

**THE REGIONALISATION OF INTERNATIONAL CRIMINAL JUSTICE IN
AFRICA**

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DECLARATION

‘I Fatuma Mninde-Silungwe declare that the work: ‘The Regionalisation of International Criminal Justice in Africa’ is mine, and that it has not been submitted before for any degree or examination in any other university and that all the sources I have used or quoted have been indicated and acknowledged as complete references.’

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Dated this..... day of.....2017

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DEDICATION

I dedicate this thesis to my family for their love, understanding and encouragement during the time I was writing it. I am especially thankful to my husband, Donvan Silungwe for encouraging me to pursue further studies, both LL M and a PhD. At no point did you complain about my absence although times were lonely and hard for both of us. You listened to my ramblings when I needed someone to talk to and encouraged me to focus on the goal. You proof read my work without complaining. May God bless you for the kindness, love and the unwavering support.

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I dedicate this thesis to the administration of international criminal justice in Africa. May this thesis provide some guidance on how to prosecute international crimes in Africa.

Fatuma Mninde-Silungwe

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ABSTRACT

The ICC Statute establishes the International Criminal Court (ICC) as a permanent institution with power to exercise jurisdiction over persons for the most serious crimes of international concern. The ICC Statute provides the supranational framework for dealing with crimes of genocide, crimes against humanity, war crimes and in the future, the crime of aggression. The underlying principle is that the ICC is complementary to national jurisdictions. There is no express provision for regional complementarity as a possible ‘middle level’ mechanism for dealing with international crimes.

Despite this status quo, Africa, through the African Union (AU) is the first continent to consider regionalisation of international criminal justice. The model for regionalisation is reflected in the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the AU Assembly on 27 June 2014 in Malabo (The Malabo Protocol). This thesis is thus a critical analysis of the substantive provisions of the Protocol and the Statute of the African Court of Justice and Human and Peoples’ Rights (ACJHPR Statute) annexed thereto. The thesis provides an analysis of the definition of crimes and general principles as provided in the ACJHPR Statute.

In terms of substantive law, the regional framework is different from the ICC Statute in certain respects. For instance, the crimes covered as international crimes under the regional framework include those that are not part of the ICC Statute. Apart from the four crimes that are part of the ICC Statute, the regional framework extends its jurisdiction to crimes of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes and illicit

exploitation of natural resources. This thesis analyses the elements of each of the crimes under the Statute and making recommendations where necessary.

In terms of methodology, the research adopts a legal-political approach to researching regionalisation of international criminal justice in Africa. This is based on the understanding that regionalisation of international criminal justice in Africa is both a political and legal process and hence the need to consider the influence of both aspects in the regionalisation process.



LIST OF ABBREVIATIONS

ACDEG	African Charter on Democracy, Elections and Governance
ACJHPR	African Court of Justice and Human and Peoples' Rights
ASEAN	Association of South East Asian Nations
ASP	Assembly of States Parties
AU	African Union
AUC	African Union Commission
CAR	Central African Republic
CEAJ	Committee of Eminent African Jurists
DRC	Democratic Republic of the Congo
EU	European Union
ICC	International Criminal Court
ICGLR	International Conference on the Great Lakes Region
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILC	International Law Commission
JCE	Joint Criminal Enterprise
NGOs	Non-Governmental Organisations
NRA	New Regionalism Approach

NSAs	Non State Actors
OAU	Organisation of African Unity
OLC	Office of the Legal Counsel
OTP	Office of the Prosecutor
PALU	Pan-African Lawyers Union
PSC	Peace and Security Council
RECs	Regional Economic Communities
SADC	South African Development Community
STC	Specialised Technical Committee
UCG	Unconstitutional Change of Government
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCLOS	United Nations Convention on the Law of the Sea
UNDHR	United Nations Declaration of Human Rights
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
WWII	Second World War

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CHAPTER 1

INTRODUCTION

1.1 Problem Statement

Regionalisation is not new in international law as it has been and is being applied in such areas as international human rights law, peace and security and international trade law, just to mention a few. However, regionalisation of international criminal law is an ‘underexplored and underdeveloped concept.’¹ There is no clarity as to the structural and normative framework that a regional mechanism dealing with international crimes may take. Among other issues, it is not clear whether a regional mechanism can be independent of the International Criminal Court (ICC) or if the nature of crimes the regional mechanism covers should be the same as those under the ICC Statute or if there is an allowance for divergence. There is dearth of literature conceptualising regionalisation of international criminal justice.² The most convincing reason for the dearth in academic literature conceptualising regionalisation is the fact that international criminal law and justice is still a developing area and as such more focus has been put in its application and administration at the international level through the ICC.

Nonetheless, the idea of regionalisation of international criminal justice has taken root in Africa. Through the continental organisation, African Union (AU), Africa has made several resolutions calling for the regionalisation of international criminal justice.³ The ultimate step

¹ Per Burke-White W ‘Regionalisation of International Criminal Law Enforcement: A Preliminary Exploration’ (2003) 38 *Texas International Law Journal* 729 (hereafter Burke-White W (2003)).

² Notable literature on conceptualisation of international criminal justice are Burke-White W (2003); Tiba F.K ‘Regional International Criminal Courts: An Idea Whose Time has Come?’ (2016) 17(2) *Cardozo Journal of Conflict Resolution* 521-549.

³ There are several resolutions that the AU made in relation to the issue and the content of which shall be considered in extension in this research and some of these are: Decision on the Application by the International

taken towards the realisation of the idea of establishing a regional mechanism for dealing with international crimes in Africa, was the adoption of the Protocol on the Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights by the AU Assembly of Heads of State on 27th June 2014, in Malabo, Equatorial Guinea (hereinafter ‘Malabo Protocol’).⁴ Annexed to the Malabo Protocol is the Statute of the African Court of Justice and Human and Peoples’ Rights (hereinafter ‘ACJHPR Statute’) providing for the structure of the court and other substantive provisions such as the definitions of crimes and general principles. The Malabo Protocol upon coming into force, will create an international criminal law section in the African Court of Justice and Human and Peoples’ Rights and gives this section jurisdiction over international crimes.⁵

The adoption of the Malabo Protocol was met with divided opinions as to whether it amounts to a positive development in the administration of international criminal justice in Africa. For instance, Du Plessis condemns the rushed process in adopting the Protocol and the inclusion



Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan Assembly/AU/Dec.222 (XII) (3 February 2009); Decisions on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Assembly/AU/Dec.245(XII) (3 July 2009); Decision on the Implementation of the Decision on the International Criminal Court Assembly/AU/Dec.334(XVI) (31 January 2011); Decision on the Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court Assembly/AU/Dec.397(XVIII) (30 January 2012); Decision on the Protocol on the Amendment to the Protocol of the African Court of Justice and Human and Rights Assembly/AU/Dec. 427(XIX) (16 July 2012); Decision on the International Jurisdiction, Justice and the International Criminal Court Assembly/AU/Dec.481(XXI) (27 May 2013); Decision on Africa’s Relationship with the International Criminal Court Ext/Assembly/AU/Dec.1 (12 October 2013); Africa Union Press Release N° 002/2012 on The Decisions of Pre-Trial Chamber I of The International Criminal Court (ICC) Pursuant To Article 87(7) of The Rome Statute on the Alleged Failure By The Republic Of Chad and The Republic of Malawi to Comply with the Cooperation Requests Issued by The Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of The Republic of The Sudan; Decision on the Progress Report of the Commission on the Implementation of the Decision on the International Criminal Court Assembly/AU/Dec.493.(XXII) (31 January 2014).

⁴ Assembly/AU/Dec.529 (XXIII), Decision on the Draft Legal Instruments Doc. Assembly/AU/Dec.8 (XXIII).

⁵ Article 3 Malabo Protocol.

of immunity for sitting heads of states and senior officials.⁶ Sirleaf considers the positive side of the Protocol and argues that when it comes into force, it will provide an alternative forum for prosecution of international crimes committed in Africa.⁷ He further argues that the court's expanded scope of crimes caters for such crimes that are specifically of regional concern such as unconstitutional change of government, corruption, terrorism amongst others.⁸

However, there are several challenges that can be highlighted with this Protocol. One such challenge is the absence of a provision under the Protocol that creates a systematic working relationship between the ICC and the regional framework. In fact, the Protocol and the ACJHPR Statute do not mention the ICC at all. This is the position despite the fact that among other crimes, the Protocol gives the regional court jurisdiction over crimes of genocide, crimes against humanity, war crimes and aggression which also fall in the jurisdiction of the ICC.⁹ In addition, some AU members are also States Parties to the ICC Statute and as such are bound by its obligations.¹⁰ These two factors make it imperative to find a way in which these two mechanisms would work together so as to avoid future conflict of jurisdiction. The problem of lack of working relationship between the ICC and the regional court is two-way in that whereas the regional mechanism does not mention the ICC, the ICC

⁶ Du Plessis M 'Shambolic, Shameful and Symbolic: Implications of the African Union's Immunity for African Leaders' ISS Paper 278 (November, 2014).

⁷ Matiangai Sirleaf 'The African Justice Cascade and the Malabo Protocol' (2017) 2 available at <http://d-scholarship.pitt.edu/30678/1/African%20Justice%20Cascade%20and%20Malabo%20Protocol%20Copy%20of%20SSRN%20Submission%201-17-16.pdf> (accessed on 5 May 2017).

⁸ Matiangai Sirleaf (2017) 8.

⁹ Article 28A Malabo Protocol.

¹⁰ AU member States which are also State Parties to the ICC Statute are: Senegal, Ghana, Mali, Lesotho, Botswana, Sierra Leone, Gabon, South Africa, Nigeria, Central African Republic, Benin, Mauritius, Democratic Republic of the Congo, Niger, Uganda, Gambia, United Republic of Tanzania, Malawi, Djibouti, Zambia, Guinea, Burkina Faso, Congo, Liberia, Kenya, Comoros, Chad, Madagascar, Seychelles, Tunisia, Cape Verde, and Côte d'Ivoire.

Statute does not have express provisions on the working relationship between the ICC and regional courts.¹¹ Considering the reality of the possibility of existence of regional courts, it is therefore necessary to make recommendations on how the two mechanisms can work together without causing conflict of jurisdiction.

The other problem is a general lack of clarity of what regionalisation of international criminal justice entails. This lack of clarity leads to regionalisation being susceptible to different interpretations. As such, certain provisions under the ICC Statute are said to provide some form of regionalisation of international criminal justice. For instance, Articles 3, 4 and 62 of the Statute. Under these provisions, the Statute provides that the Court can sit elsewhere (i.e. outside The Hague) whenever it considers it desirable to do so or following a decision to change the place of trial¹², or may exercise its functions and powers on the territory of a State Party or by special agreement on the territory of any other State.¹³ Another aspect of the ICC Statute that can be referred to as regionalisation is on the selection of judges. The fact that judges are selected from different regions is also regarded as a form of regionalisation.¹⁴ This type of regionalisation expressly provided in the highlighted provisions is what Burke-White refers to as the 'soft option' for regionalisation.¹⁵ However, what Africa through the AU seeks to establish is a complete regional mechanism dealing with international crimes more of a 'regional ICC'. There is no blueprint on how a regional court dealing with international crimes can be structured. Thus, the AU's adoption of the Malabo Protocol acts as a trailblazer

¹¹ Article 1 and Article 17 ICC Statute the ICC is complementary to national jurisdictions.

¹² Article 3(3), Article 62 ICC Statute, see also Ford S 'The International Criminal Court and Proximity to the Scene of Crime: Does the Rome Statute Permit all ICC Trials to Take Place at Local or Regional Chambers' (2010) 43 *The John Marshall Law Review* 715-52 (hereinafter Ford S (2010)).

¹³ Article 4(2) ICC Statute.

¹⁴ Article 36 (8) (ii) ICC Statute provides that States Parties in selecting judges shall take into account the need within the membership of the Court for equitable geographical representation.

¹⁵ Burke-White W (2003) 731.

for such a regional approach to investigation and prosecution of international crimes. The novelty of this approach makes it imperative to interrogate in-depth the Malabo Protocol and the ACJHPR Statute to highlight the strengths and weaknesses with a purpose of recommending improvements.

In line with the above, this thesis considers the issue of regionalisation of international criminal justice in three levels. The first level is the conceptualisation of regionalisation of international criminal justice. At this level, it will be necessary to clarify the concepts ‘region’, ‘regionalisation’, and ‘regionalism’ and their application to international criminal justice. This level also considers the theoretical framework for regionalisation of international criminal justice generally and for Africa specifically.

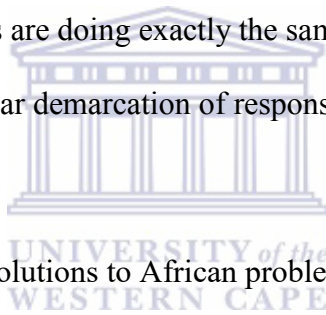
The second level involves the interrogation of the proposals for regionalisation by the AU. This involves an analysis of the history of regionalisation of international criminal justice in Africa. It also analyses the content of the Malabo Protocol and the ACJHPR Statute to assess how the norms under the regional framework compare or contrast to those under the ICC Statute. Specifically, the thesis analyses the definitions of crimes and general principles under the ACJHPR Statute.

The third level involves making recommendations for the improvement of the proposed regional framework so that it effectively contribute to closing the impunity gap. The recommendations are based on the findings made following an analysis of the provisions done in the second level.

1.2 Significance of the Problem

Conceptualisation of regionalisation of international criminal justice is critical in the deepening of understanding of what regionalisation entails and why States opt for regionalisation in certain areas. It is also essential to define the parameters for such

regionalisation and create an understanding on the relationship between international and regional frameworks. Without clarity on what regionalisation of international criminal justice entails, regional mechanisms are developed in an unsystematic manner without proper demarcation of responsibilities between different levels of international criminal justice enforcement i.e. the domestic, regional and international level. At the least, two problems are envisageable regarding unsystematic regionalisation: conflict and duplicity. Conflict in the sense that regional mechanisms are developed to counter international mechanisms and duplicity in the sense that regional frameworks are doing the same thing that the international framework is doing. Regarding conflict, regionalisation brings with it fears of fragmentation of international criminal law, and regarding duplicity, it becomes a case of misapplication of resources in that different regimes are doing exactly the same thing, a situation that could have been avoided if there is a clear demarcation of responsibilities between different regimes.



With respect to Africa, ‘African solutions to African problems’ is the common parlance as far as dealing with problems affecting the African continent is concerned.¹⁶ This parlance can become a mere rhetoric where suggested ‘African solutions’ are not properly defined or are ineffective. In relation to the administration of international criminal justice in Africa, it is essential to consider whether regionalisation of international criminal justice in Africa can be considered an African solution to the problem of impunity in Africa. In addition, it is essential to interrogate whether the proposed regional court is an appropriate, legitimate and effective solution for bringing accountability for international crimes committed in Africa.

¹⁶ Apuuli KP ‘The African Union’s Notion of ‘African Solutions to African Problems’ and the Crises in Côte d’Ivoire (2010–2011) and Libya (2011)’ available at <http://www.ajol.info/index.php/ajcr/article/viewFile/83274/73331> (accessed on 5 January 2013).

The question of regionalisation of international criminal justice cannot be separated from the ICC and Africa conundrum. The supranational international criminal justice as administered by the ICC has been a subject of criticism by the AU. The AU has made different resolutions bemoaning the conduct of the ICC in dealing with specific African situations.¹⁷ Without dwelling on the merits of the accusations at this stage, it is apparent from the different resolutions that the AU struggles to accept the legitimacy of the ICC. Somewhere within that conundrum, a proposal is made for regionalisation of international criminal justice in Africa. Considering this background, it can be concluded that regionalisation is a reaction to AU concerns on the administration of justice by the ICC and can be viewed as a method of avoiding the ICC. However, although such conclusions cannot be ignored, it is important to draw such conclusions after considering the complete history of the regionalisation process. In addition, upon analysis of the scope of regionalisation, determining whether regionalisation of international criminal justice is a part of the solution to the accountability for international crimes or merely a gambit against accountability for international crimes committed in Africa. It is therefore essential to analyse whether the AU proposed regional framework has proper structural framework and whether its substantive law can positively or negatively influence the administration of international criminal justice in Africa.

