of Uganda and the Lord's Resistance Army* (2009) 9.

<sup>129</sup> SS Maqungo 'Trial and error challenges facing the international criminal court commentary' (2003) 130 <http://www.iss.co.za/pubs/asr/12No4/SMaqungo.pdf> (Accessed 20 September 2010).

Sudan is not a member state to the Rome Statute and it is considered as undemocratic and having significant problems.<sup>130</sup> Clearly the Statute is giving a non state party the power to refer cases for investigation to the ICC affecting the fundamental states' sovereignty and equality.<sup>131</sup> It is particularly a concern when it is observed from the perspective of the Rome Statute itself which reaffirms state sovereignty.

The judge and second vice president of the ICC criticised the ICC saying that it is considered to be an imperfect construction site for more justice.<sup>132</sup> The ICC is characterized by the structural weakness that it does not have the competencies and means to enforce its own decisions.<sup>133</sup> The other grave limitation on the factual side is the enormous difficulty of carrying out investigations and collecting evidence regarding mass crimes committed in regions which are thousands of kilometres away from the Court, of difficult access, unstable and unsafe.<sup>134</sup> Carrying out investigations in Uganda, the DRC, the CAR or even Darfur entails logistical and technical difficulties, unprecedented problems which no other prosecutor or court is faced with.

The other challenge of the ICC worth mentioning is the Prosecutor's failure to understand and apply the Rome Statute and undermining the fundamental right of fair trial for an accused person. This can be seen in the ICC's case against alleged militia leader Thomas Lubanga Dyilo. On 13 June 2008, the Trial Chamber of the ICC stayed the proceedings against Mr Lubanga on the basis that the prosecution's misuse of Article 54(3 e) of the Statute and consequent inability to obtain consent to disclose potentially exculpatory confidential material to the defence. This made it impossible to piece together the constituent elements of a fair trial and importantly, that the Chamber's inability to review the documents prevented it from exercising its statutory duty to regulate the process of disclosure and the overall fairness of the proceedings.<sup>135</sup> The Appellate Chamber of the ICC also confirmed the decision of the Trial Chamber, ruling that the use of Article 54(3 e) of the Statute by the Prosecutor must not lead to breaches of his obligations vis-à-vis the suspect or the accused person.<sup>136</sup> The Appellate Chamber concluded that whenever the Prosecutor relies on Article 54 (3 e) of the Statute he must bear in mind his obligations under

---

<sup>130</sup> N Kahn 'Fighting impunity: The International Criminal Court and the African Union' Policy Brief (2009) Centre for policy studies 8.

<sup>131</sup> CL Sriram 'The ICC Africa Experiment: The Central African Republic, Darfur, Northern Uganda, and the Democratic Republic of the Congo' 4 [http://www.humansecuritygateway.com/documents/ISA\\_ICCAfricaexperiment.pdf](http://www.humansecuritygateway.com/documents/ISA_ICCAfricaexperiment.pdf) (Accessed 11 October 2010).

<sup>132</sup> Kaul (n 119) 576.

<sup>133</sup> Kaul (n 119) 578.

<sup>134</sup> This point was emphasized by Chief Prosecutor Moreno-Ocampo in his address to the fourth Assembly of States Parties to the Rome Statute in The Hague. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court statement to the Fourth Assembly of States Parties to the Rome Statute (28 November 2005).

<sup>135</sup> See 'Decision on the consequences of non-disclosure of exculpatory materials covered by Art 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on 10 June 2008' at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf) (Accessed 09 October 2010).

<sup>136</sup> Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled 'Decision on the consequences of non-disclosure of exculpatory materials covered by Art 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008', at [www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf) (Accessed 07 September 2010).

the Statute and apply that provision in a manner that will allow the ICC to resolve the potential tension between the confidentiality to which the Prosecutor has agreed and the requirements of a fair trial.<sup>137</sup>

From the above challenges it can be said that the ICC is not as such an effective institution to prosecute international crimes in the world and especially in Africa.

## **2.5. Conclusion**

This chapter laid a foundation as to the existence of international crimes in Africa and the forums to prosecute and punish them. Domestic, international and hybrid courts were analysed. Domestic jurisdiction, once every condition is met is the best place and forum to punish international crimes. Hence the priority is given to national courts. However, national courts mostly do not have the capacity and/or willingness to prosecute international crimes and in such cases the other resorts are international tribunals.

The ICTR and SCSL have their own specific jurisdictions both interims of time and location. The possibility of establishing special tribunals also examined to be inconvenient in light of the number of massive violations in the continent, the purposes of deterring future criminals and cost of maintaining them. The ICC has high potential for trying international crimes committed in Africa. However, as shown above the ICC has its own challenges which cannot make a conclusion to undermine any other forum that can possibly be established as long as those challenges and problems can be rectified. In conclusion, there exist international crimes in Africa which is taking the lives of thousands. The various problems the forums faced and keep facing in prosecuting the perpetrators of such international crimes leads to a critical thinking as to the need to look in to other options and solutions.

---

<sup>137</sup> As above.

## CHAPTER THREE

### THE PROPOSED ACJHR CRIMINAL JURISDICTION

#### 3.1. Introduction

The last chapter concluded that the forums that are available to try international crimes are not completely efficient to fully prosecute international crimes in Africa. This chapter tries to lay a background as to the immediate reasons for the establishment of the ACJHR extended criminal jurisdiction by the AU. However, the chapter does not intend to respond to the validity of such concerns and issues raised by African states and the AU. The chapter also analyses and tests AU's power to establish the criminal jurisdiction to the ACJHR in light of the UN Charter and in light of the AU Constitutive Act. Finally the chapter will introduce AU's power to intervene in grave circumstances like war crimes, crimes against humanity and genocide and the need to fight and reject impunity in Africa.

#### 3.2. Factors that militated in favour of the ACJHR's proposed criminal jurisdiction

The immediate factors which led the AU to propose the extended jurisdiction of the; ACJHR before proceeding to examine AU's power under international law and the Constitutive Act are relevant. As briefly mentioned in the second chapter, all the indictments of the ICC are in Africa and they were either referred by the governments that are concerned or by the UNSC.

It can easily be recalled that the AU was heralded the establishment of the ICC.<sup>138</sup> However, the AU has now changed its position and relationship with the ICC after the indictment of the Sudanese president, Omar Houssein Al-Bashir, and has embarked on the move not to cooperate with the ICC on his warrant of arrest. After the indictment of president Bashir, the AU requested the UNSC to differ<sup>139</sup> the proceedings initiated against President Bashir in accordance with Article 16 of the Rome Statute.<sup>140</sup> The indictment by the Pre - Trial Chamber of the ICC specifically resulted in a high concern and criticism of the ICC by the AU member states. Sudan being a non state party to the ICC, Al-Bashir is the first sitting president to be indicted by the ICC.<sup>141</sup> The other concern of the AU along with the indictment of the president of Sudan is that arresting and prosecuting president Bashir would disrupt the peace process in Darfur.<sup>142</sup> The AU's specific concern is that president Bashir is needed for the peace process in Darfur. A further

---

<sup>138</sup> P Mochochoko *Africa and the International Criminal Court* in EA. Ankumah and EK Kwakwa (Eds) (2005) *African Perspectives on International Criminal Justice, Africa Legal Aid: Accra/Maastricht/ Pretoria*, 241-258.

<sup>139</sup> Decision on the application by the International Criminal Court prosecutor for the indictment of the president of the republic of Sudan, Decision Assembly/AU/Dec.221 (XII), para 3.

<sup>140</sup> Art 16 of the Rome Statute allows deferral of investigation or prosecution by the UN Security Council for the period of 12 months and it can be renewed.

<sup>141</sup> Available at < <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/2403770/Sudan-dictator-Omar-al-Bashir-committed-Darfur-genocide.html> > (Accessed 18 August 2010).

<sup>142</sup> As above (n 146) Paras 2 and 3.

concern raised by the AU is that the indictment will interfere with their official duty and this concern is clearly summarised as:

Insofar as the indictment of sitting state officials is concerned, there is a disregard for immunities enjoyed by state officials under international law. Consequently, any such indictment severely constrains the capacity of African states to discharge the functions of statehood on the international plane.<sup>143</sup>

One of the most serious problems of the ICC's intervention in African conflicts especially in relation to the Northern Uganda<sup>144</sup> and Sudan is that it may be viewed as prejudicing attempts to secure peace.<sup>145</sup> For instance the African Union Peace and Security Council (AUPSC) had noted with regrets that the ICC decision came at a critical juncture in the process of promoting lasting peace and reconciliation in Sudan and underlined that the search for justice should be pursued in a way that does not impede the promotion of peace in Sudan.<sup>146</sup> As discussed in the last chapter the government of Uganda referred the situation in the country to the ICC. However, after the indictment of several LRA leaders, the government took the position that it would seek withdrawal of the ICC warrants if the accused agreed to undergo a traditional tribal justice ritual that requires a public confession and an apology without threat of incarceration that if the leaders make a public apology.<sup>147</sup> The LRA indicated that it will not surrender unless the ICC withdraws the warrants and consequently blamed the ICC's failure to do so for the breakdown of the peace negotiations. A classic dilemma is presented to the ICC raising questions of whether, and to what extent, criminal justice may be compromised for the sake of peace.<sup>148</sup> However, with regard to the issue of how to reconcile peace and justice, it must be noted that African states have not taken the view that one should prevail over the other or the two cannot be reconciled.<sup>149</sup>

More concerns by the AU have been that the ICC has only targeted African leaders and other African individuals, and that it represents neo - colonial influences.<sup>150</sup> Also, the role of the ICC in Africa has generated much comment and mixed reaction among a broad spectrum of Africans.<sup>151</sup> For instance, Chad accused the ICC saying that it is anti - African and biased for targeting only

---

<sup>143</sup>AU-EU Expert Report on the Principle of Universal jurisdiction, Council of European Union, 8672/1/09, REV 1, Brussels, 16 April 2009 para 38.

<sup>144</sup> As above 6.

<sup>145</sup> Concept note for the meeting of African states parties to the Rome statute of the ICC 8-9 June 2009 Min ICC/Legal/3 Rev1 10.

<sup>146</sup> Communiqué' of the 175<sup>th</sup> meeting of the Peace and Security Council of the African Union 5 march 2009, PSC/PR/Comm (CLXXV) Addis Ababa Ethiopia para 2.