1.3 Research Questions

The research questions that this thesis will seek to answer are as follows:

- 1 What is the conceptualisation of regionalisation of international criminal justice generally and in Africa specifically?

¹⁷ See fn 2. The current debate on the AU-ICC relationship includes a proposal for the development of a comprehensive strategy that includes withdrawal from the ICC by AU Member States, see AU Assembly, Decision on the International Criminal Court Assembly/AU/Dec.590(XXVI) (31 January 2016) para 10(iv).

- 2 Is there provision for regionalisation of international criminal justice under the ICC Statute?
- 3 What is the history of regionalisation of international criminal justice in Africa?
- 4 What is the scope of AU's legal framework for regionalisation of international criminal justice in Africa particularly the Malabo Protocol and the ACJHPR Statute?
- 5 What are the implications of the AU proposed model for regionalisation of international criminal justice in Africa and what areas of the framework can be improved?

1.4 Argument

The question of regionalisation brings into play the old debate of regionalism and universalism in international law, which dates to the application of the United Nations Charter (UN Charter).¹⁸ There were debates on the regionalisation of peace and security regime under Chapter VIII of the UN Charter.¹⁹ There were similar debates about the regionalisation of human rights.²⁰ At present, there are some regional mechanisms in human rights, peace and security in other areas such as law against piracy, environmental pollution, and money laundering amongst others.²¹ The fact that there is regionalisation in these highlighted areas does not necessarily mean that it should automatically be replicated in

¹⁸ Schreuer C 'Universalism v Regionalism' (1995) 6 *EJIL* 478 (hereinafter Schreuer C (1995)).

¹⁹ Van Langenhove L, Felicio T & Abass A 'The UN and Regional Organizations for Peace: Tracking a Slippery Partnership' in DeLombaerde P, Baert F & Felicio T (eds) *The United Nations and the Regions: Third World Report on Regional Integration* (2012) 91-106; Winther D *Regional Maintenance of Peace and Security under International Law: The Distorted Mirrors* (2014) 1-14.

²⁰ Buergethal L.T 'International and Regional Human Rights Law and Institutions: Some Examples of their Interaction (1977) 12 *Texas International Law Journal* 321; Weston, Lukes & Hnatt 'Regional Human Rights Regimes: A Comparison and Appraisal (1987) 20 *Vanderbilt Journal of Transnational Law* 585.

²¹ AU has a Protocol on the Peace and Security Council (2003). Regarding Human Rights, regionalisation in Africa is reflected in the African Charter on Human and Peoples' Rights (1986).

international criminal justice although lessons drawn from developed areas can be instructive in the development of regional mechanisms in international criminal justice.

The novelty of regionalisation of international criminal justice cannot be overemphasised. Murungu argues that since there is no provision under the ICC Statute providing for regional mechanisms, Africa should therefore not have established a regional framework in the first place.²² This thesis agrees with the argument that the ICC Statute does not have to permit continental organisations such as the AU to come up with regional international criminal justice framework.²³ However, this thesis extends the argument that in the formulation of a regional mechanism, there is need to create a working relationship between the regional mechanism and the ICC. Ignoring the fact that more than 60 percent of States Parties to the AU are also States Parties to the ICC Statute is an oversight that can cause future conflict of jurisdiction between the ICC and the regional framework. In addition, ignoring the existence of a permanent international court dealing with international crimes is equally an oversight, since by a Security Council referral it can exercise jurisdiction over any State, whether a State Party or a non-State Party.²⁴ It is therefore important to design a regional framework that creates a link between different levels of accountability. As Kimminich succinctly states:

‘... it may safely be assumed that regional organisations, if properly embedded in an international legal order, possessing the necessary universal backbone, can easily avoid any traces of parochialism and that it can add sinews and muscles to that backbone, making the international order strong and flexible. As usual, the real problems are hidden in the details. To what extent and under what conditions can

²² Murungu CB ‘Towards a Criminal Chamber in the African Court of Justice and Human Rights Journal of International Criminal Justice (2011)9 *JICJ* 1067-88 (hereinafter Murungu CB (2011)).

²³ Abass A ‘The Proposed International Criminal Jurisdiction for the Africa Court: Some Problematic Aspects’ (2013) *Netherlands International Law Review* 49 (hereinafter Abass A (2013)).

²⁴ Article 13(b) ICC Statute.

regional arrangements strengthen and support the universal framework? How can the beneficial working of regional organisations be assured?²⁵

Regionalisation may develop systematically or spontaneously. In this context, a systematic regionalisation may result from having an international framework that clearly articulates the parameters of the relationship between the international and the regional framework. For instance, under the UN Charter, in the area of Peace and Security, the Charter gives priority to regional arrangements for the peaceful settlement of local disputes.²⁶ There is also clarity on the relationship between the regional framework and the international framework. The Charter provides that enforcement at the regional framework should have authority from the UN Security Council.²⁷ This arrangement is also articulated at the regional level, for instance, the African Union Peace and Security regional mechanism is legislated to operate in unison to the United Nations Security Council (UNSC).²⁸ The practical aspect of this arrangement is not considered in this research however what is evident is that there should be a clear demarcation of responsibilities that is reflected in both the regional and the international framework.

²⁵ Kimminich O 'Peace-keeping on a Universal or Regional level' in Wolfrum R *Strengthening the World Order: Universalism v. Regionalism, Risks and Opportunities of Regionalisation* (1989) 43.

²⁶ Article 52(2) UN Charter.

²⁷ Article 53(1) UN Charter.

²⁸ Article 17 (1) and (3) of the Protocol on the Peace and Security Council. The protocol provides as follows:

- (1) In the fulfilment of its mandate in the promotion and maintenance of peace security and stability in Africa, the Peace and Security Council shall co-operate and work closely with the United Nations Security Council, which has the primary responsibility for the maintenance of international peace and security. The Peace and Security Council shall also co-operate and work closely with other relevant UN agencies in the promotion of peace security and stability in Africa.
- (2) ...
- (3) The Peace and Security Council and the Chairperson of the Commission shall maintain close and continued interaction with the United Nations Security Council...

On the other hand, spontaneous regionalisation is not sanctioned or backed by any legislative framework. Regardless the nature of regionalisation, any framework creating a regional mechanism should articulate the relationship between the international framework and the regional framework to avoid duplicity and conflict of jurisdiction which is not the case under the Malabo Protocol.

Regionalisation may be a multilevel process. This entails regional mechanism can exist at the continental and sub-continental levels. In such a situation, it is essential to consider how the different levels interact for the achievement of a common goal of fighting impunity. The Malabo Protocol reflects such a multilevel process particularly where it provides that the Court shall be complementary to national courts and Regional Economic Communities (RECS).²⁹ The Protocol anticipates RECs with international criminal jurisdiction and despite acknowledging the possibility of a multi-level regionalisation process, this research will be restricted to the regionalisation at the continental level and its relationship with the international level. Admittedly, defining a region is not a simple process as it is not limited by geographical proximity and at the most it is political.³⁰ Nonetheless, where different levels of accountability are envisaged, there should be a deliberate effort to articulate how the different levels will operate.

The provisions on definitions of crimes and general principles under the ACJHPR Statute require a deep analysis. Most of the crimes falling under the jurisdiction of the Court are derived from AU treaties that did not create crimes but provided for certain prohibitions. Translating the prohibitions into a penal provision is a tricky process. It is therefore necessary to analyse how prohibitions under different AU Treaties have been translated into penal

²⁹ Article 46 H Protocol.

³⁰ See Definition of region in chapter 2 of this thesis.

provisions under the ACJHPR Statute. It is also essential to consider how the definitions of international crimes falling under both the ICC Statute and the ACJHPR Statute contrast.

1.5 Literature Review

William Burke-White is one of the early writers on the regionalisation of international criminal justice, writing only a year after the Rome Statute came into force.³¹ His work is a preliminary exploration of the possibility of regionalising international criminal law.

According to him, international criminal law is traditionally supranational and it is only through the application of universal jurisdiction and semi- internationalised courts that led to international criminal law operating at different levels.³² He observes that unlike domestic and supranational enforcement, enforcement at regional level remains unexplored and this is surprising, considering the international trends towards regionalisation in international relations.³³ He further posits that regional enforcement of international criminal law offers States some political advantages whilst decreasing the sovereignty costs of membership in international criminal law enforcement bodies.³⁴ This preliminary exploration provides four potential ways of regionalising international criminal law namely: the creation of specialised regional criminal courts, the ICC sitting regionally, the exercise of universal jurisdiction by a State within a region, and through semi-internationalised criminal courts and specialised domestic courts with regional judges.³⁵ Burke-White's work initiates a debate on the possibility of establishing a regional enforcement model for accountability of international crimes.

³¹ Burke-White (2003)729-761.

³² Burke-White (2003) 730.

³³ Burke-White (2003)730.

³⁴ Burke-White (2003) 730.

³⁵ Burke-White (2003) 748.

Several other authors have written after him on regionalisation of international criminal law. For instance, William Schabas in support of regionalisation argues that there are useful and constructive results of the interaction between the universal and regional mechanisms in the field of international human rights law and the same would seem to be likely desirable within international criminal law.³⁶ A similar approach is adopted by Richard Burchill,³⁷ who argues that the regional and universal approaches in international human rights system can provide insights and lessons on the possibility of establishing regional international criminal law tribunals. Drawing lessons from the United Nations peace and security mechanisms and international human rights, he concludes that universal and regional approaches need not be exclusive choices but rather mutually compatible.³⁸ He makes an interesting conclusion that the future of an effective justice system will depend heavily on the creation of international criminal tribunals at the regional level.³⁹

Some authors have written against regionalisation of international criminal law. Rauxhloh⁴⁰ argues that regionalisation if pursued would hinder the development of international criminal law. She proposes that the ICC should develop itself into a more regional-aware court that caters for the needs of various regions.⁴¹ A similar argument is made by Hopkins⁴² who posits that regionalisation is a threat to a new and emerging under-conceptualised area of international law and as such should be opposed at all costs. Per Hopkins, regionalisation

³⁶ Schabas W 'Regions, Regionalism and International Criminal Law' (2007) 4 *NZYB Int'L* 23.

³⁷ Burchill R 'International Criminal Tribunals at the Regional Level' (2007)4 *NZYB Int'L* 26, 32(hereafter Burchill R (2007)).

³⁸ Burchill R (2007) 37.

³⁹ Burchill R (2007) 44.

⁴⁰ Rauxhloh R 'Regionalisation of the International Criminal Court' (2007)4 *NZYB Int'L* 67-84 (hereinafter Rauxhloh R (2007)).

⁴¹ Rauxhloh R (2007) 67-84.

⁴² Hopkins J 'What is wrong with Regionalising International Criminal Law' (2007)4*NZYB Int'L* 85 (hereafter Hopkins J (2007)).

would work towards the weakening of a carefully constructed consensus of the Rome Statute.⁴³ Steven Freeland argues that where regionalisation is considered an appropriate step, it is important that it is established in a system that does not conflict with global norms of international criminal law.⁴⁴

With regard to regionalising international criminal justice in Africa, Jalloh writes on the history and the context of the Africa and ICC relationship.⁴⁵ His work focuses on proposals for mending the relationship between the ICC and Africa. Abass⁴⁶ analyses the process of establishing the international criminal law section in the African Court. Highlighting some of the weaknesses in the Draft Protocol, his conclusion on the possibility of establishing a regional court is that there is nothing inherently wrong for any region of the world establishing a court with jurisdiction to prosecute international crimes. He disagrees with argument that the Rome Statute does not permit creation of regional mechanisms. He argues that the Rome Statute is just another multilateral treaty, even though it established the most important international criminal court in the world. As to the AU's relationship with the ICC, he argues that the AU is not a party to the Rome Statute therefore does not require any blessing from the ICC to confer jurisdiction similar to that of the ICC. Musila⁴⁷ highlights how Africa is becoming one of the important players in relation to the administration of international criminal justice through the regional framework. Werle and Vormbaum⁴⁸

⁴³ Hopkins J (2007) 85.

⁴⁴ Freeland S 'Internationalisation of Justice- A Case of Universal Application of International Criminal Law Norms' (2007) *NZYB Int'L* 59.

⁴⁵ Jalloh CC 'Regionalising International Criminal Law in Africa' (2009) *ICLR* 445-9.

⁴⁶ Abass A (2013) 27-50.

⁴⁷ Musila GM 'African Union and the Evolution of International Criminal Justice in Africa: Challenges, Controversies and Opportunities' *Trust Africa Publications on ICJ in Africa* (2013).

⁴⁸ Werle G and Vormbaum M (eds.) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017).

Commentary on the Malabo Protocol provides an analysis of the crimes and the general principles and rules of procedure under the Protocol.

There has also been scepticism in some writings on the proposal for regionalisation of international criminal justice in Africa. This is reflected in the work of Du Plessis⁴⁹ who bemoans the rushed manner and the lack of transparency in which the complex process of drafting, reviewing and finalising amendments was done. Murungu⁵⁰ who argues that African States Parties to the ICC Statute will act in breach of their obligations under the ICC Statute by creating the section.

This study is different from highlighted previous studies in that it is a comprehensive study on regionalisation of international criminal justice in Africa. It is an in-depth study on the conceptualisation of regionalisation of international criminal justice generally. It analyses the regionalisation of international criminal justice in Africa in its historical and political context and provides an in-depth analysis of the provisions of the Protocol and the ACJHPR Statute. In particular, the definition of crimes, general principles of criminal law under the Statute and other substantive provisions which is missing in most of the previous research highlighted. In addition, the research is being done at the time when the AU has adopted the Protocol establishing the regional court which make a case for wholesome analysis of the Protocol and the ACJHPR Statute.

1.6 Methodology and Justification

This study adopts a desktop research methodology. It will analyse primary sources of international criminal law such as international treaties like the ICC Statute, the Constitutive

⁴⁹ Du Plessis M 'Implications of the AU Decision to give African Court Jurisdiction over International Crimes' ISS Paper No. 235 (2012) (hereinafter Du Plessis M (2012)).

⁵⁰ Murungu CB (2011) 1067-88.

Act of the African Union and other relevant treaties. The study will also analyse decisions and resolutions of the African Union and its other policy bodies. The study shall also consider secondary sources such as books, chapters in books, journal articles and internet resources.

Regarding theory, it is impossible to contemplate research in regionalisation of international criminal justice that is purely positivist in nature in that it only considers the letter of the law and nothing else. Regionalisation of international criminal justice can be viewed through both political lens and legal lens. The idea of establishing a regional mechanism for accountability for international crimes was given effect by the AU Assembly, a political body whereas, the instrument that establishes the regional mechanism is a legal one. This, therefore, brings questions such as why would African States seek to establish a regional body when there is a functioning international framework, the ICC? This question cannot be answered in law yet it is relevant to the understanding of regionalisation of international criminal justice. In this regard, the methodology applied in this research is interdisciplinary. It is a legal-political approach to understanding regionalisation of international criminal justice.

The justification for adopting the legal-political approach is that the question of regionalisation can be tackled by both areas. The research is a careful analysis of materials from both disciplines. Being mindful of the fact that the research is being done by a legal scholar the need to be careful cannot be emphasised as it is advised that ‘care need to be taken over how effectively concepts from one discipline can be transferred to another.’⁵¹ In deciding to conduct such research, the question that must be borne in mind is what role will politics play and what role will the law play. Thus, this research will apply international relations theories to regionalisation only to such questions that political science will best explain and international law to those areas that international law would be best suited to

⁵¹ Cryer R, Hervey T & others *Research Methodologies in EU and International Law* (2011) 76.

explain. Specifically, in this research, international relations theories would be more relevant to explain 'why' states consider regionalisation at all when there are already functioning international courts. International law will be relevant in explaining 'how' the instrument to establish the regional framework is formulated. There is an interrelationship between the two disciplines in that whereas it is a political process that proposed the establishment of a regional framework for dealing with international crimes, the ultimate instrument creating the regional framework is a legal document that should be analysed based on international law principles.

There are various proponents of this approach including Kenneth Abbott who argues that lawyers must read and master regime theory due to its multiple uses for the study of international law.⁵² He called for a 'joint discipline' that would bridge the gap between international law and international relations.⁵³ Other proponents for this approach emerged and these include Anne- Marie Slaughter.⁵⁴ She together with others offer two explanations why there is an increase in interdisciplinary research. They argue that it is the result of responses by members of each discipline to the external environment they seek to explain.⁵⁵ It is argued that the enthusiasm of international relations theory is based partly or if not principally on the claim that an understanding of a sister discipline will enrich international lawyers practical and intellectual work from doctrinal analysis and policy prescriptions to

⁵² Abbott KW 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 *Yale Journal of International Law* 335 (hereafter Abbott KW (1989)).

⁵³ Abbott KW (1989) 335.

⁵⁴ Her research on this approach includes Slaughter, Tulumello & Wood 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship (1998) 92(3) *American Journal of International Law* 367-97 (hereinafter Slaughter, Tulumello & Wood (1998), Slaughter AM 'An International Relations Theory Approach' Proceedings of the Annual Meeting (American Society of International Law) April 4-7 (2001) 25-6.

⁵⁵ Slaughter, Tulumello & Wood (1998) 367.

international legal theory.⁵⁶ As an example, they give three ways in which international law scholars have drawn from international relations theory and these are (1) to diagnose international policy problems and formulate solutions to them; (2) to explain the function and structure of particular international legal institutions and (3) to examine and reconceptualise particular institutions of international law generally.⁵⁷

Regarding regionalisation of international criminal law, the earlier literature written on the subject adopt a similar approach. William Burke-White, writing on regionalisation of international criminal law enforcement in relation to theory argues as follows:

‘The creation of regional courts to enforce international criminal law requires states to delegate jurisdiction over international crimes to a regional enforcement body. Why should states do this particularly in line with the fact that the ICC has already come into existence? This is a political question: Why would states delegate aspects of their sovereign criminal jurisdiction to a regional body? For regional enforcement to be possible, an answer to this question must be found in political science theory.’⁵⁸

He therefore proposes three uses for political science theory in regionalisation of international criminal justice and he puts it as follows:

‘First, it must situate regional international criminal justice within the political science debate over regionalism. Second, it needs to articulate why states would follow a regionalist approach to international justice given the already existent ICC... and

⁵⁶ Slaughter, Tulumello & Wood (1998) 372.

⁵⁷ Slaughter, Tulumello & Wood (1998) 373.

⁵⁸ Burke-White (2003) 743.

third, it must suggest how, from a political science and international relations perspective, the regionalisation of international criminal justice can be achieved.’⁵⁹

This study will therefore focus on the current approach that Africa is adopting to the regionalisation of international criminal justice.

1.7 Chapter Outline

This thesis consists of eight chapters.

Chapter One

The first chapter is an introduction to the thesis. It consists of the problem statement, background to the problem, significance of the problem, research questions, the argument, literature review, methodology and justification and the chapter outline.

Chapter Two

The second chapter is the conceptual framework of the thesis. It begins by defining relevant concepts which are ‘region’, ‘regionalisation’, and ‘regionalism. It discusses regionalisation under international law generally and under international criminal law. The chapter answers the question why states regionalise some aspects of international law. In answering this question, the chapter considers the underlying theories of regionalism, divided into old and new. It also considers Pan-Africanism as a theory specifically for the regionalisation of international criminal justice in Africa. In addition, the chapter discusses matters relating to resolving conflict of norms and jurisdiction that may arise because of regionalisation of any area of international law, including international criminal law.

⁵⁹ Burke-White W (2003)743.

Chapter Three

The third chapter considers whether there is provision for regionalism or the regionalisation of international criminal justice under the ICC Statute. It analyses the provisions of the ICC Statute to establish how regionalism is reflected. The Chapter also considers in detail the complementarity principle vis-a vis regionalisation of international criminal justice criminal law.

Chapter Four

The fourth chapter discusses the history of regionalisation of international criminal justice in Africa in two significant eras of the continental organisation: the OAU and the AU era. It analyses the nature of proposals for regionalisation of international criminal justice under these two periods and their justification.

Chapter Five

The fifth chapter is an overview of the structure of the International Criminal Law Section established under the Malabo Protocol. It gives an overview on the organs of the Section, its jurisdiction, and procedural matters such as trigger mechanisms, rights of the accused, penalties and sanctions, and cooperation and judicial assistance as provided under the Protocol.

Chapter Six

The sixth chapter analyses the substantive provisions under the ACJHPR Statute, in particular the definitions of crimes. For each of the fourteen crimes falling under the jurisdiction of the Court, the chapter gives a brief historical background and an analysis of its elements. It highlights the strength and the weaknesses in the definitions and where necessary, make proposals for amendments.

Chapter Seven

The seventh chapter is a continuation of analysis of the substantive provisions of the Statute. It focuses on general principles of criminal law such as modes of liability (referred to as modes of responsibility under the ACJHPR Statute), individual criminal responsibility, corporate criminal liability, immunity among other areas. It highlights the strength and weaknesses in these areas and make proposals for amendments where necessary.

Chapter Eight

This chapter provides the summary, conclusions and recommendations of the thesis.



CHAPTER 2

CONCEPTUALISING REGIONALISATION OF INTERNATIONAL CRIMINAL JUSTICE

2.1 Introduction

This chapter conceptualises regionalisation of international criminal justice. This is done by first defining some relevant concepts namely, ‘region’ ‘regionalisation’, and ‘regionalism’. Secondly, the chapter discusses the underlying theories of regionalism in international relations. The discussion will examine the theoretical basis of regionalisation of certain areas of international law and interrogate whether the traditional international relations theories on regionalism can be applied to explain regionalisation in Africa. Thirdly, the chapter considers whether the international relations theories can explain regionalisation of international criminal justice. Fourthly, the chapter highlights some arguments for and against regionalisation generally and regionalisation of international criminal justice specifically. Lastly, the chapter discusses the relationship between regionalism and universalism particularly focusing on the threat of fragmentation because of regionalism.

2.2 Definition of Concepts ‘Region’, ‘Regionalisation’, and ‘Regionalism’

2.2.1 Region

Region can be defined from an etymological point of view. The concept is derived from the Latin words ‘regio’ which means direction and ‘regere’ which means ‘to rule’ or ‘to command’.¹ From its etymological meaning, the concept has subsequently developed to

¹ Söderbaum F ‘Comparative Regional Integration and Regionalism’ in Landman T & Robinson V (eds) *Sage Handbook of Comparative Politics* (2009) 478 (hereinafter Söderbaum F (2009), see also Söderbaum F & Shaw T (eds) *Theories of New Regionalism: A Palgrave Reader* (2003) 6 (hereinafter Söderbaum & Shaw (2003)).

denote a border or a delimited space, often a province with emphasis being made on 'territory' and 'rule'.² The concept continued to develop and it has been used first to define the space between the national and the local or micro-region and secondly, to define macro-regions, which are larger territorial units or subsystems between the state and global system.³

The recurring debate in literature is on whether a region should be defined narrowly or broadly. A narrow definition of a region puts emphasis on geographical proximity whereas a broader definition does not confine a region to some geographical precincts. Joseph Nye's definition of a region is an example of a narrow definition whereby he defines it as a 'limited number of states linked by a geographical relationship and by a degree of mutual interdependence'.⁴ Proponents of this approach to defining a region argue that without some geographic limits the concept region can become diffuse and unmanageable.⁵ Delimiting a region to geographical proximity may not reflect the reality as the exact areas forming a region can be controversial since some countries might fall within the amalgamation of two regions.⁶ In this regard, some scholars argue that a region should be understood as representing more than physical proximity among constituent States, instead members of a common region might share cultural, economic, linguistic or political ties.⁷ Therefore there is inherent flexibility in the concept of region which allows it to be subject to adaptation and

² Söderbaum F (2009) 478; Söderbaum & Shaw (2003) 6.

³ Söderbaum (2009) 478; Söderbaum & Shaw (2003) 6; see also Fawn R 'Regions and their study: Wherefrom, What for and Where to?' (2009) 35 *Review of International Studies* 5-34 (hereinafter Fawn R (2009)).

⁴ Nye J *International Regionalism* (1968) vii, see also Mansfield E & Milner H 'The New Wave of Regionalism' (1999) 53 (3) *International Organisation* 590 (hereinafter Mansfield & Milner (1999) who defines a region as a group of countries located in the same geographically specified area.

⁵ Fawn R (2009) 16 argues that geography should not be dismissed outright as a starting point for identification of regions; Hurrell A 'Explaining the Resurgence of Regionalism in World Politics' (1995) 21 *Review of International Studies* 333 (hereinafter Hurrell A (1995)).

⁶ Mansfield & Milner (1999) 591.

⁷ Abass A *Regional Organisations and the Development of Collective Security beyond Chapter VIII of the UN Charter* (2004) 25 (hereinafter Abass A (2004); Mansfield & Milner (1999) 591.

change, as such it is impossible to come up with a precise definition of what constitutes a region.⁸

Some scholars have tried to come up with practical definitions of a region. For example, Anderson and Norheim offer what they consider a pragmatic definition as follows:

‘[W]hile there is no ideal definition [of a region], pragmatism would suggest basing the definition on the major continents and subdividing them somewhat according to a combination of cultural, language, religious and stage of development criteria.’⁹

Although the criteria suggested may be regarded as pragmatic, the reality is that even at the continental level, divergences exist in the suggested areas of culture, language, religion or even development, which makes it difficult to define a region. With all this in mind, it is indeed practical to conclude that regions are a product of political agreements, socially constructed and politically contested and thus open to change.¹⁰

In his work on regional organisations and development of collective security, Abass proposes a diversity approach to defining of a region.¹¹ Central to this approach is the understanding that the concept of a region should not be subjected to pre-determined conceptual

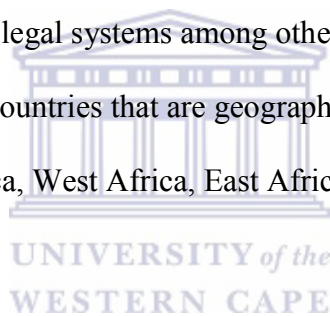
⁸ Fawcett L ‘ The History and the Concept of Regionalism’ *ESIL Conference Paper Series Vol 2 No.1 Conference Paper 4* (2012) 4 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193746 (accessed on 13 August 2014); Schreuer CH ‘Promotion of Economic Development by International Law’ in Wolfrum R (ed) *Strengthening the World Order: Universalism v Regionalism, Risks and Opportunities of Regionalisation* (1989) 73 where he argues that in economic development, the definition of a region depends on non-geographical terms such as the identity of an economic problems, similar outlooks as to their solution and a common sense of purpose.

⁹ Anderson K & Norheim H *History, Geography and Regional Economic Integration* (1993) 10.

¹⁰ Katzenstein PJ ‘Introduction: Asian Regionalism in Comparative Perspective’ in Katzenstein PJ & Shiraishi T *Network Power: Japan and Asia* (1997) 7; Mansfield & Milner (1999) 591.

¹¹ Abass A *Regional Organisations and the Development of Collective Security: Beyond Chapter VIII of the UN Charter* (2004) 25.

frameworks.¹² He argues that despite the multitudinous attempts to define a region by different scholars, there is no set of criteria that is totally acceptable or completely useless.¹³ The diversity approach, therefore defines a region as ‘a notion encompassing entities which may but not necessarily belong to a geographically determinable area, having common and disparate attributes and values but which seek the accomplishment of common goals.’¹⁴ Diversity approach is distinct in that it focuses on abstract values over mere physical geographical proximity and offers a possibility that States claiming to belong to a region may have divergent values.¹⁵ He further argues that this may prove advantageous to Africa, where members of a single regional organisation experience extremely diverse political cultures and cultural values.¹⁶ Based on this definition, the continent of Africa as a whole is a region despite the differences in culture, legal systems among other factors. The continent is divided in five sub regions consisting of countries that are geographically proximate to each other and these sub regions are: North Africa, West Africa, East Africa, Central Africa and Southern Africa.¹⁷



¹² Abass A (2004) 25.

¹³ Abass A (2004) 24.

¹⁴ Abass A (2004) 25.

¹⁵ Abass A (2004) 25.

¹⁶ Abass A (2004) 25, 26.

¹⁷ North Africa (6 countries): Egypt, Libya, Tunisia, Algeria, Morocco and Western Sahara; West Africa (18 countries): Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo; Central Africa (6 countries): Central African Republic, Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon, and São Tomé and Príncipe; East Africa (14 countries): made up by the countries in the Horn (Eritrea, Ethiopia, Somalia, Djibouti), plus Sudan, Uganda, Kenya, Tanzania, Rwanda, Burundi and plus the islands (The Comoros, Mauritius, the Seychelles and Madagascar); Southern Africa (10 countries): Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

2.2.2 Regionalisation and Regionalism

Regionalisation is defined as a process of increasing exchange, contact and coordination within a given region.¹⁸ Regionalisation understood in this sense is said to have an activist element and relates to the process of change from relative heterogeneity and lack of cooperation towards increased cooperation, integration, convergence, coherence and identity in a variety of fields such as culture, economic development, and politics among others.¹⁹ Whereas, regionalism is used to refer to a programme, an ideology, set of goals and values shaping a particular regional project.²⁰ Regionalisation may arise from regionalism but that is not necessarily and always the case since the process of regionalisation may not have been informed by any clear underlying ideology.²¹ It is also conceivable that regionalism might follow the process of regionalisation.²² For the purpose of this thesis, regionalisation refers to the process of creating a regional court for dealing with international crimes in Africa, whereas regionalism refers to the underlying principles or ideologies shaping that process. Regionalisation can be led by States, Non-State Actors (NSAs), or by Intergovernmental Organisations (IGOs). However, some scholars view regionalisation as a strictly state-led process, for instance Gamble and Payne define regionalisation as state or states-led project designed to reorganise a space along defined economic and political lines.²³ Hettne also argues that despite NSAs having a role in regionalisation, States remain its main

¹⁸ Hveem H The Regional Project in Global Governance in Söderbaum F & Shaw T *Theories of New Regionalism* (2003) 83 (hereinafter Hveem H (2003)); Schulz, Söderbaum & Öjendal *Regionalisation in a Globalizing World, A Comparative Perspective on Forms, Actors and Processes* (2001) 5 (hereinafter Schulz, Söderbaum & Öjendal (2001)).

¹⁹ Although the UN Charter in Chapter VIII refers to “regional mechanisms”, it does not provide a definition of the relevant concepts as ‘region’, ‘regionalism’ or ‘regionalisation’.

²⁰ Hveem H (2003) 83.

²¹ Hveem H (2003) 83.

²² Schrijver F *Regionalism after Regionalisation (Spain, France and the United Kingdom)* (2006).

²³ Gamble A and Payne A (eds) *Regionalism & World Order* (1996) 2.

‘gatekeepers’.²⁴ The process of regionalisation of international criminal justice in Africa is being led by the African Union, an Inter-Governmental Organisation.

Some interesting perspectives on regionalisation can also be highlighted, such as that reflected in the work of Falk²⁵ who views regionalisation as either positive or negative depending on the goal that it seeks to or ultimately achieves. For example, positive regionalisation would be aimed at reduction of political violence, the attainment of economic well-being, the promotion of human rights, benevolent governance, among others.²⁶ On the other hand, examples of negative regionalisation would be negation of the positive goals by way of warfare, poverty, racism, ecological decay, oppression, chaos, criminality among others.²⁷

A synthesis of the definitions considered, establishes regionalisation as a process of increased cooperation, integration, convergence within a particular region. Whereas, regionalism is the underlying ideology and a region as being politically constructed and is not limited to geographical proximity. The goals and common interests would define how a region is structured. The effectiveness of a regional project is dependent on how the parties to the region are willing to achieve the goal for which it was established. Narrowing it down to international criminal justice, States can decide, at the continental level, that it is in their best interest to develop a regional court dealing in international crimes regardless of differences in their legal systems, culture or other differences.