<sup>147</sup> A Croft, Uganda Offers "Blood Settlement" to LRA Rebels, Reuters, 12 March 2008 quoted in AK Greenawalt 'complementarity in crisis: Uganda, Alternative Justice, and the international criminal court' (2009) *Virginia Journal of international law association* 110.

<sup>148</sup> Greenawalt (n 153).

<sup>149</sup> As above (n 151) 11.

<sup>150</sup> Murungu (n 20) 18.

<sup>151</sup> MJ Adriko "The obligations of state parties under the Rome Statute" Workshop organized by Uganda Coalition on the International Criminal Court ,Imperial Resort Hotel, Entebbe 5 -6 September 2008 [http://www.apilu.org/Presentation\\_made\\_by\\_Adriko\\_Moses\\_on\\_the\\_domestication\\_of\\_the\\_Rome\\_Statute\\_in\\_Africa.pdf](http://www.apilu.org/Presentation_made_by_Adriko_Moses_on_the_domestication_of_the_Rome_Statute_in_Africa.pdf) (Accessed 08 October 2010).

Africans.<sup>152</sup> As a result Chad became the first state party to the Rome Statute which harboured a suspected international criminal i.e. Al-Bashir from the ICC. The AU Commission President, Jean Ping being concerned about the use of double standard, also said that the ICC always targets Africans while there are similar cases in Gaza, Caucasus and Colombia.<sup>153</sup> Similarly Mr. Richard Goldstone, former prosecutor of the ICTR and ICTY said that the ICC does appear 'too focused on prosecuting crimes committed on the continent of Africa, while paying scant regard to similar situations elsewhere in the world.'<sup>154</sup>

Furthermore, in light of the number of current cases before it focusing on African states, the ICC is perceived as 'a court for Africa'.<sup>155</sup> The general concern here is that the ICC is targeting African states unfairly by administering selective justice.<sup>156</sup> In addition, the fact that most of the African cases before the ICC are referred by their respective governments do not explain why there are no current investigations or prosecutions relating to situations outside the continent of Africa.<sup>157</sup> This concern becomes legitimate when considering the fact that the Prosecutor of the ICC can actually use his *proprio motu* power<sup>158</sup> to trigger an investigation even if other states do not make self referrals.

In general, Africa expressed its concerns that the ICC is largely portrayed as imperialist imposition by powerful western nations.<sup>159</sup> It has also been said that the ICC is extending its reach too eagerly and willingly. In doing so, the ICC is destroying the autonomy and development of governments and judicial systems in African countries.<sup>160</sup>

It was following these concerns that the AU Assembly at its 13<sup>th</sup> Ordinary Session reaffirmed<sup>161</sup> its previous resolution which adopted a decision on the implementation of its decision on the Abuse of the Principle of Universal Jurisdiction requesting the AU's Commission in consultation with the AComHPR and ACtHPR to examine the implications of the ACJHR to be empowered to try international crimes.<sup>162</sup>

---

<sup>152</sup> BBC News Africa 22 July 2010 'Bashir Warrant: Chad accuses ICC of anti-African bias'

<http://www.bbc.co.uk/news/world-africa-10723869> (Accessed 09 October 2010).

<sup>153</sup> Pursuit of justice or Western plot, International indictments stir angry debate in Africa, <<http://www.un.org/ecosocdev/geninfo/afrec/vol23no3/233-icc.html>> (Accessed 09 October 2010).

<sup>154</sup> As above.

<sup>155</sup> C Aptel & W Mwangi 'Developments in international criminal justice in Africa during 2008' (2009) *African Human Rights Law Journal* 277.

<sup>156</sup> As above (n 160).

<sup>157</sup> As above (n 151) 10.

<sup>158</sup> Rome Statute Art 15(1)

<sup>159</sup> Murungu (n 77) 18.

<sup>160</sup> Bowman (n 74) 413.

<sup>161</sup> Decision on the meeting of African states parties to the Rome statute of the ICC, Doc, Assembly/AU/13(XIII), para 5.

<sup>162</sup> Decision on the implementation of the Assembly Decision on the Abuse of the principle of Universal Jurisdiction, Doc Assembly/AU/3(XII) para 9 (2009)

### **3.3. AU's power to establish criminal jurisdiction under the UN Charter and the Constitutive Act**

AU's power to establish a criminal jurisdiction for the prosecution of international crimes in Africa must be in line with international law specifically under the UN Charter and under the Constitutive Act of the AU. The two will be discussed under the following sub sections.

#### **3.3.1. The UN Charter and the ACJHR proposed Criminal Jurisdiction**

The ACJHR proposed jurisdiction to try international crimes is in conformity with the obligation of African states and the AU under the UN Charter. Even though there is no specific provision under the UN Charter either allowing or prohibiting intergovernmental organisations like the AU to establish criminal jurisdictions to try international crimes, deep analysis of article 52 of the Charter will answer the question whether the proposed jurisdiction is in line with the Charter or not. Article 52(1) reads:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the UN.

The AU considers itself as a regional organisation within the meaning of the above article.<sup>163</sup> However, there is a dual criterion for determining whether an organisation is a regional organisation under the above provision: first, the organisation should play a role in the maintenance of international peace and security as is appropriate for regional action; and second, the objectives of organisation and its activities should be compatible with the purpose and principles of the UN.

Aneme argues the AU can be characterised as a regional organisation under Article 52(1) of the UN Charter since the AU plays a role in the maintenance of peace and security in Africa<sup>164</sup> and observes the purposes of the principles of the UN.<sup>165</sup> One other fundamental question that needs to be answered in addition is whether the prosecution of international crimes in Africa falls with the scope of the provision specifically with in 'maintenance of international peace and security'. It can be recalled that the situation in Darfur Sudan is referred by the UNSC by Resolution 1593 acting under Chapter Seven<sup>166</sup> to the ICC for investigation after the report of the International Commission of Inquiry on Darfur which characterised the conflict having crimes against

---

<sup>163</sup> Protocol relating to the establishment of the Peace and Security Council of the African Union adopted 09 July 2002, entered in to force 26 December 2003 art 17 (2).

<sup>164</sup> Constitutive Act Art 3(f) and (e); The African Union Mission in Somalia (AMISOM) is a regional peace keeping operated by the African Union to conduct peace support operation in Somalia to stabilize the security situation < <http://www.africa-union.org/root/au/auc/departments/psc/amisom/amisom.htm> > (Accessed 09 October 2010).

<sup>165</sup> As above (n 171) art 17(1).

<sup>166</sup> United Nations Security Council Resolution S/RES/1593, 31 March 2005.

humanity and war crimes.<sup>167</sup> It can also be recalled that the UNSC can pass a resolution under Chapter Seven when it considers a situation as a threat to international peace and security. For instance, Resolution 1593 the UNSC decided to refer the situation in Darfur by determining that the situation in Sudan continued to constitute a threat to international peace and security. Furthermore the Preamble to the Rome Statute specifically recognises international crimes to be a threat to international peace and security.<sup>168</sup> With this analysis, it can be clearly concluded that the existence of international crimes of genocide, war crimes and crimes against humanity can be a basis for regional organisations like the AU to take appropriate action, such as, intervention and prosecution of international crimes. Hence, the proposed criminal jurisdiction of the ACJHR is in line with the UN Charter.

### **3.3.2. The AU Constitutive Act and ACJHR's proposed Criminal Jurisdiction**

The other multilateral instrument that must be observed in light of the proposed criminal jurisdiction of the ACJHR is the AU Constitutive Act. The question that is posed here is whether the Constitutive Act of the AU grants the power to establish a criminal jurisdiction to try international crimes. The Constitutive Act grants the AU Assembly power to establish any of the organs of the Union.<sup>169</sup> The ACJHR is established as a court of justice of the Union hence the extension jurisdiction of the ACJHR can be said that it is in line with the Constitutive Act.

Furthermore, among the objectives and principles of the AU, regional integration, peace and security, protection of human rights and respect for democracy and rule of law can be mentioned.<sup>170</sup> It is important to note that any consideration whether or not to extend the jurisdiction of the ACJHR must be governed by the obligation undertaken by the state parties to the Act of the Union to promote and protect human and people's right in accordance with the ACHPR and other relevant human rights instruments.<sup>171</sup>

Among the organs of the AU the ACJHR is one as a court of the Union.<sup>172</sup> As mentioned in the first chapter, the ACJHR will have a wide jurisdiction<sup>173</sup> to entertain matters arising from instruments that are ratified by the states concerned and any matters of international law. Also, as mentioned under the second chapter, most African states are state parties to major international instruments that specifically define international crimes and put an obligation on them to prosecute and punish such international crimes. Furthermore, the prosecution of international

---

<sup>167</sup> Report of the International Commission of Inquiry on Darfur to the UN Secretary- General, 25/1/2005, Geneva. Submitted pursuant to the UN Security Council Resolution 1564(2004) paras 489-522 (Report of ICID), <[http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)>(Accessed 29 May 2010).

<sup>168</sup> The Rome Statute Preamble para 3.

<sup>169</sup> Constitutive Act art 9(d).

<sup>170</sup> Constitutive Act arts 3 & 4.

<sup>171</sup> Constitutive Act art 3(h); (n Coalition for an effective court on human and peoples' Rights (CEAC), Darfur Consortium and other organisations *Implications of the African Court of Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity and war crimes* (an opinion) 6.

<sup>172</sup> Look at art 5(1d) of the Constitutive Act in line with ACJHR Protocol art 3.

<sup>173</sup> Statute of the African Court of Justice and Human rights Annex to the Protocol to the African Court of Justice and Human Rights art 28.

crimes is considered to have evolved to a rule of customary international law (*jus cogens* norm) that applies to every state without the need to show that African states are party to any instrument. Once operational, the ACJHR will automatically have jurisdiction over international instruments that African states are a party to. Hence, it can be clearly argued that the proposed jurisdiction of the ACJHR to try international crimes is in line with the Constitutive Act of the AU.

### **3.3.3. The need to punish international crimes and end impunity in Africa**

The AU Constitutive Act has specific provision<sup>174</sup> which mandates the Union to intervene in member states pursuant to a decision of the AU Assembly of Heads of States in respect of grave circumstances such as the commission of crimes against humanity, war crimes and genocide. Furthermore, the Act contains provisions<sup>175</sup> which request the AU to take effective action against impunity in cases of international crimes. These provisions may be read to empower the AU to extend the jurisdiction of the ACJHR.