²⁴ Hettne B ‘The New Regionalism Revisited’ in Söderbaum F & Shaw T (eds) *Theories of New Regionalism: A Palgrave Reader* (2003) 23 (hereafter Hettne B (2003)).

²⁵ Falk R ‘Regionalism and the World Order: The Changing Global Setting’ in Söderbaum F & Shaw T (eds) *Theories of New Regionalism: A Palgrave Reader* (2003) 69 (hereafter Falk R (2003)).

²⁶ Falk R (2003) 69, 70.

²⁷ Falk R (2003) 70.

2.3 Why Do States Regionalise?

This section examines international relations theories for regionalism to answer the question as to why States regionalise certain areas of international law. The justification for examining the theories on regionalism is that since regionalism has the consequence of States subjugating or delegating some of their sovereignty to a regional body, the question as to why they subjugate can only be aptly answered through political science or international relations theories.²⁸ Further, the section will analyse some arguments proffered throughout history for and against regionalisation. The arguments will be analysed generally for international law and specifically for international criminal justice.

2.3.1 International Relations Theories on Regionalism

In international relations, regionalism is characterised by two waves namely, the first wave and the second wave, also referred to as old and new regionalism respectively.²⁹ Old and new regionalism can be explained temporally or theoretically.³⁰ Temporally, the old and new dichotomy is determined by the time in history in which the process of regionalisation took or is taking place with the cold war being the watershed. Thus, old regionalism dates from the end of WWII to the end of the 1980s whereas the new regionalism dates from 1990 onwards.³¹ Since the regionalisation of international criminal justice in Africa is taking place post 1990, temporally, it falls under new regionalism.³² The temporal description may

²⁸ Burke-White W (2003) 743; Katzenstein S 'In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century' (2014) 55(1) *Harv. Int'l L.J* 151-209 (hereinafter Katzenstein S (2014)).

²⁹ Vayrynen R 'Regionalism: Old and New' (2003) 5 *International Studies Review* 25-51; Wunderlich J *Regionalism, Globalisation and International Order, Europe and Southeast Asia* (2007) 7-29, (hereinafter Wunderlich J (2007)).

³⁰ Schulz, Söderbaum & Öjendal (2001) 3.

³¹ Wunderlich J (2007) 12 states that another way of defining them is to state that old regionalism lies in the cold war era, whereas new regionalism is post-cold war.

³² Tiekou TK 'Theoretical approaches to Africa's International Relations' in Murithi T (ed) *Handbook of Africa's International Relations* (2014) 11-20 (hereinafter Tiekou TK (2014) argues that although international relations

provide a simplistic approach to analysing regionalism but it is important to note that, there are continuities and similarities between the first and the second waves that makes the distinction not as clear cut.³³ Nonetheless, it is essential to analyse some of the theories that emerged under these two waves.

2.3.1.1 Old Regionalism

The relevant theories on regionalism to be considered under old regionalism are: neo-realism, neoliberal institutionalism, functionalism and neo-functionalism.

2.3.1.1.1 Neorealism

Neorealism is an outgrowth of realism also referred to as classical realism. Realists believe that power is the currency of international politics and as such pays careful attention to how much military or economic power States have relative to each other.³⁴ The distinction between the two lies in their response to why States want power? For classical realists, the answer is human nature, whereas for neorealist, it is the architecture of the international system that forces States to pursue power.³⁵ The international system has no higher authority that sits above the great powers, there is therefore no guarantee that one State will not attack another. As such, it is only logical for a State to be powerful enough to protect itself from any attack.³⁶ Neorealism has three key assumptions and these are: (1) States are the key units in

theories provide useful pointers for understanding African International Relations, there is a need for new theories to capture African realities.

³³ Söderbaum F *The Political economy of regionalism: The Case of Southern Africa* (2004) 16 (hereafter Söderbaum F (2004).

³⁴ Mearsheimer J 'Structural Realism' in Dunne, Kurki & Smith *International Relations Theories: Discipline and Diversity* 3ed. (2013) 77.

³⁵ Mearsheimer J 'Structural Realism' in Dunne, Kurki & Smith *International Relations Theories: Discipline and Diversity* 3ed. (2013) 78.

³⁶ Mearsheimer J 'Structural Realism' in Dunne, Kurki & Smith *International Relations Theories: Discipline and Diversity* 3ed. (2013) 78.

action, (2) they seek power as a means to an end, the ultimate end is survival, and (3) they are rational actors.³⁷ From these key assumptions of neorealism, the understanding is that States will pursue their national interests which are defined in terms of power.³⁸ Since power is an end in itself as well as a means to an end, States compete in order to maintain a balance of power.³⁹ States cooperation is seen as a means for survival and as such neorealism looks at regionalism from the outside in, arguing that regional groupings are formed to respond to external challenges.⁴⁰ Neorealism privileges the State and emphasises on its sovereignty and views them as having their own distinctive problems which may result in their interests failing to converge.⁴¹ In this regard, regionalisation occurs as a means of survival under certain circumstances whereby States open up for cooperation or form alliances in order to counter a common enemy.⁴² Regionalism is considered to be an instrument that enables states to tackle external political and economic pressures.⁴³

Another neo-realist understanding to regionalism is the concept of ‘hegemony’ or ‘stabiliser’.⁴⁴ Neorealists argue that a hegemony can stimulate the emergence of regional

³⁷ Keohane R.O ‘Realism, Neorealism and the Study of World Politics’ in Keohane R.O *Neorealism and its Critics* (1986) 7 (hereinafter Keohane R.O (1986).

³⁸ Waltz K *Theory of International Politics* (1979) 116-28 (hereinafter Waltz K (1979); also in Waltz K ‘Anarchic Orders and Balances of Power’ in Keohane R.O *Neorealism and its Critics* (1986) 98-130 (hereinafter Waltz K (1986).

³⁹ Waltz K (1979) 116-28; Waltz K (1986) 98-130.

⁴⁰ Schulz, Söderbaum & Öjendal (2001) 7; Söderbaum F (2004) 18.

⁴¹ Söderbaum F (2004) 18.

⁴² Söderbaum F (2004) 18; Waltz K (1979) 116-28 who explains what he terms the balance of power theory, whereby he argues that at the minimum, states seek their own self-preservation. In order to achieve their goals, they may have internal balancing through improvement of their economy or military for example or they may seek external balance through creation of alliances with other states, Wunderlich J *Regionalism, Globalisation and International Order* (2013) 18-19.

⁴³ Waltz K (1979) 107 states do not willingly put themselves in a situation of dependence, but they consider the economic and political gains to be derived.

⁴⁴ Söderbaum F (2004) 19.

cooperation or regional institutions in several ways. Hurrell⁴⁵ gives four examples in which the concept of hegemony can contribute to the formation of a region, and these are: (i) that regions are a reaction of the weaker States towards greater powers. He gives an example of the Association of South East Asian Nations (ASEAN) (against Vietnam), the Gulf Cooperation (against Iran), and Southern African Development Community-SADC (against South Africa)⁴⁶; (ii) that in the post WWII period in Germany, regions were constructed in order to contain and possibly entangle hegemony (in the case of West Germany by means of the European Community); (iii) that the possibility of weaker States to use regionalisation as an instrument to become attached to a hegemony (dubbed as band-wagoning in neo-realist terms); and (iv) that in the case of declining hegemony regional formation are perceived as a resource for the hegemony itself 'to pursue its interests, to share burdens, to solve common problems and to generate international support and legitimacy for its policies.'⁴⁷

Another neorealist perspective is that of regional security complex found in the work of Buzan.⁴⁸ He defines the regional security complex as 'a set of units whose major processes of securitization, desecuritization or both are so interlinked that their problems cannot reasonably be analysed or resolved apart from one another.'⁴⁹ Buzan shares the neorealist perspective on hegemony whereby he argues that strong States make strong and mature regions; whereas weak States, in their quest for security and power tend to create regional

⁴⁵ Hurrell A (1995) 342.

⁴⁶ At the time of formation, SADC was called Southern African Development Coordination Conference (SADCC) and was established with an aim among others of the member states to be less dependent on apartheid South Africa.

⁴⁷ Hurrell A (1995) 343.

⁴⁸ Buzan B *People, States and Fear: The National Security Problem in International Relations* (1983) (hereinafter Buzan (1983)); Buzan B *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era* (1991) (hereinafter Buzan (1991)); Buzan B & Weaver O *Regions and Powers: The Structure of International Security* (2003) (hereinafter Buzan B (2003)).

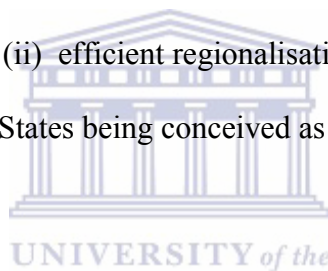
⁴⁹ Buzan B (2003) 491.

conflicts and immature regions.⁵⁰ According to him, Western Europe is an example of the former whereas regions in Africa represent the later.⁵¹ Neorealism has been criticised for its emphasis on the greater powers through the concept of hegemony and its State centric nature.⁵²

2.3.1.1.2 Neoliberal Institutionalism

Neoliberal institutionalism share some assumptions that fall under neorealism such as that States are rational actors and that the international system is anarchical in some sense.⁵³

However, neoliberal institutionalism posits that international regimes and institutions play an important role in promoting cooperation among States.⁵⁴ The three core arguments under this theory are that: (i) an increase in the level of regional interdependence lead to increase in the demand for regional cooperation; (ii) efficient regionalisation is expected to be institutionalised; and (iii) despite States being conceived as rational egoists, they can be led to cooperate regionally.⁵⁵



Neoliberal institutionalism just like neorealism considers States as important actors in regionalisation.⁵⁶ Under neoliberal institutionalism it is argued that for States to ensure their own survival, they may pursue interdependence with other States where common interests are

⁵⁰ Buzan B (1983) 65; Buzan (1991) 289; Söderbaum (2004) 20.

⁵¹ Buzan (1991) 96-107.

⁵² Keohane R.O 'Theory of World Politics, Structural Realism and Beyond' in Keohane R.O (1986) 158-203; Söderbaum (2004) 18.

⁵³ Baldwin D.A 'Neoliberalism, Neorealism and World Politics' in Baldwin D.A (ed.) *Neoliberalism and Neorealism: The Contemporary Debate* (1993) 3-25 (hereinafter Baldwin D.A (1993)).

⁵⁴ Baldwin D.A (1993)8.

⁵⁵ Schulz, Söderbaum & Öjendal (2001) 9; Sterling-Folker J 'Neoliberalism' in Dunne, Kurki & Smith *International Relations Theories, Discipline and Diversity* 3. ed (2013) 114-115.

⁵⁶ Keohane RO *After Hegemony, Cooperation and Discord in the World Political Economy* (1984) 8-9, 25 (hereafter Keohane (1984); Keohane RO & Martin L 'The Promise of Institutional Theory' (1995) 20(1) *International Security* 39-51 (hereafter Keohane & Martin (1995); Söderbaum (2004) 21.

envisaged, as such, they promote the creation of formal and informal institutions in order to facilitate the solution of common problems and to coordinate action.⁵⁷ The regional cooperation is defined by creation of international regimes that are functionalised, issue-specific and concerned with the maximisation of benefits attainable through regional transactions.⁵⁸ Institutionalists claim that participating States can obtain absolute gains by means of regional cooperation.⁵⁹ In institutionalism, States will act as a negotiator at the intergovernmental and supranational level, limited by national political considerations.⁶⁰ In addition, regionalisation is motivated by procurement of public good to avoid negative externalities for interdependence and absolute gains.⁶¹

The main challenge of this theory is that most of its proponents emphasise on regional organisations from Europe such as the EU, and these are put forward as the point of reference for understanding regionalism.⁶² The generalities that characterise these theories ignore the power asymmetries in global political economy as well as important questions such as by whom and for what purpose regionalism occur.⁶³

⁵⁷ Keohane RO 'Institutional Theory and the Realist Challenge after the Cold War' in Baldwin D.A ed *Neoliberalism and Neorealism: The Contemporary Debate* (1993) 271 (hereafter Keohane RO (1993)).

⁵⁸ Keohane RO (1993) 274.

⁵⁹ Keohane (1995) 44.

⁶⁰ Schulz, Söderbaum & Öjendal (2001) 22; Söderbaum (2004) 22.

⁶¹ Söderbaum (2004) 22; Schulz, Söderbaum & Öjendal (2001) 9.

⁶² Söderbaum (2004) 22.

⁶³ Söderbaum (2004)22.

2.3.1.1.3 Functionalism

Early works of functionalism is by Leonard Woolf, who as early as the year 1916 indicated a break from a state-centric system.⁶⁴ In emphasising on the important role of non-state entities he wrote:

‘We are accustomed to regard the world as neatly divided into compartments called states and nations...But this vision of the world divided into isolated compartments is not a true reflection of facts as they exist in a large portion of the earth today.’⁶⁵

The later proponent of functionalism is David Mitrany. His ideas were popularly known as functionalist approach to international politics.⁶⁶ His work outlines the 19th Century growth in international governments in similar terms to that of Woolf.⁶⁷ He argues that:

‘The nineteenth century produced that amazing growth in the material equipment of civilisation which welded the world together into one organic whole, making each people a partner in the fate of all. The outward expression of that change was the appearance of world-wide popular movements and making of innumerable private and public international agreements.’⁶⁸

He argues that the rise of nation State and the insistence of new States on the doctrine of sovereign equality when they were clearly weaker and smaller than great powers hinders international cooperation. However, he acknowledges that the state of affairs was working against statism, and he puts his idea in the following manner:

⁶⁴ Woolf L *International Government* (1916) (hereinafter Woolf (1916), see also Archer C *International Organisations* (1984) 83 (hereinafter Archer C (1984)).

⁶⁵ Woolf L (1916) 216-17.

⁶⁶ Mitrany D *The Functional Theory of Politics* (1975) (hereafter Mitrany D (1975)).

⁶⁷ Archer C (1984) 83.

⁶⁸ Mitrany D (1975) 89.

‘No matter what the size or shape of a particular community, its functions are such that they are to be organised, and the forces and the factors now at work no longer have any true relation to the old political divisions, within or without a state. The new functions imposed upon our political institutions are compelling a complete reconstruction of the technique of government on a purely practical basis. I reach that conclusion by asking at the outset not, “what is the ideal form for international society?” But rather “what are its essential functions?”’⁶⁹

This is simplified as ‘form follows functions.’⁷⁰ He foresaw the establishment of functional bodies ‘with autonomous tasks and powers’ which would ‘do things jointly’ and that this would link authority with a specific activity hence breaking the traditional linking of authority to a definite territory.⁷¹ Mitrany’s vision of the world was that functions of everyday social life, such as transport, health care, or communication are no longer just carried out within the confines of each sovereign state, but must be undertaken across regional, continental or on universal basis and these activities would be overseen by international organisations which would be more like a board of management.⁷² Mitrany’s scheme was aimed at allowing such functions of social life to be carried out at the level where they work more efficiently.⁷³

Functionalism is criticised mainly for its abhorrence of the political. Mitrany did not envisage any political control of the functional ties between countries. This approach is considered strange when the proposed functional agencies would be making political decisions

⁶⁹ Mitrany D (1975) 99.

⁷⁰ Söderbaum (2004) 20.

⁷¹ Mitrany D (1975) 125.

⁷² Archer C (1985) 85.

⁷³ Archer C (1984) 86.

concerning authoritative allocation of resources.⁷⁴ As Duffy and Feld put it that ‘what functionalism lacked was a healthy dose of political realism to counteract the political idealism of the theory.’⁷⁵

2.3.1.1.4 Neo-Functionalism

The proponents of this theory include Ernst Haas and Leon Lindbergh.⁷⁶ Neo-functionalists acknowledged the dilemma that Mitrany’s approach faced in dealing with political decisions, therefore, they introduced a method of making necessary choices at international level that challenged the functionalist approach of severability of politics from economics.⁷⁷ Their approach is ‘function follows interests’ as opposed to the classical functionalism of ‘form follows functions’.⁷⁸ Neo-functionalists regarded States as the primary and the most significant actors in regionalisation. Haas argues as follows:

‘The study of regional integration is concerned with explaining how and why states cease to be wholly sovereign, how and why they voluntarily mingle, merge and mix with their neighbours so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflict between themselves.’⁷⁹

⁷⁴ Archer C (1984) 87,88.