Apart from Article 4(h) of the Act the AU does not seem to have an express mandate to establish a jurisdiction to prosecute individuals who commits international crimes. However, there is no clear indication that intervention under Article 4(h) is meant to include prosecution of the international crimes in Africa. As shown in the first chapter intervention under Article 4(h) of the Act shall also be interpreted to include peaceful intervention such as prosecuting perpetrators of such international crimes. This is particularly because forcible measures are not always effective and satisfactory.<sup>176</sup> Hence it becomes inevitable that AU needs to establish a court which is empowered to try the international crimes in Africa in order to effectively perform its obligation under the Act particularly under article 4(h). The Act further condemns and rejects impunity,<sup>177</sup> which requires African states and the AU to make sure that perpetrators of international crimes will not go unpunished. The commitment of the AU to fight impunity for the aforementioned international crimes is shown through its various resolutions,<sup>178</sup> as well as regional pacts, such as the Pact on Security, Stability and Development in the Great Lakes Region.<sup>179</sup>

---

<sup>174</sup> Constitutive Act Art 4 (h).

<sup>175</sup> Constitutive Act, Arts 3(h), 4(o), & 5(1d).

<sup>176</sup> As above 116.

<sup>177</sup> Constitutive Act Art 4 (o).

<sup>178</sup> See for example *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court* (ICC), Doc. Assembly/AU/13(XIII), Para 4; *Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction*, Doc. Assembly/AU/3 (XII) Assembly/AU/Dec.213(XII), Para 3; *Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Sudan*, Assembly/AU/Dec.221(XII), Para 6; Assembly/AU/Dec. 103 (VI); *Decision on the Implementation of the Assembly on the Abuse of the Principle of Universal Jurisdiction*, Assembly/AU/Dec.213(XII); Decision Assembly/AU/Dec. 199(XI), 1 July 2008 & Decision Assembly/AU/Dec. 240(XII), 4 February 2009.

<sup>179</sup> Art 8 of the Great Lakes Pact reads, in part: The Member States, in accordance with the Protocol on the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination, recognize that the crime of genocide, war crimes, and crimes against humanity are crimes under international law and against the rights of peoples, and undertake in particular: a) To refrain from, prevent and punish, such crimes.

### **3.4. Conclusion**

This chapter has attempted to show the various reasons and the concerns for the AU to come up with the proposal of the extended jurisdiction of the ACJHR. Among which the indictment of the sitting president of Sudan, the concern of justice over peace and the use of selective justice by the ICC were briefly discussed. In addition, the chapter established an argument that the proposed criminal jurisdiction is in line with both the UN Charter and the AU Constitutive Act.

The proposal of the new jurisdiction to the ACJHR is in fact not frivolous and inconsiderate but rather it is in line with international obligations of African states and the AU itself. That being the case, there are several practical and institutional problems to consider in the African regional system for this jurisdiction to be practically in accordance with the principle of the fight against impunity. The next chapter will highlight both the advantages and the challenges of the new jurisdiction of the ACJHR.

## CHAPTER FOUR

### ASSESSMENT OF THE PROPOSED CRIMINAL JURISDICTION OF THE ACJHR

#### 4.1. Introduction

This chapter analyses the advantages of having a criminal jurisdiction to try international crimes in Africa. Among which are ACJHR's legitimacy, effectiveness and access to justice for African victims. However, there are also various challenges that the new proposed jurisdiction of the ACJHR would likely face in the event that the AU decides to extend criminal jurisdiction to its initial jurisdiction. This are mainly the conflict of jurisdiction with the ICC, the possibility of none cooperation of African states with the criminal jurisdiction and financial problems. Considering the advantages and disadvantages of having this criminal jurisdiction is crucial to answer questions that might be raised as an implication towards the proposal of the AU to establish the criminal jurisdiction in light of ending impunity in Africa. Finally, the chapter ends with the researcher's perspective on the proposed jurisdiction of the ACJHR in light of AU's and African states' obligation to fight and end impunity in Africa in accordance with the Constitutive Act.

#### 4.2. Advantages of the new proposed criminal jurisdiction of the ACJHR

There are several advantages that the proposed criminal jurisdiction of the ACJHR would bring in light of ending impunity in Africa. This is particularly true when seen from the perspective of the various challenges that the ICC is facing. Further, the various concerns raised by the AU and African states on the work of the ICC will highly legitimatise the AU's proposal on establishing a criminal jurisdiction. This dissertation views legitimacy, access to justice and effectiveness as advantages and possible contributions of the jurisdiction towards an effective international criminal justice system. It is important to have the a clear understanding of the advantages that the criminal jurisdiction of the ACJHR will have rather than just to make a blanket conclusion that it is completely useless and will be ineffective.<sup>180</sup>

##### 4.2.1. Legitimacy

Contending that the AU's proposal to establish the criminal jurisdiction would enable its leaders to escape from prosecution by the ICC by itself would lead to a wrong conclusion. Rather seeing the rationale of the proposal in light of the fundamental principles that are enshrined under the Constitutive Act is necessary and appropriate.

---

<sup>180</sup> CEAC (n 29); Amnesty International Report (n 30).

The AU currently has the principle of intervention in certain grave specific circumstances in its member states<sup>181</sup> as opposed to the OAU's corner stone principle of non-interference in the private affairs of member states.<sup>182</sup> OAU's principle of non-interference led to several tragedies such as the collapse of the Somali state, genocide in Rwanda, the protracted conflict in the DRC and the crisis in Darfur.<sup>183</sup> The ultimate rationale to incorporate the right of intervention in the Constitutive Act therefore stemmed from concern about the OAU's failure to intervene and stop the gross and massive human rights violations witnessed in Africa in the past.<sup>184</sup> That said, the questions and concerns like where was the AU while all those massive human rights violations were committed and why the AU comes up with this proposal to try international crimes in Africa now and not before<sup>185</sup> is groundless. This is because the AU cannot do so without an enabling instrument to make it intervene and take actions towards such atrocities. This being the major ground and reason for the timing and the objectives of the proposal of the AU to establish the criminal jurisdiction has a complete legitimacy under the Constitutive Act.

The ACJHR's criminal jurisdiction if decided is better than any of the jurisdictions that were discussed in the second chapter specially the ICC. This is particularly true considering the various challenges and concerns that African states are having towards the ICC. This includes the use of double standards and selective justice of the ICC to focus on situations and conflicts in Africa only while there are similar or even worse situations in the other continent.<sup>186</sup> It can be said that the proposed criminal jurisdiction will mainly solve the problems that the ICC faced in its eight years of operation and keep facing considering that African states dedications can be achieved.

As discussed in the second chapter there are various international crimes in the continent of Africa which necessitates a criminal jurisdiction that will try and punish them. It is true that there is a need for high political will on the part of African states to make this jurisdiction effective. However, it is submitted here that the fact that it is going to be an African institution by Africans will highly legitimize the future work of the ACJHR criminal jurisdiction.

---

<sup>181</sup> Constitutive Act Art 4 (h & j).

<sup>182</sup> D Kuwali 'The end of humanitarian intervention: evaluation of the African Union's right of intervention' (2010) 1, <http://ajol.info/index.php/ajcr/article/view/52165/40791> (Accessed 04 October 2010)

<sup>183</sup> T Murithi 'The African Union's Transition from non- intervention to non-indifference: An Ad hoc Approach to the Responsibility to Protect?' 1-14, <http://www.garnet.sciencespobordeaux.fr/Garnet%20papers%20PDF/MURITHI%20Tim.pdf> (Accessed 04 October 2010).

<sup>184</sup> B Kioko 'The right of intervention under the African Union's Constitutive Act: From non- interference to non-intervention' (2003) 812 [www.cicr.org/Web/eng/siteeng0.nsf/htmlall/.../IRRC\\_852\\_Kioko.pdf](http://www.cicr.org/Web/eng/siteeng0.nsf/htmlall/.../IRRC_852_Kioko.pdf) (Accessed 04 October 2010).

<sup>185</sup> Murungu (n 20) 41.

<sup>186</sup> Look for example the situation in Iraqi [http://www.seattlepi.com/opinion/266162\\_iraqsurvival11.html](http://www.seattlepi.com/opinion/266162_iraqsurvival11.html), Afghanistan , Cambodia and Sir Lanka <http://www.ahrchk.net/statements/mainfile.php/2009statements/1950/> (Accessed 07 October 2010) .

### **4.2.2. Access to justice**

Establishing a criminal jurisdiction in Africa will bring justice closer to home - Africa. The Court will be easily accessible for victims and all participants of international criminal justice system in Africa. It is generally understandable that in cases of human rights protection national systems can work better in the protection of human rights than regional systems. The same is true that regional human rights systems can work better in the protection and promotion of human rights than international systems. This is because of their closeness to the countries, victims of violations and can be easily reached by the societies that they are designed to work for. The same analogy can also be followed in the case of protection of human rights from massive atrocities through international criminal justice system. Hence, the regional criminal jurisdiction of the ACJHR, if established, will be more accessible for protection of human rights than the ICC. The ICC is located in the Hague Netherlands, which is relatively far for African victims who suffered from mass atrocities and conflicts to observe justice being done. As the maxim states 'justice should not only be done but seen to be done'.

In addition African societies will benefit from the accessibility of the ACJHR in using its jurisdiction and having faith in the trials that will be taken place. In addition their feeling of being part of the justice process when prosecutions are conducted in Africa highly legitimatises the establishment of this jurisdiction in Africa. Hence, African peoples will be more inclined to not only bring cases before the ACJHR but to also cooperate as they will be able to observe justice being done in their own context and language.