⁷⁵ Duffy AC & Feld WJ ‘Wither Regional Integration Theory?’ in Feld WJ & Boyd G (eds.) *Comparative Regional System* (1980) 501.

⁷⁶ Haas E *The Unity of Europe: Political, Social and Economic Forces* (1958), Haas E *The Obsolescence of Regional Integration Theory* (1975) (hereinafter Haas E (1975)); Lindbergh LN *The Political Dynamics of European Economic Integration* (1963).

⁷⁷ Haas E (1958) 12 who explains that ‘economic integration, however defined, may be based on political motives and frequently begets political consequences.’ see also Söderbaum (2004) 21.

⁷⁸ Söderbaum(2004) 21

⁷⁹ Haas E ‘The Study of Regional Intergration: Reflections on the Joy and Anguish of Pretheorising’(1970) 24(4) *International Organisation* 610 (hereinafter Haas E (1970)).

Within neo-functionalist theory, the concept of ‘spill over’ is also dominant. Spill over from the technical and economic to the political.⁸⁰ Simply put, the benefits of regionalisation in the economic areas have a spill over effect on the political and other areas. Neofunctionalists view regional institutions as the most effective means for solving common problems.⁸¹ The institutions and supranational authorities are initiated by states, but the regional bureaucrats and interest groups become more important actors in the process.⁸²

Criticisms against neo functionalism are that it tends to be indeterminate, this is related to the fact that some regional integration is unexpected due to the ‘spill over’ effects as such States cannot interpret the process leading to a particular regional result.⁸³ It is therefore argued that one of its evident shortcomings relates to the contingency of its predictions. It lacks dependent variables with which to frame the virtuous cycle of spill over effects.⁸⁴ It is also argued that neofunctionalists expected too much, too quickly and they underestimated the anti-pluralists and nationalist orientations of their time as the theory had little regard for exogenous and extra regional forces.⁸⁵

2.3.1.2 New Regionalism

New regionalism temporally refers to regionalism taking shape in the post-cold war period. It is to some extent built on earlier theoretical experiences under old regionalism thus considers the drawbacks and the strengths of the early theories of regionalism.⁸⁶ It is argued that the

⁸⁰ Haas E (1970) 617.

⁸¹ Söderbaum F (2004) 21.

⁸² Söderbaum F (2004) 21.

⁸³ Moravcsik A *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1998) 14 (hereafter Moravcsik A (1998)).

⁸⁴ Moravcsik A (1998) 16.

⁸⁵ Breslin S & Higgott R ‘Studying Regions: Learning from the Old, Constructing the New’ (2000) 5(3) *New Political Economy* 335.

⁸⁶ Schulz, Söderbaum & Öjendal (2003) 12.

mainstream theories in regionalism need not be dismissed altogether and may still be helpful in the analysis of regionalism and regionalisation as clearly pointed out by Mittelman that:

‘The New Regionalism Approach (NRA) is an important advance on different versions of integration theory (...functionalism, neo-functionalism, institutionalism and neo-institutionalism and so on)...[A]ll of them are deficient in as much as they understate power relations and fail to offer an explanation of structural transformation. In some ways a break with this tradition, the NRA explores contemporary forms of transnational co-operation and cross-border flows through comparative, historical, and multilevel perspectives.’⁸⁷

New regionalism is based on the necessity to unpack the state, avoid state centrism inherent in mainstream theories and better understand the state-society complexes.⁸⁸ Hettne analyses the distinction between the old and new regionalism in the following manner:

‘(1) whereas the old regionalism was formed in the bi-polar cold war context, the new regionalism is taking shape in a multipolar world order, (2) whereas the old regionalism was created from the outside and from above...the new is a more spontaneous process from within or from below, (3) whereas the old regionalism was specific with regard to objectives, the new is more comprehensive, multi-dimensional process.’⁸⁹

⁸⁷ Mittelman JH ‘Rethinking the New Regionalism in the Context of Globalisation’ in Hettne, Bjorn, Andras et al (eds) *Globalism and the New Regionalism* (1999) 25-6.

⁸⁸ Schulz, Söderbaum & Öjendal (2003) 13.

⁸⁹ Hettne B ‘The New Regionalism: Impact for Development and Peace’ in Hettne B & Inotai A *The New Regionalism: Implications for Global Development and International Security* (1994) UNU/WIDER Research 1-2 available at http://www.wider.unu.edu/publications/working-papers/previous/en_GB/rfa-14/ (accessed on 16 August 2014); see also Nkhata MJ ‘The Role of Regional Economic Communities in the Protecting and the Promoting of Human Rights in Africa: Reflections on the Human Rights Mandate of the Tribunal of the

New regionalism is characterised by the voluntary process from within emerging regions where constituent States and other actors merge or pool their sovereignty to tackle global challenges.⁹⁰ New regionalism is not only limited or concerned with neighbouring group of States but also recognises the role of Non-State Actors in regionalisation.⁹¹ It seeks to avoid rigid theoretical postulates in regionalism.⁹² It is an acknowledgment of the pluralism of regionalism which may be overlapping, heterogeneous and often contradictory.⁹³ Under this approach any regionalisation project should be analysed in accordance to its individual characteristics instead of being restricted to some theoretical postulates. However, it is argued that although new regionalism is based on the fact that each region has its own internal dynamics, at the same time there is pressing evidence that regions must be understood in a global perspective.⁹⁴

2.3.2 Is Old and New Regionalism Applicable to Africa?

Having analysed the theories on regionalism, it is essential to consider whether they can explain regionalism in Africa. A research by Sakyi and Opuku on regionalism and economic integration in Africa shows that some of the theories of regionalism discussed above do apply in Africa. For instance, they argue that the establishment of the Organisation of African Unity (OAU) can be understood through the lens of neo-realism.⁹⁵ As already highlighted, at the core of neo-realism is the dominance of the State. In this regard, in relation to the OAU, this

Southern African Development Community' (2012) 20(1) *African Journal of International and Comparative Law* 88-90 (hereinafter Nkhata MJ (2012).

⁹⁰ Söderbaum & Shaw (2003)23.

⁹¹ Söderbaum & Shaw (2003) 24.

⁹² Schulz, Söderbaum & Öjendal(2003) 13.

⁹³ Schulz, Söderbaum & Öjendal (2003) 14.

⁹⁴ Schulz, Söderbaum & Öjendal (2003) 14.

⁹⁵ Sakyi D & Opuku E 'Regionalism and Economic Integration in Africa: A Conceptual and Theoretical Perspective' *The African Capacity Building Foundation*, Occasional Paper No.22 (August 2014)7 (hereinafter Sakyi & Opuku (2014).

is reflected in Article 3 of the OAU Charter which provided as some of its principles the sovereign equality of all member states, non-interference in the internal affairs of the state, respect for sovereignty and territorial integrity of each State, and for States inalienable right to independent existence, among others.⁹⁶ The concept of hegemony under neo-realism also explains Africa's regionalism, for instance, the role that President Kwame Nkrumah the former President of Ghana played in pushing for the establishment of the OAU and the role Muammar Ghaddafi the former President of Libya played in pushing for the establishment of the African Union.⁹⁷ As Khadiagala argues, leadership had always been important in the regional institutional building in Africa.⁹⁸

Apart from neo-realism, it is also argued that new regionalism can be used to explain regionalism in Africa. As Sakyi & Opuku state that 'despite the existence of different theories explaining regionalism in Africa, all recent forms of regionalism are classified under new regionalism regardless of the initiating entity.'⁹⁹ However, there are other voices that argue that Africa has not developed international relations theories in accordance to its own terms since it has been defined and oriented by dominant international agendas.¹⁰⁰ In that regard, there is need to develop new theories that capture African realities which distinguishes Africa's international relations from international politics of the so-called great powers.¹⁰¹

It is important to highlight that although the theories highlighted can be used to explain regionalism in Africa, there are other uniquely African ideologies that cannot be ignored such

⁹⁶ Sakyi & Opuku (2014).

⁹⁷ Khadiagala GM *Governing Regionalism in Africa: Themes and Debates* Centre for Policy Studies Policy Brief 51(November 2008) 3 (hereinafter Khadiagala GM (2008)).

⁹⁸ Khadiagala GM (2008) 3.

⁹⁹ Sakyi & Opuku (2014) 9.

¹⁰⁰ Murithi T 'Introduction: The Evolution of Africa's International Relations' in Murithi T (ed) *Handbook of Africa's International Relations* (2014) 1.

¹⁰¹ Tieku TK (2014)11.

as Pan-Africanism. There is no single definition of Pan-Africanism but whilst acknowledging its different dimensions, it can safely be defined as the expression of spirit of solidarity and cooperation among African countries and societies.¹⁰² Its initial principal aim was to end racial discrimination against people of African descent.¹⁰³ In the 21st Century, Pan-Africanism has taken a different form as it focuses on the right of Africans to take control of their social, economic and political affairs and achieve peace and development.¹⁰⁴ Pan-Africanism can also explain Africa`s common positions in different areas, including the administration of international criminal justice.¹⁰⁵ Therefore, in considering the regionalisation of international criminal justice in Africa, apart from the theories under new and old regionalism, Pan-Africanism can also be regarded as providing a theoretical basis for regionalisation.

2.3.3 Does the Old and New Regionalism Apply in the Regionalisation of International Criminal Justice?

Literature is divided on whether new and old regionalism can provide a theoretical foundation for regionalisation of international criminal justice. For instance, Poh Heng argues that institutionalism and neorealism can be used as a basis for regionalisation of international criminal justice and his research was specific to the ASEAN region.¹⁰⁶ On the basis of

¹⁰² Murithi T (2014) 1; Murithi T ‘Institutionalising Pan-Africanism: Transforming African Union Values and Principles into Policy and Practice’ ISS Paper 143 (June 2007) 1-2; Ndhlovu-Gatsheni SJ ‘Pan-Africanism and the International System’ in Murithi T (ed) *Handbook of Africa’s International Relations* (2014) 21 (hereinafter Ndhlovu-Gatsheni SJ (2014)).

¹⁰³ Murithi T (2014) 2; Ndhlovu-Gatsheni SJ (2014) 21-2.

¹⁰⁴ Murithi T (2014) 2.

¹⁰⁵ Murithi T (2014)2.

¹⁰⁶ Poh Heng T *Advancing International Criminal Justice in South East Asia through the Regionalisation of International Criminal Law* PhD Thesis, University of Nottingham (2014) available at <http://eprints.nottingham.ac.uk/27831/1/Thesis.pdf> (accessed on 28 January 2015) (hereafter Poh Heng T (2014)).

institutionalism, he argues that in order to stabilise their relations and instil orderly process in international criminal justice, States may establish or join institutions such as a regional court.¹⁰⁷ Based on neo-realism, sacrificing State sovereignty in order to enforce international criminal law is motivated by some relative advantage whereas opposing it entails some relative costs to the State.¹⁰⁸ He concludes that the rational or viability of a regional international criminal justice initiative exists regardless which of the theories is applied.¹⁰⁹ With specific reference to the regionalisation of international criminal justice in Africa, Tiba argues that functionalism or realism does not proffer a theoretical basis for the establishment of the regional court.¹¹⁰ He argues that functionalism understood as States creating and designing international institutions to solve cooperation problems fails to answer three fundamental questions : (1) why do courts emerge in some issue areas and not in others? (2) Why has it taken the African region longer to establish a criminal division when it thought of establishing other courts through the African Union? (3) What determines the timing of the establishment of courts?¹¹¹ There are different areas of cooperation among States but there is no way of explaining the establishment of courts in certain areas of cooperation and not in others, for example a court on trade related matters and not on criminal justice. The failure in explaining the timing of regionalisation is seen in that when the AU was adopting its Constitutive Act, it did not occur to the African leaders to establish a court with international criminal jurisdiction despite the genocide in Rwanda and the other conflicts that occurred in some parts of the continent after independence from colonial rule.¹¹² He also discounts the

¹⁰⁷ Poh Heng T (2014) 96.

¹⁰⁸ Poh Heng T (2014) 100-101.

¹⁰⁹ Poh Heng T (2014) 101.

¹¹⁰ Tiba K.F Regional International Criminal Courts: An Idea whose Time has Come (2016) 17 *Cardozo Journal of Conflict Resolution* 521-549 (hereinafter Tiba K (2016)).

¹¹¹ Tiba K (2016) 530-31.

¹¹² Tiba K (2016) 531.

realist argument that the exigencies of state power and interest, and the systemic influences that produces patterns of balancing and bandwagoning by States play an important role in regionalisation. He argues that while such argument may work in other regions such as Europe, it might not work in Africa where the sway of the economically strong States over the weaker nations is not as pronounced.¹¹³ In addition, the concept of hegemon cannot be applied to the expansion of criminal jurisdiction of the African court in that although strong African States may have diplomatic clout to maintain the issue on the agenda, they cannot influence the decision of other African States. For Tiba, the plausible explanation would be the politics of identity i.e. legitimate African grievances towards colonialism, racism and double standards of international relations.¹¹⁴

On his part, Burke-White argues that although the theory of regionalising international criminal justice might find its starting point in the first and second wave theories of regionalisation, the two waves do not provide a sound theoretical basis for the regionalisation of international criminal justice.¹¹⁵ Equally, the second wave fails to explain regionalisation of international criminal justice due to its economic centric nature as it focuses more on economic integration.¹¹⁶ Burke-White proposes an alternative theoretical approach to regional criminal enforcement which draws on elements from both the first wave and second wave theories of regionalism.¹¹⁷

¹¹³ Tiba K (2016) 532.

¹¹⁴ Tiba K (2016) 532. This politics of identity fits into the definition of Pan-Africanism.

¹¹⁵ Burke-White W (2003) 743.

¹¹⁶ Burke-White W (2003) 744.

¹¹⁷ Burke-White (2003) 744.

His theory is influenced by the proposition of liberal interrelations theory that consider individuals and private groups as fundamental actors in international politics.¹¹⁸ The proposed theory requires regionalisation is to be understood as a two-step process. First, States must develop a set of preferences in favour of regional outcomes and secondly, they must articulate and implement a strategy of regionalisation that aligns with those goals.¹¹⁹ The first step requires that ‘Government formulate a consistent set of national preferences’ in favour of regionalisation.¹²⁰ The national preferences represent that of the government and Non-State Actors e.g. the civil societies and other interest groups.¹²¹

After identifying the national preferences, the next step is the choice by a particular government of a strategy for regionalisation.¹²² Under this proposed theory, reference is made to Moravisk ‘bargaining over substantive cooperation’ among States whereby the ‘bargaining’ would only lead to regionalisation when ‘the benefits of reducing future political uncertainty outweigh the sovereignty costs of membership in regional organisations.’¹²³ Joining a regional mechanism is seen as more attractive and the sovereignty costs of membership to a regional organisations is significantly lower than that of a supranational institution such as the ICC as such:

‘If regional courts share the values of its Member States and enforces international criminal law within the scope of that value set, then members should have less to fear

¹¹⁸ This is more a new wave phenomenon that emphasizes on the importance of other actors that are Non-State in regionalism, see Burke-White (2003) 744; Moravisk A ‘Taking Preferences Seriously: A Liberal Theory of International Politics’(1997) 51(4) *International Organization* 513-53.

¹¹⁹ Burke-White (2003) 745.

¹²⁰ Burke-White (2003) 745; Moravisk (1998) 20.

¹²¹ Burke-White (2003) 745.

¹²² Burke-White (2003) 746.

¹²³ Burke-White (2003) 746; Moravisk A *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (1998) 21 (hereinafter Moravisk (1998)).

from such an organization. Within a regional framework, the potential range of perceived “foreign” invasive action by a criminal court would be reduced, thus increasing the domestic demand for regionalization and easing government’s decision to delegate sovereignty.’¹²⁴

In sum, the proposed theory of regionalisation of international criminal law requires domestic political calculations to influence States preferences to regionalisation. States then choose to delegate sovereignty to a regional enforcement mechanism when the benefits of regionalisation outweigh the costs of regionalisation. However, although the proposed approach provides a systematic way towards regionalisation, governments do not always act rationally in determining their policy preferences. The influence to regionalise may not be from within the State, it may also not be representative of the populace but the government officials that have the power to bind the States to international obligations. In the case of regionalisation of international criminal justice in Africa, the regional organisation, the AU, took a leading role in formulating the regional framework and as Chapter 4 of this thesis will show the two-stage process being proposed herein was not applied.

The theories under the old and new regionalism were influenced by European regionalism and were more towards economics. Burke-White advocates for completely a different theory of regionalisation of international criminal justice. For Africa, as Tiba rightly argues, the politics of identity i.e. the actual and perceived double standards in international relations, influenced regionalisation.¹²⁵ It is not easy to delimit regionalisation to a single theory as each regionalisation project must be considered individually, analysing the motive behind States and in the case of Africa the Inter-Governmental Organisation creating a regional

¹²⁴ Burke-White (2003) 747.

¹²⁵ Tiba K (2016) 532.

mechanism dealing with international crimes, the design and the goal that the regional mechanism seeks to achieve.

2.4. Arguments for and against Regionalism

Having considered some of the theoretical aspects of regionalism, this section will look into some of the arguments proffered throughout history, in favour of or against regionalism. The question as to whether regionalisation or regionalism is necessary is subjective and is also dependant on what the regional framework in question seeks to achieve. This section is a synthesis of some of the arguments proffered for or against regionalism in general.

2.4.1 Arguments for Regionalism

In support of regionalism it is argued that: there is a natural tendency towards regionalism within smaller groups of neighbouring States founded on homogeneity of interest, traditions and values¹²⁶; political, social and economic integration is more easily attainable among smaller number of states of a particular geographic area than on a global basis¹²⁷; regional economic cooperation provides effective economic units that can compete successfully in the world markets which is impossible for smaller States¹²⁸; local threats to peace are more willingly and appropriately dealt either by States in that particular area than by those which are further removed and have little direct influence on the conflict¹²⁹; as the world is not ready to establish a global authority capable of maintaining peace and promoting world welfare, regionalism is the first step in the establishing of consensus towards eventual full

¹²⁶ Ferreira-Snyman A 'Regionalism and the Restructuring of the United Nations with Specific Reference to the AU 44(3) *Comparative & International Law Journal South Africa* (2011) 360 (hereafter Ferreira-Snyman (2011)).

¹²⁷ Best E & Christiansen T 'Regionalism in International Affairs' in Baylis, Smith & Owens(eds) *The Globalization of World Politics, An Introduction to International Relations* 6 ed (2014) 402 (hereinafter Best E & Christiansen T (2014)); Ferreira-Snyman A (2011) 360

¹²⁸ Ferreira-Snyman (2011) 360.

¹²⁹ Abass A (2004) 34-43; Best E & Christiansen T (2014) 402; Ferreira-Snyman (2011) 360.

intergovernmental coordination or integration¹³⁰; and the heterogeneity of political, economic, social and geographic factors throughout the world that militates against global unity can easily be accommodated within a regional framework.¹³¹ As such in favour of regionalism, it is argued that:

‘The world is too diverse and unwieldy, the distances –physical, economic, cultural, administrative and psychological between peoples at opposite ends of the earth are too formidable to permit development of a working sense of common involvement and joint responsibility.’¹³²

It is argued that insisting on universality can make it lose its appeal as Edward Carr would argue:

‘The lure to universality has had since 1919 a dangerous fascination for promoters of international order. The universality of any world organisation almost inevitably tends to weaken its appeal to the particular loyalties and particular interests. It was probably the weakness of the League of Nations that its commitments were general and anonymous, it imposed the same obligations on Albania as on Great Britain, and the same obligation on both to defend the independence of Belgium against Germany and that of Panama against the United States. These generalisations should be justified in terms of pure reason but should not translated into terms of concrete policy so that the whole structure remains abstract and unreal...A world organisation may be a necessary convenience as well as a valuable symbol but the intermediate unit is more

¹³⁰ Ferreira-Snyman (2011) 360.

¹³¹ Bennet AL and Oliver JK *International Organisations: Principles and Issues* (2002) 238.

¹³² Claude IL *Swords into Plowshares: The Problems and Progress of International Organisations* 1 ed. (1971) 103(hereafter Claude IL (1971)).

likely to be the operative factor in the transition from nationalism to internationalism.¹³³

Admittedly, the relevance of regionalism in any area is also dependant on the nature of the problem to be dealt with whether at the national, regional or international level.¹³⁴ Whereas some problems are more international and can be effectively be dealt with by global agencies, whilst others are characteristically regional and as such their solutions should lie at the regional level.¹³⁵

2.4.2 Arguments against Regionalism

Some of the arguments against regionalism are as follows: as a result of world interdependence there are an increasing number of political, economic and social problems reaching across regional boundaries that require regional solutions and regional resources are often inadequate to resolve the problems of States within the region,¹³⁶ only a universal organisation can adequately manage the power of large States that can often dominate regional arrangements,¹³⁷ regions are imprecise and impermanent no agreement can be reached on a system of regions into which the globe can be conveniently be divided,¹³⁸ regional alliances create potential for rivalries and competition for military supremacy among regions, thus providing greater possibility for regional wars,¹³⁹ and regionalism can be a

¹³³ Carr EH *Nationalism and After* (1945) 45.

¹³⁴ Claude IL (1971) 103.

¹³⁵ Claude IL (1971) 103.

¹³⁶ Ferreira-Snyman (2011) 364. An example is failure by the AU to fund peace keeping missions in Africa which leads to dependants on donations from EU and other donors see Jentzsch C 'Opportunities and Challenges to Financing African Union Peace Operations' (2014) 4(2) *African Conflict and Peacebuilding Review* 86-107.

¹³⁷ Ferreira-Snyman (2011) 364.

¹³⁸ Ferreira-Snyman (2011) 364.

¹³⁹ Ferreira-Snyman (2011) 364.

countermovement against universal law through the expression of values that are counter to the universal law.¹⁴⁰

2.4.3 Arguments for and against Regionalism in International Criminal Justice

The arguments for and against regionalism highlighted in the previous section are an indication of the general debate on the subject. Regarding international criminal justice, the question has been dealt with in several writings, although not extensively. This section will thus highlight some of the arguments that have been made for and against regionalism in international criminal justice.

In favour of regionalism in international criminal justice, it is argued that regionalism offers a solution to criticisms levelled against supranational and national justice system.¹⁴¹ The criticisms relate to international mechanisms being ‘unwieldy, expensive and both physically and psychologically distant from the crimes in question’, whereas national courts although they are less expensive, they are said to often lack the juridical resources and as such they run a risk of bias.¹⁴² Therefore, it is argued that regional tribunals offer physical and psychological proximity, the latter being a sense of connection with the tribunal that is based on the understanding that a tribunal that is regarded as a foreign agent loses credibility.¹⁴³ It is further argued that regional mechanisms have low financial costs as compared to international mechanisms and are less likely to be subjected to political manipulation as opposed to national mechanisms.¹⁴⁴ This argument does not reflect some of the realities in

¹⁴⁰ Ferreira-Snyman (2011) 364; see also Simma B ‘Universality of International Law from the Perspective of a Practitioner’ (2009) 20 (2) *EJIL* 265-97.

¹⁴¹ Burke-White W (2003) 734 see also Burchill R ‘Regional Approaches to International Humanitarian Law’ (2010) 41 *VUWL* 205-34.

¹⁴² Burke-White W (2003) 734.

¹⁴³ Burke-White W (2003) 736.

¹⁴⁴ Burke-White W (2003) 738,741.

regional arrangements, for instance, the administration of justice at the regional level can equally be expensive as such the cost element does not always hold true in all circumstances. Regarding proximity, a regional court may not be as proximate to all the States forming the region. As previously highlighted in defining the concept region, regions are politically determined as such, in certain cases, and in the case of the AU member states, geographical proximity may not be a determining factor.

With regard to national courts, although they are considered to be the best forum for prosecuting international crimes, the perpetrators of those crimes might still be in power and as such it is usually difficult to prosecute them at the domestic level as such a regional court will provide an alternative forum for the prosecution of such crimes.¹⁴⁵ In the same vein, it is argued that at the international level, there is ‘limited room for justice’ owing to some jurisdictional limits such as the gravity requirements and the high threshold for the crimes falling within the jurisdiction of international courts such as the ICC.¹⁴⁶

In support of regionalisation of international criminal justice, it is also argued that regional tribunals reflect some shared sense of identity and values that is common amongst the members and in that sense it is regarded as being more legitimate as compared to an international framework.¹⁴⁷ This reflects the understanding that States are more willing to surrender their sovereignty to a regional court as opposed to an international court.¹⁴⁸

However, the effectiveness of a regional court is dependent on the powers that the States creating it has given it. In certain cases, the States creating such mechanism may make it so

¹⁴⁵ Genovese C & Van der Wilt H Fighting Impunity of Enforced Disappearances through a Regional Model (2014) 6(1) *Amsterdam Law Forum* 9 (hereinafter Genovese & Van der Wilt (2014)).

¹⁴⁶ Genovese & Van der Wilt (2014) 13.

¹⁴⁷ Burke-White W (2003) 737.

¹⁴⁸ Ferreira-Snyman (2011) 363.

toothless for purposes of self-protection, a clear example of this in Africa is the SADC Tribunal.¹⁴⁹

As against regionalism in international criminal justice, it is argued among other things that the development of international criminal law in a number of different courts carries a diffuse, incoherent cluster of international criminal law standards.¹⁵⁰ In that regard, the ICC being a permanent court, representing a majority of States, it is in a much better position to foster consistency.¹⁵¹ It is also argued that the crimes under the ICC Statute are ‘of concern to the international community as a whole’ as such victims of such crimes are not just victims in their specific communities but to the world at large.¹⁵² The threat of fragmentation of international criminal law through regionalism cannot be ignored, however, as the next section on regionalism and international law will show, there is a need to find methods or remedies to conflicts that may ensue as a result of regionalism.¹⁵³

A lot of arguments can be proffered in favour of or against the regionalism in international criminal justice. However, the appropriate approach is to consider each regional framework individually. In particular, consider how it can contribute to the most important goal of fighting impunity. Regarding Africa, the question as to whether regionalism should be there or not, although important, is foregone, since steps have already been taken to establish the

¹⁴⁹ Where after the Tribunal assumed human rights jurisdiction in a case involving the controversial land policy in Zimbabwe, the SADC heads of States decided to review the mandate of the SADC Tribunal. For details relating to the case see Nkhata MJ (2012) 87-109.

¹⁵⁰ Rauxhloh (2007) 73, 76 she argues that if all the regions of the world developed their own courts, different standards will emerge across different regions.

¹⁵¹ Rauxhloh (2007) 74.

¹⁵² Paragraph 4 Preamble of the ICC Statute; Rauxhloh (2007) 74.

¹⁵³ Van den Herik L & Stahn C *Diversification and Fragmentation of International Criminal Law* (2012) 25.

regional framework. The issue to be considered is to consider its salient features and assess how much it can contribute to fighting impunity.

2.4.4 Interim Conclusion

At this stage, it can be concluded that regionalisation is a political process and as rightly argued by Koskenniemi & Leino that ‘special regimes and new organs are often created as tools or reactions to political present that has proved to be unsatisfactory.’¹⁵⁴ Different theories in both new and old regionalism gives a general impression on why states regionalise. In as far as the process of regionalisation of international criminal justice in Africa, it would be necessary to analyse the history and the reasons given for that regionalisation and relate the same to the highlighted theories. Apart from the old and new theories of regionalism, Pan-Africanism can be used as a theoretical basis for explaining regionalism in international criminal justice in Africa.

Different arguments have been proffered for and against regionalism generally and that of international criminal justice. The benefits of a regional framework lie in both its design and how effective it is in practice. It is therefore imperative, to critically analyse the Malabo Protocol and the ACJHPR Statute to determine how they contribute towards creating an effective court.

2.5 Regionalism and the Threat of Fragmentation

At this stage, it can be understood that regionalism is influenced by political goals. In pursuit of their political goals, States develop a form of ‘regional international law’. In specific areas of international law such as international criminal law, it would be ‘regional international criminal law’. In certain cases, the regional approach may differ or be contrary to

¹⁵⁴ Koskenniemi M & Leino P ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *LJIL* 578.

international law. It is therefore important to consider how such differences are dealt with in international law in order to inform dealing with similar challenges in international criminal law. The choice for regionalisation of international criminal justice presents a similar challenge whereby the decision to regionalise was made by a political body and a legal instrument is drafted to implement the decision of the political body. The legal instrument in question when it comes into force will represent a regional perspective on international criminal law that is in certain areas different from the international framework under the ICC Statute and other international instruments providing for international crimes e.g. the Genocide Convention.¹⁵⁵

The establishment of a regional court brings into issue the arguments relating to universalism versus regionalism. In addition, it also brings into issue the concerns on fragmentation of international criminal law, especially where the regional Statute has different norms to that under the ICC Statute and international law in general. It also brings into issue the question of conflict of jurisdiction between different regimes i.e. the regional and the international court.¹⁵⁶

With regard to fragmentation, it is said to occur when different treaty regimes are set up by states and there is no coordination between such regimes hence the potential for conflict.¹⁵⁷ In fact, it was the proliferation of international courts and tribunals that sparked off the debate

¹⁵⁵ see Chapter 6 of the thesis for an analysis of areas of divergence between the definitions of crimes under the ICC Statute as compared to under the ACJHPR Statute.

¹⁵⁶ Del Vecchio an *International Courts and Tribunals Between Globalisation and Localism* (2012) 197-8 (hereinafter Del Vecchio A (2012)); Shany Y *The Competing Jurisdictions of International Courts and Tribunals* (2003) (hereafter Shany Y (2003)).

¹⁵⁷ Koskenniemi M *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, ILC, A/CN.4/L.682 (April 2006) 13 available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf (accessed on 17 August 2014) (hereafter Report on Fragmentation (2006)).

on fragmentation.¹⁵⁸ An International Law Commission (ILC) report on fragmentation of international law gives three meanings of regionalism in international law that should be taken into account. First, regionalism can be understood as a set of approaches or methods of understanding international law.¹⁵⁹ This refers to particular orientations of legal thought and culture for instance, ‘Anglo-American’, ‘Continental’ ‘European’ or ‘Third world’ approaches to international law.¹⁶⁰ Secondly, regionalism is understood as a technique for international law making.¹⁶¹ This second aspect is based on the understanding that international law should develop in the regional context and due to the homogeneity of interests and actors, there is efficient and equitable implementation of the relevant norms.¹⁶² Thirdly, regionalism is understood as the pursuit of geographical exception to universal international law.¹⁶³ In a positive sense, this might mean a rule with a regional sphere of validity or in a negative sense might mean a limitation to the sphere of validity of a universal rule or principle.¹⁶⁴ In its positive sense, the rule or principle is binding only on states that are members to the regional framework whereas in the negative sense, regionalism would exempt states that are members of a regional framework from the binding rule of a universal rule or principle.¹⁶⁵ Regionalism in international criminal justice in Africa reflect in varying degrees

¹⁵⁸ Spelliscy S ‘The Proliferation of International Tribunals: A Chink in the Armor’ (2001) 40 *Columbia Journal of Transnational Law* 143-176; Stahn C & Van den Herik LJ ‘Fragmentation, Diversification and ‘3D’ Legal Pluralism: International Criminal Law as the Jack-in-the Box?’ in Van den Herik LJ & Stahn C *The Diversification and Fragmentation of International Criminal Law* (2012) (hereinafter Stahn C & Van den Herik LJ (2012).

¹⁵⁹ Report on Fragmentation (2006) 103.

¹⁶⁰ Report on Fragmentation (2006) 103.

¹⁶¹ Report on Fragmentation (2006) 106.

¹⁶² Report on Fragmentation (2006) 106.