### **4.2.3. Effectiveness**

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

The new criminal jurisdiction will also be effective in curbing international crimes in Africa. For future perpetrators of international crimes in Africa, the ACJHR will set an important precedent. It is believed that the new jurisdiction of the ACJHR will be much effective in deterring future crime rates in Africa. The ICC generally lacks understanding of the countries in which it is operating. It fails to take country context into account while applying international laws during

investigation, prosecution and witness protection levels.<sup>187</sup> ICC staff are disproportionately European for instance currently 14 out of 19 judges of the ICC in each division are Europeans and Latin Americans,<sup>188</sup> and therefore lack language, geographic and local knowledge to contextualise the exact circumstances on the ground or from the possible witnesses in Africa.<sup>189</sup>

The criminal jurisdiction in Africa if established will fill in the gap of impunity towards non states parties to the Rome Statute. Out of 53 African states only 30 states are parties to the Rome Statute, thereby having an obligation to comply with the complementarity principle and to cooperate with the ICC. The rest of African countries will not have such obligation and will therefore end up being a safe haven for perpetrators of international crimes. For instance, the ICC arrest warrant against Joseph Kony cannot be executed because he is residing in a non member state that is Sudan which is non state part to the Rome Statute.<sup>190</sup> Even among those 30 African states most of them signed a bilateral treaty with the US not to surrender any US citizen if found committing any of the international crimes in Africa.<sup>191</sup> In general, relying on the ICC for prosecution of international crimes in Africa as the ultimate choice will lead to a gap in fighting impunity in Africa. Hoping that the proposal of the AU to establish the criminal jurisdiction of the ACJHR will be unanimously agreed by its member states these kinds of problems will be addressed.

#### **4.3. Challenges of the proposed criminal jurisdiction of the ACJHR**

The above stated advantages of having the criminal jurisdiction in Africa is not without possible challenges. These challenges include the non compliance of states parties, possible jurisdictional conflict with the ICC especially with regards to African states which are parties to the Rome Statute and the obvious financial problems of the AU to sustain the expensive costs of international criminal proceedings. The challenges combined together are considered to create an impunity gap contrary to the Constitutive Act.<sup>192</sup>

---

<sup>187</sup> International Refugee Rights Initiative 'Justice for International Crimes in African and Darfur: Confronting the Complementarity Challenge' (June 2009) summary of workshop proceedings report pepper 7 Also available [http://www.darfurconsortium.org/member\\_publications/2009/June/IRRI.summaryworkshop.060609.pdf](http://www.darfurconsortium.org/member_publications/2009/June/IRRI.summaryworkshop.060609.pdf) (Accessed 06 October 2010) .

<sup>188</sup> < <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/pre%20trial%20division?lan=en-GB> > (Accessed 12 October 2010).

<sup>189</sup> As above (n 197).

<sup>190</sup> Amnesty international arrest now! Uganda: Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (November 2010) Available at <http://www.amnestyusa.org/document.php?id=ENGAFR590082007&lang=e> (Accessed 06 October 2010).

<sup>191</sup> For more on these states look DH Cotton & GO Odongo 'The magnificent seven: Africa's response to US article 98' (2007) *African human rights law journal*; D Nsereko 'Triggering the Jurisdiction if the international criminal court' (2004) *African Human Rights Law Journal* 261 – 263.

<sup>192</sup> CEAC (n 29) 18.

### **4.3.1. Conflict of jurisdiction with the ICC**

The first challenge that is raised against the proposed criminal jurisdiction of the ACJHR is the conflict of jurisdiction it will create with the ICC.<sup>193</sup> The subject matter of the ICC and the new proposed jurisdiction of the ACJHR is similar i.e. both will have the power to try international crimes of genocide, war crimes and crimes against humanity. Considering the already existing ICC, designed and created for the purpose of trying international crimes, AU's proposal to create a criminal jurisdiction is considered as duplication of jurisdiction. Indeed, the proposed criminal jurisdiction is facing total rejection from a number of important quarters: different international organisations, African institutions and some researchers.<sup>194</sup> African institutions and NGO's raised their voices concerning the role that African states played in the creation of the ICC and the effect of the new criminal jurisdiction.<sup>195</sup>

As mentioned above, 31 African states are state parties to the Rome Statute. If the proposal to extend the jurisdiction of the ACJHR to try international crimes of genocide, war crimes and crimes against humanity is decided, it will affect the obligations of the 30 African states towards their obligation under the Rome statute. This is particularly because these African states will be in a position not to refer cases or conform to their obligation under the Rome Statute.

Additional argument was raised concerning the proposed jurisdiction that it will make the ICC a court of last resort.<sup>196</sup> However, even without the existence of the proposed jurisdiction of the ACJHR, the ICC is required to be a court of last resort under its Statute. This means if national courts are effective, willing and capable to prosecute international crimes the need for the ICC will be almost nonexistent as per the complementarity principle dictates. This makes the aforementioned argument frivolous.

### **4.3.2. Lack of financial capacity and political will**

The other major challenge towards the proposed jurisdiction of the ACJHR is the lack of financial capacity of the AU to sustain the court and its proceedings. This is true when seen from the current financial problems of the AU and its organs. It would, therefore, not be easy for the ACJHR to deal with investigations and prosecutions of complex criminal cases, in accordance with the highest standards of due process of law which, by their nature, are extremely expensive.<sup>197</sup>

---

<sup>193</sup> CEAC (n 29) Murungu (n 20); Amnesty International Report (n 30)...

<sup>194</sup> As above.

<sup>195</sup> CEAC (n 29) 10.

<sup>196</sup> Amnesty Report (n 30) 12.

<sup>197</sup> Amnesty Report (n 30) 13.

The cost of a single trial for an international criminal trial is estimated to be \$20 million.<sup>198</sup> This is nearly double the approved 2009 budgets for the ACtHPR and the AComHPR standing at US \$ 7 642 269 and US \$ 140 037 880 for 2008 respectively.<sup>199</sup> The cost of protecting victims, witnesses and collection of evidences during and before trials is very costly as it can be observed from the *ad hoc* tribunals and the ICC. If these costs were drawn from the budget of the ACJHR, it will undoubtedly seriously undermine its work, resulting in another financial crisis which will cause delays which undermines its credibility. Here, it might be relevant to mention that the delay in trying Hissène Habré in Senegal because of financial problems sent already an ambiguous message about the commitment of African states to end impunity.<sup>200</sup> The overall message here is that the AU needs to see the practical problems that might arise in the future in light of the various current financial problems it is having before deciding on the establishment of the criminal jurisdiction of the ACJHR.

Lack of political will of African states is considered to be a major challenge for the effectiveness of the proposed jurisdiction.<sup>201</sup> The resource and financial availability is even further subjected to the political will of the African state leaders who would fear being prosecuted by the same court that they are funding.<sup>202</sup> While the establishment of an effective ACJHR is important for addressing violations of human rights and ensuring accountability of states which is often lacking at the national level, overburdening the court with criminal jurisdiction will drain scarce resources of an already overstretched system; and distract the court from pursuing its original mandates effectively. This will render the investigation and prosecution of crimes ineffective under international law.<sup>203</sup>

Some arguments with regards to lack of human resource were raised as a challenge to the proposed criminal jurisdiction along with financial problems of the AU.<sup>204</sup> However, the practicing African personalities in the ICTR and SCSL show that there is no deficiency of human man power if the proposed jurisdiction is to be established. Further, African personalities occupy a number of important positions in the ICC, such as the Deputy Prosecutor and four judges are from African states. Hence it is difficult to contend human resource as a challenge.

---

<sup>198</sup> A Smith *After genocide: Bringing the devil to justice* (2009); The international criminal tribunal for Rwanda spent \$1.1 billion US dollars to conclude 45 trials, an average of some \$24.4 million US per case quoted in CEAC (n 29) 16.

<sup>199</sup> African union, Budget Execution Report, 30 September 2008, EX.CL/455(XIV) –a, p.1. Also in 2008 the annual budget of the African court on human and peoples rights was \$7,901,214 and for the African commission on human and peoples' rights, \$6,003,857 Referred in CEAC (n 29) 16-17.

<sup>200</sup> Amnesty Report (n 30) 13.

<sup>201</sup> Murungu (n 20) 39; TB Nyanduga, 'Reflections and perspectives of the African commission on human and peoples' rights', paper presented at a consultative conference on international criminal justice, 'regional courts and commissions', 9-11 September 2009, united nations headquarters, new York, 1-8.

<sup>202</sup> Murungu (n 20) 41.

<sup>203</sup> Amnesty Report (n 30) 13.

<sup>204</sup> CEAC (n 29) 13.

### 4.3.3. Non compliance and lack of cooperation by African states

African states are known for their non compliance with the recommendations of the AComHPR with no attendant consequences.<sup>205</sup> Even in the various sub regional organisations and their tribunals such as the Southern African Development Community (SADC) Tribunal,<sup>206</sup> the Economic Community of West African States (ECOWAS) Court of Justice,<sup>207</sup> African states tend to fail and avoid the decisions of these tribunals. With this regard also it has been said that,

In the absence of such a norm of compliance and co-operation, the existence of a regional human rights court with criminal jurisdiction would likely result in forum shopping by regional states accused of gross and massive violations of human rights.<sup>208</sup>

A mechanism of regional cooperation such as holding detainees and prisoners for the ACJHR would have to be established and implemented and it should be provided with such facilities by each member state. The other problem if the AU decides to have the criminal jurisdiction of the ACJHR is the impracticality of its operations and African states' problem with indicting a sitting president. International crimes are mainly committed by sitting presidents or high officials. It is highly doubted that other African states would be willing to enforce an arrest warrant issued by the ACJHR. This might be true even if there is a clear link to the commission of the international crimes because of the deep-rooted principle of non interference in internal affairs of another state in Africa.<sup>209</sup> Hence, the new proposed criminal jurisdiction of the ACJHR will be impractical if African states continue to non-cooperate with the Court.

### 4.4. The proposed criminal jurisdiction in light of ending impunity in Africa

This research is based on the possibility of the creation of the ACJHR criminal jurisdiction as the AU may or may not decide on establishing the criminal jurisdiction. The Protocol establishing the ACJHR needs 15 member states ratification to come into force. However, only three countries ratified as of October 2010,<sup>210</sup> any amendments to the protocol which established the ACJHR can be made only after the Protocol becomes effective. Hence, presently, the only existing framework of international norms and institutions to try international crimes is led by the ICC.

---

<sup>205</sup>Non-Compliance of States Parties to Adopted Recommendations of the African Commission: A Legal Approach 24th ordinary session, OAU DOC/OS/50b (XXIV), para 2 (1998) quoted in GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' rights: A possible remedy' (2006) *African Human Rights Law Journal* 467.

<sup>206</sup> At the beginning of September 2009, Zimbabwe announced withdrawal from the jurisdiction of the SADC Tribunal in an apparent bid by government to stop the effect of two judgments passed against it; Raymond Maingire, "Zimbabwe Withdraws from SADC Tribunal", 2 September 2009, available at <http://www.thezimbabwetimes.com/?p=22107> . The major decision affected is the case of *Mike Campbell (Pvt) Ltd & Anor. v Republic of Zimbabwe*, Case No. SADCT: 2/07.

<sup>207</sup> For example the Gambia has failed repeatedly to comply with decisions of the ECOWAS Court of Justice; see also *Manneh v The Gambia*, 5 June 2008, ECW/CCJ/JUD/03/08, see "IFJ Calls on ECOWAS and Gambia to Enforce Court Ruling on Disappearance of Journalist 3 Years On", available at <http://africa.ifj.org/en/articles/ifj-calls-on-ecowas-and-gambia-to-enforce-court-ruling-on-disappearance-of-journalist-3-years-on> .

<sup>208</sup> CEAC (n 29) 19.

<sup>209</sup> Murungu ( n 20) 40.

<sup>210</sup> The three countries are Burkina Faso, Libya and Mali, it is available at <http://www.africa-union.org/root/au/Documents/Treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf> (Accessed 06 October 2010).

However, the main question yet to be answered through this research is whether the proposal of the AU to establish a criminal jurisdiction to try international crimes in Africa furthers justice or promotes impunity. To answer this complex question a lot of analysis in respect of both the advantages and challenges is made in the above sub sections. However, the following additional considerations are also taken in to an account to answer the question better.

As discussed in the last chapter, several legitimate concerns and questions were raised by the AU and African states against the ICC which really undermines its legitimacy and effectiveness in prosecuting international crimes in Africa. These concerns led to an order by the AU to every African state not to cooperate with the ICC in the arrest of the President of Sudan. The research is not supporting the AU's action but would like to make an observation of the situation. The President may or may not be responsible for the crimes which he is charged, as it is for the trial to decide. However, the president will most likely not face the trial which means that he would be enjoying impunity in the event that he is actually responsible of the crimes. In a situation where such doubts exist and if the result is a gap in impunity, then the existence of a criminal jurisdiction in Africa would not be complete disaster. It is of course going to delay the process as it will not be established soon even if the proposal is decided on; however, as Gilbert rightly says delay is better than a complete impunity.<sup>211</sup>

It can be admitted that there are challenges in the African human rights system under the AU, specifically financial challenges. However, it will be wrong to conclude that there is no protection of human rights in the African regional human rights system, because there will be a complete denial of the existence of important and unique human rights developments in the African regional system. Hence, for the mere fact that there is no constant funding for the AU to sustain its organs, it should not be concluded that the proposal is going to promote impunity rather than furthering justice.

As discussed in the second chapter, there is no perfect institution to fight impunity in Africa. However, in spite of the imperfections of the ICTR, it has contributed to the erosion of the impunity of top leaders and to the verification and recording of historical facts.<sup>212</sup> There is no reason to deny that the ACJHR despite possible challenges reviewed, is going to make a contribution in the fight against impunity.

For the question raised above, it is believed that the ultimate answer lies in the future dedication of African states in supporting the proposed jurisdiction of the ACJHR if a decision is to be made for its establishment. African states need to be ready to overcome the challenges of the AU by specifically working and progressing on being compliant with the general human rights system

---

<sup>211</sup> G Gilbert *Responding to international crime* (2006) 3.

<sup>212</sup> Y Beigbeder *International justice against Impunity progress and new challenges* (2005) 110.

under the AU and specifically the ACJHR. Furthermore, their dedication is also required by making financial contributions to the ACJHR to sustain the costs of international criminal proceedings. Cooperation with regard to the arrest, surrender and imprisoning persons who are responsible, will highly be requested from each member states. It is only then that African states are going to be in line with their obligation arising from the Constitutive Act. Otherwise the result of this proposal, if decided on, will be rather promoting impunity of the perpetrators of international crimes in Africa, which is against the Constitutive Act. The researcher expresses confidence that if properly designed and cooperation in terms of both finance and political will can be obtained from each member state of the AU, the ACJHR will be a reliable court in light of fighting impunity and furthering justice in Africa.

#### **4.5. Conclusion**

With regards to extending jurisdictions to try international crimes and put an end to the culture of impunity for high officials including heads of states Beigbeder argues:

When national justice is generally incapable, incompetent or unwilling in a particular country, where political and judicial conditions would ensure the impunity of criminal leaders, the possible remedies are the extension of international justice.<sup>213</sup>

This is particularly true in light of the incapacity which is suffered by several African national jurisdictions to try perpetrators of massive human rights violations.

The chapter attempted to show the possible advantages that the proposed criminal jurisdiction will have in light of rejecting impunity in Africa, among which, the ACJHR's criminal jurisdiction, once established is going to be legitimate, effective in light of access to information and evidences. As well it is presumed and believed to bring justice closer to home – Africa for African victims. However, all these advantages can be if and only if the various challenges such as lack of cooperation and funding by African states to the new ACJHR jurisdiction can be effectively addressed. Furthermore, failure to address all the related possible challenges is going to lead towards promoting impunity as opposed to African states obligation under the Constitutive Act of the AU.

---

<sup>213</sup> As above 40.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1. Conclusion

The main question for this research was how relevant is the proposed criminal jurisdiction of the ACJHR to try crimes against humanity, genocide and war crimes in light of the ICC's current jurisdiction in the same matters. To answer this question other sub-questions were raised first, how effective are the current jurisdictions of African national courts, ICTR, SCSL and ICC to prosecute and punish international crimes in Africa and second, what possible advantages of the proposed jurisdiction might have in light of fighting impunity in Africa.

Each chapter attempted to answer the questions accordingly. The second chapter showed the existence of international crimes in Africa and the forums to prosecute such as national courts, the SCSL, the *ad hoc* tribunal of ICTR and the ICC. Since, national courts are not provided with all the resources to carry out the investigation, the prosecution and the trial cannot be reliable to prosecute international crimes in Africa. The ICTR and SCSL have a specific jurisdiction in terms of time and place of the commission of the crimes which makes them not to be the ultimate answer for the prosecution of international crimes in Africa. The same holds true for possible special tribunals that can be established along with the inconvenience and cost of maintaining the tribunals. The ICC has its own challenges which cannot lead to a conclusion to undermine any other forum that can possibly be established as long as those challenges and problems can be rectified. Among others the challenges of ICC in light of implementation problems of the Rome Statute in domestic levels, nonexistence of universal jurisdiction, non cooperation by states parties and lack of prison facilities and police forces and some other structural problems were discussed.

With this background the third chapter assessed the establishment of the ACJHR criminal jurisdiction. The chapter attempted to show the various reasons and the concerns for the AU to come up with the proposal of the extended jurisdiction of the ACJHR. Among which the indictment of the sitting president of Bashir, the concern of justice over peace and the use of selective justice by the ICC were briefly discussed. As well the chapter tried to establish an argument that the proposed criminal jurisdiction is in line with both the UN Charter and the AU Constitutive Act.

The fourth chapter attempted to answer the other question with regards to the possible advantages of establishing a criminal jurisdiction under the ACJHR. These includes legitimacy, access to justice and effectiveness in light of access to information and evidences for trials along with the possibility of bringing justice closer to home – Africa for African victims. The chapter

made also a remark that all the advantages can be obtained if and only if the various challenges such as lack of cooperation and funding by African states to the new ACJHR jurisdiction can be effectively addressed.

The research findings answered the main question i.e. the proposed jurisdiction of the ACJHR to be relevant in light of several international crimes that has been and still being committed in Africa. Selected countries were analysed to be victims of such international crimes such as Burundi, Liberia, CAR, DRC, Uganda and Sudan, however existing jurisdiction of the ICC are analysed to be ineffective to try these crimes. The Proposed jurisdiction of the ACJHR is considered to be more legitimate, effective and accessible as opposed to the ICC to try international crimes in Africa.

## **5.2. Recommendations**

The idea of having an African Criminal Court to try international crimes committed in Africa by itself is considered to be relevant for the continent. The decision on the proposed extension of jurisdiction to the ACJHR to try international crimes is yet to be rendered by the AU and its member states. In doing so the AU and every African States are recommended to take into account several considerations and factors that might actually help the fight against impunity as per the Constitutive Act and international law. Overlooking these factors is believed to endanger their obligations under the Constitutive Act by actually promoting impunity in Africa.

First and foremost the AU and its member states shall ascertain that there will be a full cooperation and political willingness to support the proposed jurisdiction of the ACJHR. The AU specifically is recommended to inquire and ascertain if these commitments and willingness of each member states to cooperate and be submissive to the ACJHR criminal jurisdiction can be obtained. Despite the advantages of having this jurisdiction, keeping a realistic view of the future possibilities while deciding on the proposal of having this criminal jurisdiction in Africa is highly recommended.

The AU needs to enhance its capacity in different terms. Such as creating a mechanism through its organs to oversee, control and take measures on member states that are not complying or cooperating with the proposed jurisdiction of the ACJHR. For instance, the AUPSC can be authorised for this purpose. Furthermore, in financial resources the AU must ascertain that it can actually try and prosecute international crimes in Africa as generally the financial support by state members is insignificant comparing to the high amount of finance international criminal proceedings requires by their nature.

Secondly, African states are generally recommended to develop a culture of compliance to the general African human rights system. It can be recalled from the previous chapter that states noncompliance with the recommendation of the AComHPR is an obstacle to the full realisation of

human rights in Africa. As such the protection of human rights from massive violations particularly from international crimes through prosecuting the perpetrators of such crimes can only be achieved if the general human rights system is working hand in hand. Hence, the effectiveness of the human rights system by itself will highly predict the effectiveness of the proposed criminal jurisdiction of the ACJHR.

Thirdly, if it is unlikely or impossible to obtain states' willingness and cooperation or if the AU cannot enhance its capacity and secure the necessary finance for the proposed jurisdiction of the ACJHR, the establishment of this criminal jurisdiction might promote impunity, as perpetrators are going to escape prosecution by the ICC. Hence, in such circumstances the AU should not decide on establishing the said criminal jurisdiction but rather keep the original jurisdiction of the ACJHR and subject those people who are suspected of committing international crimes to the ICC without failure as perpetrators of international crimes should not go unpunished.