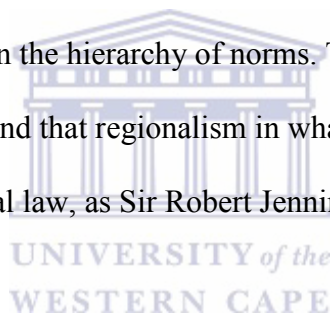
¹⁶³ Report on Fragmentation (2006) 108.

¹⁶⁴ Report on Fragmentation (2006) 108.

¹⁶⁵ Report on Fragmentation (2006) 109, see also Pulkowski D ‘Theoretical Premises of Regionalism and the Unity of International Law’ ESIL Conference Paper Series (Paper No 16/2012) 3 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193763 (accessed on 17 August 2014) (hereafter

the three meanings of understanding regionalism as highlighted in the ILC report. As the analysis of the provisions in Chapter 6 will show, certain provision reflects the continental approach to international criminal law, whilst other provides an exception to ‘universal’ international criminal law. An example will be the immunity provision whereby the continental position had always been that immunity should apply to sitting heads of States and senior public officials despite the position being different under the ICC Statute.¹⁶⁶ In this case, the immunity can be understood on one hand as a continental approach to international criminal law whilst on the other hand it can also be understood as a pursuit of regional exception to the ‘universal’ international criminal law.¹⁶⁷

The challenge is to find a way of making these different regimes work together in harmony. For a positivist, the solution lies in the hierarchy of norms. The underlying aspect being the universality of international law and that regionalism in whatever form does not affect the universal character of international law, as Sir Robert Jennings elaborates in the following manner:



‘[T]he first and essential principle of public international law is its quality of universality; that is to say that it be recognised as valid and applicable in all countries whatever their cultural, economic, social, political, or religious histories and traditions...that is not to say, of course, that there is no room for regional variation, perhaps even in matters of principle. Universality does not mean uniformity. It does

Pulkowski D (2012), he defines ‘regional international law’ as geographically confined form of particular international law. His examples of regional international law are in the area of trade law where the regional trade agreements complement the more universal regime of the World Trade Organisation (WTO) or in the area of human rights where the creation of regional systems for human rights protection applies in addition to the international covenants

¹⁶⁶ Cf Article 46 A *bis* Malabo Protocol and Article 27 ICC Statute.

¹⁶⁷ Article 46 A *bis* ACJHPR Statute; On the point of immunity being a regional exception to international criminal law see Du Plessis M (2014).

mean however that such a regional international law, however variant, is part of the system as a whole, and not a separate system, and it ultimately derives its validity from the system as a whole.’¹⁶⁸

At the domestic level, where there is a clear hierarchy of norms, the solution would have been easier, whereby the superior norms would take precedence over inferior norms.¹⁶⁹ It is therefore essential to unpack the challenges of applying positivism in resolving conflict of norms in international law.

2.5.1 The Challenge of Positivism in the Regionalisation of International Law

Positivism in international law can be considered an opposite to realism in political theory in that whereas realists in political science dismiss the importance of law in world politics, the positivists in international law declare that the law transcends the everyday world of politics.¹⁷⁰ Positivists develop arguments of legality of international law on the basis that international law when created by multilateral treaties such as the Charter of the UN may become ‘law properly so called’ through the incorporation into the domestic via the process of ratification.¹⁷¹ One of its major proponents is Hans Kelsen who developed the pure theory of law which attempts to answer what law is not what it ought to be.¹⁷² He states that the theory represents a science of law not legal politics and that it is called the pure theory of law because it only describes the law and attempts to eliminate from the object of this description

¹⁶⁸ Jennings RY ‘Universal International Law in a Multicultural World’ in Bos M & Brownlie I (eds) *Liber Amicorum for the Rt. Hon. Wilberforce* (1987) 39, 41-2.

¹⁶⁹ Shany Y (2003) 94-5 domestic legal systems have a clear normative structure in place (e.g. constitution, primary legislation, secondary legislation) whereas international norms are generally considered to be on the same normative level regardless of source and validity (customs, treaties and general principles of law).

¹⁷⁰ Armstrong, Farrell & Lambert 2ed *International Law and International Relations* (2012) 10 (hereinafter Armstrong, Farrell & Lambert (2012) respectively).

¹⁷¹ Armstrong, Farrell & Lambert (2012) 11.

¹⁷² Kelsen H *The Pure Theory of Law* (1967) (hereafter Kelsen H (1967)).

everything that is not strictly law.¹⁷³ The pure theory of law undertakes to delimit the cognition of the law against the adulteration from other disciplines such as psychology, sociology, ethics and political theory.¹⁷⁴ The pure theory does not seek to ignore or deny the connection of the law with other disciplines but wishes to avoid the uncritical mixture of methodological different disciplines (methodical syncretism) which he argues obscures the essence of the science of the law and obliterates the limits imposed on it by the nature of its subject matter.¹⁷⁵

Central to Kelsen's theory is the concept of the 'norm' which in his thought has the essential meaning that in the event of an act 'A' occurring, a specific consequence 'B' is to occur as such norms are propositions that something ought to happen in given circumstances.¹⁷⁶ With regard to international law, he argues that international law is law if it is a coercive order, that is to say a set of norms regulating human behaviour by attaching certain coercive acts (sanctions) as consequences to certain facts, as delicts, determined by this order as conditions and the specific sanctions of international law are war and reprisals and both are regarded as sanctions of international law¹⁷⁷

The Kelsen approach would work effectively where there is some form of hierarchy of norms. Unlike on the domestic level, such hierarchy does not exist in international law generally. Pulkowski proposes that in order to deal with a situation of conflict between the regional and the international framework, the solution lies in integrating of a rule into coherent and unified whole as the condition for validity.¹⁷⁸ This is influenced by the positivist

¹⁷³ Kelsen H (1967) 1.

¹⁷⁴ Kelsen H (1967) 1.

¹⁷⁵ Kelsen H (1967) 1.

¹⁷⁶ Kelsen H (1967) 3-17.

¹⁷⁷ Kelsen H (1967) 320.

¹⁷⁸ Pulkowski D (2012) 5.

approach and the grundnorm which unifies the legal order into a single, coherent system. As already noted, the theory may be difficult to apply in practice in that although conflicting rules may be undesirable, they are inconceivable when regionalising any area of international law.¹⁷⁹ As a matter of rule, there is no obligation on the part of the regional international law to recognise the primacy of universal international law. It is argued that international law does not require all norms in the system to be seamlessly integrated with each other in order to be recognised as valid.¹⁸⁰ The question therefore remains on how the conflicts can be resolved.

2.5.2 Resolving Conflict of Norms

Conflict exists where different norms apply at the regional and international level that a party to both frameworks cannot comply with one without violating the other.¹⁸¹ The norms in question are mutually exclusive and they cannot co-exist in a legal order.¹⁸² The precise example is that if a subject would observe norm 'A' it would violate norm 'B' and if were to observe norm 'B' it would violate norm 'A'.¹⁸³ As the report on fragmentation of international law notes, regionalism might be pursued to exempt members of a regional framework from applying the binding rule of a universal framework.¹⁸⁴ The challenge is that conflict causes uncertainty to any area of international law in that the subject of the law is unable to behave in conformity with both applicable norms.¹⁸⁵ The challenge is finding the

¹⁷⁹ Pulkowski D (2012) 5.

¹⁸⁰ Pulkowski D (2012) 6.

¹⁸¹ Vranes E 'The 'Norm Conflict' in International and Legal Theory' (2006) 17 *European Journal of International Law* 395-418

¹⁸² Sadat-Akhavi SA *Methods of Resolving Conflicts between Treaties* (2003) 5 (hereinafter Sadat-Akhavi SA (2003)).

¹⁸³ Kammerhofer J *Uncertainty in International Law: A Kelsenian Perspective* (2011) 139 (hereinafter Kammerhofer J (2011)).

¹⁸⁴ Report on Fragmentation of International Law (2006) 108.

¹⁸⁵ Kammerhofer J (2011) 139.

appropriate method of dealing with such a conflict. There are several factors that make resolving such conflicts a challenge and these include first, that the mere breach of a norm does not change or negate its validity,¹⁸⁶ secondly, there is no hierarchy of norms under international law and thirdly the absence of systematic relationships between different levels of implementation.¹⁸⁷

The traditional approaches for dealing with such conflicts of norms in international law include the adoption of the maxims of *lex posterior*, *lex specialis* and *lex superior*.¹⁸⁸ The report on fragmentation of international law provides a detailed analysis on how these maxims, rules or principles apply. The maxim *lex specialis derogate legi generali* suggests that whenever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific.¹⁸⁹ The maxim may apply to norms that are within the same treaty, between two different treaties or between a treaty and non-treaty standard.¹⁹⁰ The maxim *lex posteria derogate legi priori* means ‘the later law supersedes an earlier law’. *Lex posteria* maxim entails that state parties to a treaty are also parties to an earlier treaty on the same subject, the earlier treaty is not suspended or terminated but it will only apply to the extent its provisions are compatible with those of a later treaty.¹⁹¹ The maxim *lex superior derogate lex inferiori* means that superior norms suppress inferior norms. This maxim operates on the basis of existence of hierarchy of norms in international law. In this regard,

¹⁸⁶ Kammerhofer J (2011) 141.

¹⁸⁷ De Hoogh ‘A Regionalism and the Unity of International Law from a Positivist Perspective’ (2012) ESIL Conference Paper No. 3/ 2012 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193745 (accessed on 18 August 2014) who talks of rudimentary relationship between domestic, regional or international order.

¹⁸⁸ Report on Fragmentation (2006) 25.

¹⁸⁹ Report on Fragmentation (2006) 34-64.

¹⁹⁰ Report on Fragmentation (2006) 34.

¹⁹¹ Article 30(3) Vienna Convention on the Law of Treaties (1969).

peremptory norms (*jus cogens*) are universally accepted as superior.¹⁹² A rule may be regarded as superior by virtue of treaty provision and this is the case of Article 103 of the United Nations Charter.¹⁹³

The traditional devices and instruments are not dogma and may not make sense in every circumstance. Kammerhofer argues that the problem with these devices is that they are so universally accepted that no one questions their legitimacy as a means of resolving conflict of norms.¹⁹⁴ He argues that there is no work that delve into the theoretical basis or justification of these maxims.¹⁹⁵ The report itself expresses reservation on the application of these maxims in the following manner:

‘Do Latin maxims (*lex specialis*, *lex posterior*, *lex superior*) still have relevance in the resolution of conflicts produced in a situation of economic and technological complexity? Although this report answers this question in the positive, it also highlights the limits of the response. Public international law does not contain rules in which a global society’ problems are, as it were, already resolved. Developing these is a political task.’¹⁹⁶

There is no consistent practice on the part of States on which method is most favourable for resolving conflicts.¹⁹⁷ Sadat-Akhavi suggests a 5 point criteria for resolving treaty conflicts and these are: (i) ascertaining the existence of a conflict ; (ii) ascertaining the conflict

¹⁹² Article 53 Vienna Convention on the Law of Treaties (1969).

¹⁹³ Article 103 UN Charter provides that ‘In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail ‘.

¹⁹⁴ Kammerhofer (2011) 146.

¹⁹⁵ Kammerhofer (2011) 146.

¹⁹⁶ Report on Fragmentation (2006) 247.

¹⁹⁷ Sadat-Akhavi SA (2003) 186.

resolving clause in the treaties involved; (iii) in the absence of the conflict resolving clause, reference must be made to Articles 30 (3),(4) and (5) of the VCLT;(iv) if there is no rule of conventional law applicable, reference must be made to the intention of the State Parties as to the method of resolving conflicts; and (v) in cases not falling under (i)-(iv) the principle of ‘priority of the later treaty over the earlier one’ should be applied.¹⁹⁸ Although she set down this criteria, she acknowledges that there are certain exceptions that depends on the type of the treaty in issue,¹⁹⁹ as such the question of conflict of norms in international law treaties will require an in-depth study to consider whether the rules propounded are applicable.

2.5.3 Resolving Conflict of Jurisdiction

It has been highlighted that fragmentation can also cause conflict of jurisdiction in the case where the regional and international court share some common jurisdiction.²⁰⁰ The viable solution for avoiding conflict of jurisdiction is proposed as the availability of “substantive inadmissibility provisions in agreements [or treaties] that grant right to bring action before various courts or tribunals.”²⁰¹ In international criminal law, complementarity is the relevant rule applied in resolving conflict of jurisdiction between the ICC and domestic courts and the same can be extended to regional courts. Complementarity is favorable for two main reasons, first, for its political acceptability as it does not seek to elevate the ICC to a superior status,

¹⁹⁸ Sadat-Akhavi SA (2003) 212.

¹⁹⁹ Sadat-Akhavi SA (2003) 213-47 where she gives example of human rights treaties and private law treaties with special rules for conflict resolution.

²⁰⁰ Del Vecchio A (2012) 181 where she argues that the proliferation of international courts and tribunals lead to conflict of jurisdiction and consequences which include conflicts of interpretations with regard to the same rule.

²⁰¹ Del Vecchio A (2012) 201. She gives an example of Article 282 of UNCLOS which provides that:

“If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this Part, unless the parties to the dispute otherwise agree.”

which could be resisted by States protecting their sovereignty. Secondly, complementarity has already proved to be effective in dealing with managing conflict of jurisdiction between the domestic and the international level, as such the same rules guiding the domestic level and the ICC can be extended to apply to the regional and the ICC. As Berman in his work on legal pluralism confers complementarity as one method of dealing with jurisdiction redundancies stating that:

‘Complementarity regimes are a more formalized way of harnessing the potential power of jurisdictional redundancy. Here the idea is that when two legal communities claim jurisdiction over an actor, one community agrees not to assert jurisdiction, but only so long as the other community takes action. This is a hybrid mechanism because one community does not hierarchically impose a solution on the other, but it does assert influence on the other’s domestic process through its mere presence as a potential jurisdictional actor in the future. The best-known complementarity regime in the world today is the one enshrined in the statute of the International Criminal Court.’²⁰²

A detailed analysis of the principle of complementarity will be done in the next chapter it suffices to state that in order to be an effective mechanism for dealing with conflict between two different regimes, there must be recognition and a deliberate measure towards creating a dialect between the two different regimes. Insistence on a hierarchy as has been highlighted might prove difficult, however, the best approach is for the different regimes to complement each other. Regarding international criminal law, the framework for complementarity that is

²⁰² Berman PS ‘Global Legal Pluralism’ (2007) *South California Law Review* 1215 see also Van Sliedregt E ‘Pluralism in International Criminal Law’ (2012) 25 (4) *Leiden Journal of International Law* 847-55.

already provided for under the ICC Statute and has guided the relationship between the domestic and the ICC, can be extended to regional mechanisms.

2.6 Conclusion

This chapter has provided a conceptual basis for regionalisation of international criminal justice in Africa. It has defined the concepts of region, regionalisation and regionalism clarifying that it is essential to understand regionalisation as a process and regionalism as the underlying ideology. In defining region, the most important factor is that it cannot be restricted to geographic proximity of states, although it is a relevant factor. Regions have emerged between states that are geographically far apart and as such the pragmatic approach is to accept that regions are politically determined.

The answer to the question why states regionalise lies in regionalism theories in international relations and falls under the old and new regionalism theories. As far as regionalisation in Africa is concerned, the role of Pan-Africanism as an important underlying ideology cannot be ignored. This is also regarded as the politics of identity, whereby actual and perceived bias of the international system can trigger the process of regionalisation.