### **For the ICC**

Finally the ICC as a permanent and supposedly independent international criminal court has a responsibility to ensure that there is balance in the investigation and prosecution of cases. The ICC is advised to avoid doubts and concerns as to the way it is operating. The ICC should be able to fix concerns like its selectivity quickly and easily. For instance, the Prosecutor can make investigations in other parts of the world where there are massive violations as in Africa as victims in other parts of the world are equal with victims of Africa. He should specifically not wait for referrals from the members of the Rome statute or the UNSC. He can always use his *proprio motu* powers in a situation where there exist massive violations. This will actually answer the concerns and doubts with regards to its independence.

The problems identified and the solutions suggested are in no way exhaustive.

**Word count: 17 981 (Chapter 1-5 including footnotes)**

## Bibliography

### Books and chapters in books

Aneme, GA (2008) *A study of the African Union's right of intervention against genocide, crimes against humanity and war crimes* Oslo: University of Oslo 106.

Beigbeder, Y (2005) *International justice against Impunity progress and new challenges* Boston: Martinus Nijhoff publishers 110.

Eichstaedt, P (2009) *First kill your family child soldiers of Uganda and the Lord's Resistance Army* Chicago: Lawrence hill books 9.

Flint, J & Waal, AD (2008) *Darfur a new history of a long war* New York: Zed Books Ltd 130.

Gilbert, G (2006) *Responding to international crime* Boston: Martinus Nijhoff publishers 3.

Hansungule, M 'African courts and the African Commission on Human and Peoples Rights' in Bosl, A & Diescho, J (eds) (2009) *Human Rights in Africa Legal perspectives on their protection and promotion* Namibia: Macmillan Education Namibia 235.

Hauss, C (2001) *International conflict resolution international relations for the 21<sup>st</sup> century* New York: The Continuum International Publishing group 22.

Macedo, S (Ed) (2004) *Universal jurisdiction: national courts and the prosecution of serious crimes under international law* Philadelphia: University of Pennsylvania Press.

Mochochoko, P 'Africa and the International Criminal Court' in Ankumah, EA & Kwakwa, EK (Eds) (2005) *African Perspectives on International Criminal Justice*, Africa Legal Aid: Accra/Maastricht/ Pretoria, p. 241-258.

Ratner, SR, Abrams, JS & Bischoff, JL (2009) *Accountability for human rights atrocities in international law beyond the Nuremberg legacy* Oxford: Oxford University Press 43,177.

Schabas, W (2004) *An introduction to the international criminal court* Cambridge: Cambridge university press 25.

Smith, A (2009) *After genocide: bringing the devil to justice* New York: Prometheus Books.

Stigen, J (2008) *The relationship between the International Criminal Court and national jurisdictions the principle of complementarity* Boston: Martinus Nijhoff publishers 20.

### **Journal Articles**

Aneme, GA 'Apology and trials: The case of the Red Terror trials in Ethiopia' (2006) 6 *African human rights law journal* 75.

Aptel, C & Mwangi, W 'Developments in international criminal justice in Africa during 2008' (2009) 9 *African human rights law journal* 277.

Askin, KD 'Gender crimes Jurisprudence in the ICTR: positive developments, International criminal justice' (2005) 3(4) *Journal of International Criminal Justice* 1007.

Bederman, DJ (Ed) 'International decisions' (2004) 104 (2) *American journal of international law* 325.

Bekou, O & Shah, S "Realising the potential of the International Criminal Court: The African experience" (2006) 6(3) *Human Rights Law Review* 499 & 501.

Biegon, J & Killander, M 'Human rights developments in the African Union during 2008' (2009) 9 *African human rights law journal* 306.

Boed, R 'The Effect of a Domestic Amnesty' (2000) 33 *Cornell International Law Journal* 297.

Bowman, R 'Lubanga, the DRC and the African Court: lessons learned from the first international criminal court case' (2007) 7 *African human rights law journal* 420 & 413.

Cogan, JK 'International Criminal Courts and Fair Trials—Difficulties and Prospects, (2002) 27 *Yale Journal of International law* 111 & 119.

Cotton, DH & Odongo, GO 'The magnificent seven: Africa's response to US article 98' (2007) 7 *African human rights law journal* 1 - 34.

Dinstein, Y 'International Criminal Law' (1985) 20 *Israel law Review* 206 & 221.

Edelenbos, C 'Human Rights Violations: A Duty to Prosecute?' (1994) 7(2) *Leiden Journal of International Law* 5.

Greenawalt, AK 'Complementarity in crisis: Uganda, Alternative Justice, and the international criminal court' (2009) 50(1) *Virginia Journal of international law association* 110.

Kaul, HP 'The international criminal court: current challenges and perspectives' (2007) 6 *Washington University Global Studies Law Review* 577 also available at [http://law.wustl.edu/WUGSLR/Issues/Volume6\\_3/kaul.pdf](http://law.wustl.edu/WUGSLR/Issues/Volume6_3/kaul.pdf) (Accessed on 20 September 2010).

Kaul, HP 'The International Criminal Court: Key Features and Current Challenges, in the Nuremberg trials' (2006) 6 *Washington University Global Studies Law Review* 245 & 246.

Morris, MH 'The trials of current jurisdiction: the case of Rwanda' (1997) 7 *Duke journal of comparative and international law* 349.

Murungi, BK "Implementing the international criminal court statute in Africa: Some reflections" (2001) 7(1) *East African Journal of Peace and Human Rights* 137.

Nsereko, DN 'Triggering the Jurisdiction if the international criminal court' (2004) 4(2) *African human rights law journal s* 261 – 263.

Orentlicher, DF 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,' (1991) 100 *Yale Law Journals* 2537.

Randall, KC 'Universal jurisdiction under international law' (1998) 66 *Texas Law Review* 785 -89.

Ryngaert, C 'The international criminal court and universal jurisdiction: a fraught relationship?' (2009) 12(4) *New criminal law review* 505-506.

Scharf, M 'Swapping Amnesty for Peace' (1996) 31 *Texas International Law Journal* 1.

Wachira, GM & Ayinla, A 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' rights: A possible remedy' (2006) 6(2) *African human rights law Journal* 467.

Wright, PQ 'The Law of the Nuremberg Trial' (1947) 41 *American Journal of International Law* 56.

### **Other articles**

Kioko, B 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 812 also available at <[www.cicr.org/Web/eng/siteeng0.nsf/htmlall/.../IRRC\\_852\\_Kioko.pdf](http://www.cicr.org/Web/eng/siteeng0.nsf/htmlall/.../IRRC_852_Kioko.pdf)> (Accessed on 04 October 2010).

Kuwali, D 'The end of humanitarian intervention: evaluation of the African Union's right of intervention' (2010) 1, also available at <<http://ajol.info/index.php/ajcr/article/view/52165/40791>> (Accessed on 04 October 2010).

Maqungo, SS 'Trial and error challenges facing the international criminal court commentary' (2003) 130 also available at <<http://www.iss.co.za/pubs/asr/12No4/SMaqungo.pdf>> (Accessed on 20 September 2010).

Murithi, T 'The African Union's Transition from non-intervention to non-indifference: An Ad hoc Approach to the Responsibility to Protect?' 1-14, Also available at <<http://www.garnet.sciencespobordeaux.fr/Garnet%20papers%20PDF/MURITHI%20Tim.pdf>> (Accessed on 04 October 2010).

Murungu, CB International Criminal Court, the African Union and prosecution of international crimes in Africa (2010) Unpublished article presented in a short course on International law at the University of Pretoria good governance program (18 - 29 January 2010) 18.

Nyanduga, TB 'Reflections and perspectives of the African commission on human and peoples' rights', paper presented at a consultative conference on international criminal justice, 'regional courts and commissions' (9-11 September 2009) united nations headquarters, new York, 1-8.

Kambala, OK 'International justice in Africa Debate: International Criminal Court in Africa: <[http://www.csls.ox.ac.uk/documents/Kambala\\_jul2010\\_Final.pdf](http://www.csls.ox.ac.uk/documents/Kambala_jul2010_Final.pdf)> (Accessed 20 October 2010).

Scheffer, D 'international criminal court : the challenge of jurisdiction' (1999) also available at <<http://www.iccnw.org/documents/DavidSchefferAddressOnICC.pdf>> (Accessed on 20 September 2010)

Sriram, C 'The ICC Africa Experiment: The Central African Republic, Darfur, Northern Uganda, and the Democratic Republic of the Congo' 4, also available at <[http://www.humansecuritygateway.com/documents/ISA\\_ICCAfricaexperiment.pdf](http://www.humansecuritygateway.com/documents/ISA_ICCAfricaexperiment.pdf)> (Accessed on 11 October 2010).

Wouters, J 'The obligation to prosecute international law crimes'  
<<https://www.law.kuleuven.be/iir/nl/onderzoek/opinies/obligationtoprosecute.pdf>>  
(Accessed on 28 September 2010).

### **International Instruments**

Constitutive Act of the African Union adopted in Lomé, Togo on 11 July 2000 and entered in to force on 26 May 2001.

Convention on the Prevention and Punishment of the Crime of Genocide Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948.

Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (1998/2004).

Protocol of the Court of Justice of the AU adopted by the 2<sup>nd</sup> Ordinary Session of the Assembly of the Union Maputo, Mozambique, 11 July 2003.

Protocol relating to the establishment of the peace and Security Council of the African Union adopted on 09 July 2002, entered in to force 26 December 2003.

Protocol to the African Court of Justice and Human Rights adopted by the 11<sup>th</sup> Ordinary Session of the Assembly, held in Sharm El-Sheikh, Egypt, 1st July 2008.

Statute of the African Court of Justice and Human rights Annexed to the Protocol to the African Court of Justice and Human Rights.

The Rome Statute of the International Criminal Court document A/CONF.183/9 of 17 July 1998 entered into force on 1 July 2002.

The Statute of the International Criminal Tribunal for Rwanda, Security Council Res. 955, 49<sup>th</sup> Sess., U.N. Doc. S/RES/955(1994).

The Statute of the International Criminal Tribunal for the former Yugoslavia adopted 25 May 1993 by Resolution 827.

The Statute of the Special Court of Sierra Leone adopted by Security Council resolution 1315 (2000) of 14 August 2000.

### **African Union Resolutions and Communiqué's**

Decision on the Implementation of the Assembly on the Abuse of the Principle of Universal Jurisdiction Assembly/AU/Dec.213 (XII).

AU Assembly decision on the merger of the African ACHPR and ACJ of the AU Sirte (2005) Assembly/AU.Dec.83(V).

Decision on the report of the commission on the abuse of the principle of universal jurisdiction Decision Assembly/AU/Dec. 199(XI), 1 July 2008.

Decision on the Hissene Habré case Decision Assembly/AU/Dec.240(XII), 4 February 2009.

Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Sudan, Assembly/AU/Dec.221(XII), Para 6, Para 3.

Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. Assembly/AU/3 (XII) Assembly/AU/Dec.213(XII), Para 3;

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

Decision on the implementation of the Assembly Decision on the Abuse of the principle of Universal Jurisdiction, Doc Assembly/AU/3(XII) Para 9 (2009).

Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Doc. Assembly/AU/13(XIII), Para 4.

Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court Assembly/AU/Dec. 245(XIII) Rev.1, adopted on 3 July 2009 Sirte, Libya Para 10.

Decision on the meeting of African states parties to the Rome statute of the ICC, Doc, Assembly/AU/13(XIII), Para 5.

Decision on the implementation of the assembly decision on the abuse of the principle of universal jurisdiction, Assembly/AU/Dec.213(XII).

Communiqué of the 175<sup>th</sup> meeting of the peace and security council of the African Union 5 march 2009, PSC/PR/Comm (CLXXV) Addis Ababa Ethiopia Para 2.

### **Reports and other documents**

African union, 'Budget Excution' Report, EX.CL/455(XIV) 30 September 2008 1.

Amnesty international 'International criminal court the contribution Africa can make to the review conference' (2009) 12.

Amnesty international 'Arrest now! Uganda: Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen' (November 2010) Available at <<http://www.amnestyusa.org/document.php?id=ENGAFR590082007&lang=e>> (Accessed on 06 October 2010).

Report of the African Union high-level Panel on Darfur (AUPD) 'Peace and Security Council 207th meeting at the level of the heads of state and government' 29 October 2009 Abuja, Nigeria psc/ahg/2(ccvii) 86-87.

Coalition for an effective court on human and peoples' Rights (CEAC), Darfur Consortium and other organisations 'Implications of the African Court of Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity and war crimes' (an opinion) also available at < [www.soros.org/.../international.../africa\\_20091217.pdf](http://www.soros.org/.../international.../africa_20091217.pdf) > (accessed on 11 October 2010).

Concept note for the meeting of African states parties to the Rome statute of the ICC 8-9 June 2009 Min ICC/Legal/ 3 (Restricted circulation) Rev.1 10.

Edith M. Lederer, 'UN Says Darfur Conflict Worsening, with Perhaps 300,000 Dead' Associated Press 22 April 2008. Quoted in Genocide in Darfur Briefing paper June 2008 also available at <<http://www.savedarfur.org/s/background/>> (Accessed on 18 September 2010).

International Refugee Rights Initiative 'Justice for International Crimes in African and Darfur: Confronting the Complementarity Challenge' (June 2009) summary of workshop proceedings report pepper 7 Available <[http://www.darfurconsortium.org/member\\_publications/2009/June/IRRI.summaryworkshop.060609.pdf](http://www.darfurconsortium.org/member_publications/2009/June/IRRI.summaryworkshop.060609.pdf)> (Accessed on 06 October 2010).

Principles of the Nuremberg Tribunal, 1950 No. 82 Adopted by the International Law Commission of the United Nations, 1950 Under General Assembly Resolution 177 (II).

'Report of the International Commission of Inquiry on Darfur to the UN Secretary- General' 25 January 2005, Geneva. Submitted pursuant to the UN Security Council Resolution 1564(2004) paras 489-522 (Report of ICID), available at <[http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf)>(Accessed on 29 May 2010).

Save the children Denmark in northern Uganda <<http://www.redbarnet.dk/Default.aspx?ID=2199>> (Accessed on 18 September 2010).

'Conflict in Central African Republic uproots 300 000' UN reports available at <<http://www.un.org/apps//news/story.asp?NewsID=25320&Cr=car&Cr1=unicef>> (Accessed on 21 September 2010)

AU-EU Expert Report on the 'Principle of Universal jurisdiction', Council of European Union, 8672/1/09, REV 1, Brussels, 16 April 2009 Para 38.

MJ Adriko "The obligations of state parties under the Rome Statute" Workshop organized by Uganda Coalition on the International Criminal Court, Imperial Resort Hotel, Entebbe 5 -6 September 2008, available at <[http://www.apilu.org/Presentation\\_made\\_by\\_Adriko\\_Moses\\_on\\_the\\_domestication\\_of\\_the\\_Rome\\_Statute\\_in\\_Africa.pdf](http://www.apilu.org/Presentation_made_by_Adriko_Moses_on_the_domestication_of_the_Rome_Statute_in_Africa.pdf)> (Accessed on 8 October 2010).

Antonio Cassese Report on the special court of Sierra Leone (12 December 2006) 8.  
N Kahn 'fighting impunity: the International Criminal Court and the African Union' Policy Brief (2009) Centre for policy studies 8.

## **International Case laws**

Case Concerning Application of the Genocide Convention, (*Bosnia and Herzegovina*) v *Yugoslavia* (*Serbia and Montenegro*) ICJ Reports and Judgment (13 September 1993) 325, 440.

Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the status conference on 10 June 2008' available at <[www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1401-ENG.pdf)> (Assessed on 17 September 2010).

Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I 'Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, available at <[www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf](http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1486-ENG.pdf)> (Accessed on 20 September 2010).

*Manneh v The Gambia*, 5 June 2008, ECW/CCJ/JUD/03/08.

*Mike Campbell (Pvt) Ltd & Anor v Republic of Zimbabwe*, Case No. SADCT: 2/07.

*Prosecutor v Akayesu* Case No. ICTR-96-4-T (Trial Chamber), 2 September 1998, para. 578.

*Prosecutor v Bagosora, Kabiligi, Ntabakuze and Nsengiyumva* Case No. ICTR-98-41-T (Trial Chamber).

*Prosecutor v Bikindi* Case No. ICTR-01-72-T (Trial Chamber), 2 December 2008 para 428.

*Prosecutor v Bisengimana* (Case No. ICTR-00-60-T) (Trial Chamber), 13 April 2006 para. 41.

*Prosecutor v Goran Jelusic* (Case No.IT-95-10) (ICJ?) Trial Chamber, Judgment, (14 December 1999), para 59.

*Prosecutor v Kallon and Kamara* Case Nos. SCSL-2004-15-AR 72(E), SCSL-2004-16-AR 72(E).

*Prosecutor v Kallon* Case No. SCSL-04-15-AR 72, Norman (Case No. SCSL-04-16-72AR, Kamara (Case No. SCSL-04-16-AR72), Decision on Constitutionality and Lack of Jurisdiction, 13 March 2004, para 55.

*Prosecutor v Kamuhanda* Case No. ICTR-95-54A-T (Trial Chamber), 22 January 2004, para. 737.

*Prosecutor v Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Trial Chamber, Judgment, (21 May 1999), para 88.

*Prosecutor v Kondewa* Case No. SCSL-03-12-PT, Decision on the Urgent Defence Application for Release from Provisional Detention, 21 November 2003, para 27.

*Prosecutor v Musema* (Case No. ICTR-96-13-A), Trial Chamber, (27 January 2000), para 15.

*Prosecutor v Muvunyi* Case No. ICTR-2000-55 A-T (Trial Chamber), 12 September 2006, (Trial Chamber) para 511.

*Prosecutor v Norman* Case No. SCSL-04-14-AR 72, Decision on Preliminary Motion based on Lack of Jurisdiction (Child Recruitment), 13 May 2004, paras 25, 53-55.

*Prosecutor v Norman, Kallon and Kamara* Case Nos. SCSL-2004-14-AR 72(E), SCSL-2004-15-AR 72(E), SCSL- 2004-16-AR 72(E).

*Prosecutor v Nzabirinda* Case No. ICTR-2001-77-T (Trial Chamber), 23 February 2007.

*Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, PTC I, 4 March 2009.

*Prosecutor v Rutaganda* (Case No. ICTR-96-3) Trial Chamber, (6 December 1999), Para 46.

*Prosecutor v Rwamakuba* Case No. ICTR-98-44C-T (Trial Chamber), 20 September 2006 para. 1.

*Prosecutor v Semanza* Case No. ICTR-97-20-T (Trial Chamber) 15 May 2003 paras. 354-371, 512.

*Prosecutor v Simba* Case No. ICTR-01-76-T (Trial Chamber) 13 December 2005, para. 421.

*Prosecutor v Taylor* Case No. SCSL-2003-01-I, Decision on Immunity from Jurisdiction, 31 May 2004 paras 40-42.

*Prosecutor v Zigiranyirazo* Case No. ICTR-01-73-T (Trial Chamber), 18 December, 2008 para 430.

*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, ICJ Opinion (28/5/1951) 15, para 23

*Semanza v Prosecutor* Case No. ICTR-97-20-A (Appeals Chamber), 20 May 2005, para. 268

### **Internet sources**

African Union < <http://www.africanunion.org/root/au/auc/departments/psc/amisom/amisom.htm> > (Accessed on 09 October 2010).

African Union <<http://www.africanunion.org/root/au/Documents/Treaties/list/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR.pdf>> (Accessed on 06 October 2010).

Another town in Africa – “Lira” Uganda’s Child Soldiers (Joseph kony’s Lords’ Resistance Army <<http://kabiza.com/Lira-Children-Kony-Rebels.htm>> (Accessed on 18 September 2010).

BBC News Africa 22 July 2010 ‘Bashir Warrant: Chad accuses ICC of anti-African bias’ Available at <<http://www.bbc.co.uk/news/world-africa-10723869>> (Accessed on 09 October 2010).

Central African Republic: a silent crisis crying out for help available at <<http://www.un.org/events/tenstories/06/story.asp?storyID=300>> (Accessed on 21 September 2010).

Concept note for the meeting of African states parties to the Rome statute of the ICC 8-9 June 2009 Min ICC/Legal/ 3 (Restricted circulation) Rev.1 10.

DRC events of 2008 human rights watch available at <<http://www.hrw.org/en/node/79181>> (Accessed on 10 October 2010).

Genocide in Darfur Sudan <<http://www.darfurscores.org/darfur>> (Accessed on 18 September 2010).

Human rights first crimes against humanity + DRC <<http://www.humanrightsfirst.org/cah/ij/regions/drc/drc.aspx>> (Accessed on 10 October 2010).

International Criminal Court <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>> (Accessed on 20 September 2010).

International Criminal Court <<http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/>> (Accessed on 22 September 2010).

International Criminal Court <<http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/chambers/pre%20trial%20division/pre%20trial%20division?lan=en-GB> > (Accessed on 12 October 2010).

Kenya/post-election violence: UN human rights chief calls for special tribunal to fight impunity, available at <  
[http://www.unog.ch/unog/website/news\\_media.nsf/%28httpNewsByYear\\_en%29/FD956512C98A6469C125773C00545305?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/FD956512C98A6469C125773C00545305?OpenDocument) > (Accessed on 14 October 2010).

Principles of the Nuremberg Tribunal, 1950 No. 82 Adopted by the International Law Commission of the United Nations, 1950 Under General Assembly Resolution 177 (II), paragraph (a), Principle VI c; also available at < <http://deoxy.org/wc/wc-nurem.htm>> (Accessed on 17/09/2010).

Pursuit of justice or Western plot, International indictments stir angry debate in Africa, Available at < <http://www.un.org/ecosocdev/geninfo/afrec/vol23no3/233-icc.html> > (Accessed on 09 October 2010).

Uganda's forgotten war <<http://www.redbarnet.dk/Default.aspx?ID=2199>> (Accessed on 22 September 2010).

UN 10 Stories the world should hear more about Uganda: child soldiers at centre of mounting humanitarian crisis <<http://www.un.org/events/tenstories/06/story.asp?storyID=100>> (Accessed on 19 September 2010).

## Appendices

### Appendix 1

#### **Assembly/AU/Dec.221(XII) DECISION ON THE APPLICATION BY THE INTERNATIONAL CRIMINAL COURT (ICC) PROSECUTOR FOR THE INDICTMENT OF THE PRESIDENT OF THE REPUBLIC OF THE SUDAN**

##### **The Assembly:**

- 1. EXPRESSES ITS DEEP CONCERN** at the indictment made by the Prosecutor of the International Criminal Court (ICC) against the President of the Republic of The Sudan, H.E. Mr. Omar Hassan Ahmed El Bashir;
- 2. CAUTIONS** that, in view of the delicate nature of the peace processes underway in The Sudan, approval of this application would seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;
- 3. ENDORSES** the Communiqué issued by the Peace and Security Council (PSC) of the African Union (AU) at its 142nd meeting, held on 21 July 2008, and **URGES** the United Nations Security Council, in accordance with the provisions of Article 16 of the Rome Statute of the ICC, and as requested by the PSC at its above-mentioned meeting, to defer the process initiated by the ICC.
- 4. REQUESTS** the Commission to implement this Decision by sending a high-level delegation from the African Union for necessary contacts with the UN Security Council;
- 5. FURTHER REQUESTS** the Commission to convene as early as possible, a meeting of the African countries that are parties to the Rome Statute on the establishment of the International Criminal Court (ICC) to exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities, and to submit recommendations thereon taking into account all relevant elements;
- 6. REITERATES** AU's unflinching commitment to combating impunity and promoting democracy, the rule of law and good governance throughout the entire Continent, in conformity with its Constitutive Act;
- 7. CONDEMNS** the gross violations of human rights in Darfur, and **URGES** that the perpetrators be apprehended and brought to justice, and **SUPPORTS** the decision by the PSC to establish a High-Level Panel of Eminent Personalities under the chairmanship of former President of the Republic of South Africa, H.E. Mr. Thabo Mbeki, to examine the situation in depth, and to submit

recommendations on how best the issues of accountability and combating impunity, on the one hand, and reconciliation and healing, on the other, could be effectively and comprehensively addressed;

**8. NOTES** the steps taken by the Republic of The Sudan to address human rights violations in Darfur, and **REITERATES** the call by various AU Organs for the Government of The Sudan to take immediate and concrete steps to investigate and bring the perpetrators to justice, and to take advantage of the availability of qualified lawyers to be seconded by the AU and the League of Arab States, and in this regard **CALLS UPON** all parties to scrupulously respect the values and principles of human rights.

## Appendix 2

### **Assembly/AU/Dec.245(XIII) Rev. DECISION ON THE MEETING OF AFRICAN STATES PARTIES TO THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (ICC) Doc. Assembly/AU/13(XIII)**

Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

#### **The Assembly,**

**1. TAKES NOTE** of the recommendations of the Executive Council on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC);

**2. EXPRESSES ITS DEEP CONCERN** at the indictment issued by the Pre-Trial Chamber of the ICC against President Omar Hassan Ahmed El Bashir of the Republic of The Sudan;

**3. NOTES WITH GRAVE CONCERN** the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur;

**4. REITERATES** the unflinching commitment of Member States to combating impunity and promoting democracy, rule of law and good governance throughout the continent, in conformity with the Constitutive Act of the African Union;

**5. REQUESTS** the Commission to ensure the early implementation of Decision Assembly/Dec.213(XII), adopted in February 2009 mandating the Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concern such as genocide, crimes against humanity and war crimes, which would be complementary to national jurisdiction and processes for fighting impunity;

**6. ENCOURAGES** Member States to initiate programmes of cooperation and capacity building to enhance the capacity of legal personnel in their respective countries regarding the drafting and safety of model legislation dealing with serious crimes of international concern, training of members of the police and the judiciary, and the strengthening of cooperation amongst judicial and investigative agencies;

**7. FURTHER TAKES NOTE** that any party affected by the indictment has the right of legal recourse to the processes provided for in the Rome Statute regarding the appeal process and the issue of immunity; Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009

**8. REQUESTS** the Commission to convene a preparatory meeting of African States Parties at expert and ministerial levels (Foreign Affairs and Justice) but open to other Member States at the end of 2009 to prepare fully for the Review Conference of States Parties scheduled for Kampala, Uganda in May 2010, to address among others, the following issues: i.) Article 13 of the Rome Statute granting power to the UN Security Council to refer cases to the ICC; ii.) Article 16 of the Rome Statute granting power to the UN Security Council to defer cases for one (1) year; iii.) Procedures of the ICC; iv.) Clarification on the Immunities of officials whose States are not party to the Statute; v.) Comparative analysis of the implications of the practical application of Articles 27 and 98 of the Rome Statute; vi.) The possibility of obtaining regional inputs in the process of assessing the evidence collected and in determining whether or not to proceed with prosecution; particularly against senior state officials; and vii.) Any other areas of concern to African States Parties.

**9. DEEPLY REGRETS** that the request by the African Union to the UN Security Council to defer the proceedings initiated against President Bashir of The Sudan in accordance with Article 16 of the Rome Statute of the ICC, has neither been heard nor acted upon, and in this regard, **REITERATES ITS REQUEST** to the UN Security Council;

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

**11. EXPRESSES CONCERN OVER** the conduct of the ICC Prosecutor and **FURTHER DECIDES** that the preparatory meeting of African States Parties to the Rome Statute of the ICC scheduled for late 2009 should prepare, *inter alia*, Reservation entered by Chad Adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Great Socialist People's Libyan Arab Jamahiriya on 3 July 2009 guidelines and a code of conduct for exercise of discretionary powers by the ICC

Prosecutor relating particularly to the powers of the prosecutor to initiate cases at his own discretion under Article 15 of the Rome Statute;

**12. UNDERSCORES** that the African Union and its Member States reserve the right to take any further decisions or measures that may be deemed necessary in order to preserve and safeguard the dignity, sovereignty and integrity of the continent;

**13. FINALLY REQUESTS** the Commission to follow-up on the implementation of this Decision and submit a report to the next Ordinary Session of the Assembly through the Executive Council in January / February 2010 and in this regard **AUTHORIZES** expenditure for necessary actions from arrears of contributions.

### Appendix 3

**Assembly/AU/Dec.213(XII) DECISION ON THE IMPLEMENTATION OF THE ASSEMBLY  
DECISION ON THE ABUSE OF THE PRINCIPLE OF UNIVERSAL JURISDICTION DOC.  
Assembly/AU/3(XII)**

**The Assembly:**

**1. TAKES NOTE** of the Progress Report of the Commission on the Implementation of the Assembly Decision Assembly/AU/ Dec.199(XI) adopted by the Assembly in Sharm El-Sheikh, Egypt, in July 2008 on the Abuse of the Principle of Universal Jurisdiction;

**2. ALSO TAKES NOTE** of the work of the African Union-European Union (AU-EU) Technical Ad-hoc Expert Group set up by the Eleventh AU-EU Ministerial Troika with the mandate to clarify the respective understanding on the African and EU side on the principle of universal jurisdiction;

**3. REITERATES** its commitment to fighting impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the African Union;

**4. EXPRESSES** its regret that in spite of its previous Summit decision calling for a moratorium and whilst the African Union (AU) and the European Union (EU) were already in discussion to find a durable solution to this issue, a warrant of arrest was executed against Mrs Rose Kabuye, Chief of Protocol to the President of the Republic of Rwanda, thereby creating tension between the AU and the EU;

**5. UNDERSCORES** that the African Union speaking with one voice, is the appropriate collective response to counter the exercise of power by strong states over weak states;

**6. REITERATES** its appeal to all United Nations (UN) Member States, in particular the EU States, to suspend the execution of warrants issued by individual European States until all the legal and political issues have been exhaustively discussed between the AU, the EU and the UN;

**7. REQUESTS** the Chairperson of the African Union to follow up on this matter with a view to ensuring that it is exhaustively discussed at the level of the UN Security Council and the UN General Assembly;

**8. URGES** the AU and EU Commissions to extend the necessary support to the Joint Technical Ad-hoc Expert Group;

**9. REQUESTS** the Commission, in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes, and report thereon to the Assembly in 2010

**10. ALSO REQUESTS** the Commission to follow up on this matter with a view to ensuring that a definitive solution to this problem is reached and to report to the next ordinary session of the Assembly through the Executive Council in July 2009.