Regionalism in any area of international law, including international criminal law bring into issue the debates of regionalism versus universalism and the issue of fragmentation of international criminal law. The regionalisation of international criminal law can be a threat to the universality of international criminal law particularly through different norms applying at the region and at the international level. The conflict of norms resulting from regionalism are conceivable but there is a need for an in-depth study on resolving such conflicts between the ICC and the regional framework. In addition, there is a potential conflict of jurisdiction between the region and the ICC. The appropriate principle that can effectively resolve such conflict of jurisdiction is the principle of complementarity. It is therefore necessary to

consider how complementarity between the regional court and the ICC would work and the following chapter will provide a discussion on the same



CHAPTER 3

THE ICC STATUTE AND REGIONALISM IN INTERNATIONAL CRIMINAL JUSTICE

3.1 Introduction

This chapter analyses the provisions of the ICC Statute to determine how regionalism is reflected therein and how the process of regionalisation can be undertaken based on its provisions. The chapter also analyses the principle of complementarity provided in the ICC Statute to assess its applicability to regional courts. At this stage, there is no such court in existence, however, the adoption of the Malabo Protocol and the proposed expansion of the African Court of Justice and Human and Peoples Rights (ACJHPR) necessitate such an analysis. In addition, the chapter analyses provisions on admissibility of cases before the ICC to determine whether a regional court can fit within the laid down assessment criteria for admissibility. It will also consider the proposal for amendment of the ICC Statute so that it recognises regional courts and assesses the strengths and weaknesses of the proposal.

3.2 Is there Provision for Regionalism under the ICC Statute?

Regionalism is not mentioned in the ICC Statute. However, there are some provisions in the Statute that can be considered to have some connotations of regionalism. In that regard, there is a need to analyse these provisions and consider their significance.

3.2.1 Geographical Proximity

Geographical proximity is considered as one of the advantages of having a regional as opposed to an international criminal court.¹ It is advantageous in that the prosecution of international crimes is done within or close to the communities where the crimes were committed. The issue to be considered is whether the element of geographical proximity is available within the provisions of the ICC Statute. Article 3 of the Statute, establishes The Hague as the seat of the court. However, Article 3(3) of the Statute provides that the Court can sit elsewhere, whenever it considers it desirable as provided in the Statute. Whereas Article 62 provides that ‘unless otherwise decided, the place of the trial shall be the seat of the court.’

The question of the seat of the Court has often been raised within the context of the Africa and ICC conundrum, whereby the issue is whether it is possible for the ICC to move trials to Africa, where most of the situations under investigation are located.² In most of these situations, it would be practically impossible for the ICC to move proceedings to situation countries considering that most of such countries are conflict areas, and that therefore, it would be risky and unsafe to have trials there.³ For instance, in the case of *The Prosecutor v Thomas Lubanga Dyilo*, the prosecution indicated to the Court that it intended to discuss the place of trial.⁴ There was a general agreement to move part of the trial to the DRC. However,

¹ Burke-White W (2003) 735.

² Gosnell CM, ‘A Court Too Far’ *New York Times* of 28 March 2008.

³ In the Lubanga Trial, although the prosecution and the defence wanted the trial to move to the DRC, the witnesses did not feel comfortable to testify in there, see *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, Annex 2 at paras. 68- 69 (24 April 2008).

⁴ Prosecution's response to the "Réponse de la Défense à l'invitation de la Chambre de Première Instance à présenter des conclusions sur des questions devant être tranchées à un stade précoce de la procédure", ICC-01/04-01/06-941, para. 11(15 August 2007).

in deciding whether to move or not, the Court considered a letter that was sent to the Court by the DRC Government through its Minister of Justice stating that the DRC Government would not accept such a move as it would lead to ethnic tensions in the areas that had just been pacified.⁵ The Court then made a finding that in the absence of consent from the DRC and taking into account the reasons given, the place of trial would remain The Hague.⁶

A similar request to change the place for trial was made in the case of *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* where the defence requested that proceedings be moved to Kenya or to Arusha, Tanzania in order to minimise disruption in the defendants' public and private lives, facilitate investigations, and bring justice closer to the Kenyan people.⁷ In a plenary session, the Court held that they were in principle in favour of bringing the proceedings closer to the affected communities.⁸ However, the Court ultimately rejected the proposal citing, among other things, security concerns and the cost implications of holding proceedings outside The Hague.⁹ The opinion of the Court was divided between some judges supporting the idea and others not and after voting, they did not reach the two-thirds procedural requirement provided under rule 100(3) of the Rules of Procedure and Evidence.¹⁰ The Lubanga and Ruto decisions show that security, host state consent and costs

⁵ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, Annex 2 at para. 105(24 April 2008).

⁶ *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Trial Chamber I Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, Annex 2(24 April 2008) para 105.

⁷ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang*, ICC-01/09/11-567, Joint Defence Application for a Change of Place where the Court shall sit for Trial (24 January 2013).

⁸ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial ICC-01/09-01/11-875-Anx (26 August 2013) para 10.

⁹ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* Decision of the Plenary of Judges on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial ICC-01/09-01/11-875-Anx (26 August 2013) para 12.

¹⁰ *The Prosecutor v William Samoei Ruto and Joshua Arap Sang* Decision of the Plenary of Judges

implication are some of the factors that the Court takes into account in order to decide whether to change the place of trial or not.

Ford argues that instead of a situation country, a regional set up would be a suitable replacement whereby the trials are not necessarily held in the situation country but in a country within the same region.¹¹ He bases his argument on purposive interpretation of Articles 3, 4 and 62 of the ICC Statute as follows:

‘First, the ordinary meaning of Article 62 of the Rome Statute allows the Court to move all or most of its trials to local or regional chambers if that would be in the interests of justice. Second, Article 4(2) of the Rome Statute should be interpreted to permit the ICC to exercise un-enumerated powers where those powers are essential to the implementation of the ICC’s authority to move the place of the trial. Accordingly, the ICC has the authority to create a local or regional trial chamber, including the authority to enter into a formal agreement with the receiving country, sign multi-year contracts to acquire the use of suitable facilities, and post staff to the receiving country.’¹²

The conclusion that based on Articles 3, 4 (2) and 62 of the ICC Statute, the ICC has authority to create regional chambers is rather tenuous. First, in as much as Article 3 of the ICC Statute allows the change of the place of trial, whenever the court desires to do so, and Article 4(2) provides that the Court may exercise its functions on territory of a State Party or by agreement any another State, they do not give the court power to create a regional ICC.

on the Joint Defence Application for a Change of Place where the Court Shall Sit for Trial ICC-01/09-01/11-875-Anx (26 August 2013) para 14.

¹¹ Ford S ‘The International Criminal Court and Proximity to the Scene of the Crime: Does the Rome Statute permit all of ICC’s Trials to Take Place at Local or Regional Chambers?’ (2010) 43 *John Marshall Law Review* 717 (hereinafter Ford S (2010)).

¹² Ford S (2010) 751.

Secondly, Article 62, refers to ‘unless otherwise decided’ which suggest that shifting the trial from the seat of the court is a matter of exception. In addition, Rule 100, the relevant procedural provision in the Rules of Procedure and Evidence, only caters for situations where the court considers that it is in the interest of justice to sit in another State but does not provide for the creation of a regional chamber.¹³ In that regard, the provisions only relate to shifting in place of trial and they do not give a mandate to create a regional ICC.

3.2.2 Geographical Appointments

Another aspect of the Rome Statute that considers regionalism is the selection of judges and appointment of other staff members of the Court. Regarding selection of judges, the Statute provides that States Parties shall take into account the need within the membership of the Court for equitable geographical representation.¹⁴ A similar criterion applies when the Prosecutor and the Registrar of the Court are employing members of staff.¹⁵

This is what Burke-White regards as a soft option of regionalisation, that does not necessarily involve the creation of a regional court but involves taking into account some regional considerations when dispensing justice at the international level.¹⁶ However, on the basis of the premise that Judges are supposed to be independent, and that at the international level they are not representing their states interests, geographical representation is irrelevant in countering allegations of bias against the Court.¹⁷ As an example, in response to allegations of bias against Africa by the Court, it would be overstretching the point to argue that such

¹³ Rule 100(1) -(3) Rules of Procedure and Evidence.

¹⁴ Article 36 (8) (a) (ii).

¹⁵ Article 44(2) it is provided that apart from efficiency, competency and integrity, the criteria in Article 36 (8) shall apply.

¹⁶ Burke-White W (2003) 731.

¹⁷ Chandrachud A ‘Diversity and the International Criminal Court: Does Geographic Background Impact Decision Making’ (2013) *Brook. J. Int’L* 487-520

allegations should not arise because the Court employs staff from Africa, including the Prosecutor and judges. Such an argument cannot be sustained and amounts to reading more into geographical representation since the judges and prosecutors are not political actors to represent the interests of the region from which they come from as they are supposed to act independently within the law. It is therefore not cogent to connect geographical representation to matters of bias or independence of the Court. On a positive note, Geographical representation has the advantage of bringing staff from different legal systems to help complement the mixed legal system that was created under the ICC Statute.

3.2.3 Cooperation with Intergovernmental Organisations

Intergovernmental Organisations describes organisations set up by two or more States through an agreement and the AU is an example of such.¹⁸ Cooperation between IGOs and the ICC is regulated under Part 9 of the ICC Statute which provides for international cooperation and judicial assistance. Article 87 (6) of the Statute states as follows:

‘The Court may ask any intergovernmental organisation to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed with such an organisation and which are in accordance with its competence or mandate.’

The provision does not create a mandatory obligation for cooperation on the part of intergovernmental organisations.¹⁹ The justification behind such wording is that ‘the Court and the intergovernmental organisation are placed on the same level as distinct international legal subjects.’²⁰ Equally, there are no consequences under the Statute for an

¹⁸ Per Akehurst M A *Morden Introduction to International Law* (1977) 71.

¹⁹ Cf Article 86 which makes it mandatory for States Parties to cooperate fully with the Court in the investigation and prosecution of crimes.

²⁰ Triffiterer O (1999) 1064.

intergovernmental organisation's failure to cooperate with the court.²¹ The Statute does not envisage that there will be regional courts, created by intergovernmental organisations, with similar jurisdiction as the Court, which necessitates a solid working relationship as the possibility of conflict of jurisdiction is high in such cases. Therefore, the case for a systematic relationship that guarantees cooperation between different levels of accountability for international crimes cannot be overemphasised.

3.3 Complementarity and the Regionalisation of International Criminal Justice

The complementarity principle under the ICC Statute entails that national jurisdictions have the primary responsibility over investigation and prosecution of international crimes.²² In that regard, the ICC or a regional court would provide some form of residual or subsidiary mechanism for dealing with international crimes. Since the regional and the international are residual or subsidiary mechanisms, it must be established which forum between the two would assume jurisdiction when the domestic level is unwilling or unable to prosecute international crimes.

It is rightly argued that whenever a judicial body fulfils functions that can be or are also in fact fulfilled by another judicial body, the question of mutual relationship and interaction between these organs arise.²³ In the negotiations towards the establishment of the ICC, the question was relevant in relation to national and international jurisdictions and complementarity was put forward as a solution.

²¹ Art 87 (7) provides that where a State Party fails to comply with a request to cooperate the Court may make a finding to that effect. An example of that finding in Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir.

²² Par 10 Preamble, Article 1 ICC Statute.

²³ Kleffner JK *Complementarity in the Rome Statute and National Criminal Jurisdictions* (2008) 58 (hereinafter Kleffner JK (2008)).

It is simple to assert that complementarity extends to regional courts in that where a crime is being investigated or prosecuted by a regional court, the ICC must not exercise its jurisdiction. However, one must analyse the text of the ICC Statute to ascertain how it can be applied to a regional court.²⁴ In the previous chapter, complementarity has been proposed as the most viable solution for resolving conflict of jurisdiction between different regimes in international criminal justice. This part will provide meat to that proposition by analysing the salient details of the principle. This will be done through the analysis of Articles 1, 17, 20(3) of the Rome Statute and paragraph 10 of the preamble to the ICC Statute. The questions to be answered are whether the principle of complementarity under the ICC Statute accommodate administration of international criminal justice at the regional level and whether a case be rendered inadmissible at the ICC on the ground that it is being or has been investigated or prosecuted by a regional court.

3.3.1 Defining Complementarity

It is difficult to come up with a precise definition of what complementarity means. The dictionary meaning of the term is ‘a complementary relationship or situation’²⁵ or ‘a state or system that involves complementary components.’²⁶ Components are complementary if they complete each other.²⁷ The dictionary meaning envisages two things that are different from each other but work to their mutual benefit. The dictionary meaning provides a starting point to understanding the meaning of complementarity however an analysis of the text of the ICC Statute and relevant case law will provide a deeper understanding of the concept.

²⁴ Jackson M ‘Regional Complementarity: The Rome Statute and Public International Law’ (2016) 14(5) *JICJ* 1061-72.

²⁵ Pearsall & Trumble *The Oxford English Reference Dictionary* 2ed (1996) 296, see also El Zeidy M *The Principle of Complementarity in International Criminal Law, Origin Development and Practice* (2008) 1.

²⁶ *Collins English Dictionary: 21st Century Edition* 5ed (2001) 327.

²⁷ Pearsall & Trumble *The Oxford English Reference Dictionary* 2ed (1996) 296.

Literature emphasises on the dual nature of complementarity or, simply put, as its ‘double life’.²⁸ On one hand, complementarity is a technical rule on admissibility in the ICC Statute determining whether a case can be prosecuted at the ICC or not, whereas, on the other hand complementarity can be understood as a ‘big idea’ that entails a broader understanding of the principle.²⁹ The ‘big idea’ refers to what is regarded as the catalysing effects of complementarity which are: (i) an obligation on the States Parties to investigate and prosecute international crimes pursuant to the ICC Statute (ii) an obligation to criminalise in the domestic law and (iii) the prohibition of amnesties.³⁰

Complementarity is understood as giving the priority to investigate and prosecute international crimes to the domestic jurisdictions.³¹ Therefore, ideally, the ICC is supposed to be the Court of last resort. As to why States Parties opted for complementarity, Cassese highlights the two underlying reasons. First, he states that for pragmatic purposes States considered it inappropriate for the court to be flooded with cases from all over the world because of the limited resources and infrastructure that the court operates under and, secondly, States intended to protect their sovereignty.³² These considerations are crucial and

²⁸ Nouwen S *Complementarity in the Line of Fire: The Catalysing Effects of the International Criminal Court in Sudan and Uganda* (2013) 11 (hereafter Nouwen S (2013)); see also Benzing M ‘The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight against Impunity’ (2003) 7 *Max Planck Yearbook of United Nations Law* 591–632; Bergsmo M (ed) *Active Complementarity: Legal Information Transfer* (2011); Ebobrah ST ‘Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations’ (2011) 22(3) *EJIL* 663-88; Kleffner JK (2008); Stahn C *Complementarity: A Tale of Two Notions*’ (2008) 19 *Crim.LF* 87; Stigen J *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (2008) 31-80 (for the history of complementarity in international criminal justice)

²⁹ The concept of complementarity as a ‘big idea’ is borrowed from Sarah Nouwen who argues that complementarity has a double life. First as a technical admissibility rule or secondly as a ‘big idea’ which includes responsibilities or obligations for states. See Nouwen S (2013) 11.

³⁰ Nouwen S (2013) 36.

³¹ Cassese A *International Criminal Law* 2ed (2008) 343 (hereafter Cassese A (2008)).

³² Cassese A (2008) 343.

should be borne in mind when applying the principle of complementarity to different situations.

3.3.2 Complementarity as a Legal Principle vis-à-vis Regionalisation

The principle of complementarity is found in paragraph 10 of the preamble and Article 1 of the ICC Statute. Paragraph 10 of the preamble emphasises that the ICC shall be complementary to national criminal jurisdictions. Article 1 characterises the ICC as permanent, with power to exercise jurisdiction over persons for the most serious crimes of international concern and as complementary to national criminal jurisdictions. The Statute in these provisions restricts complementarity to the relationship between the ICC and national jurisdictions. The highlighted provisions are general in nature and do not provide details as to how complementarity is to be implemented. They are said to establish complementarity as a principle as opposed to a legal rule.³³ Paragraph 10 of the preamble and Article 1 of the Statute are expanded on in Article 17 where complementarity is provided as a criterion for admissibility of cases before the ICC.³⁴ Article 17(1) of the ICC Statute provides as follows:

Article 17

1. Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:
 - (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless if the State is unwilling or unable genuinely to carry out the investigation or prosecution.

³³ Kleffner JK (2008) 100.

³⁴ Kleffner JK (2008) 99; Schabas W *The International Criminal Court: A Commentary on the Rome Statute* (2011) 50.

- (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;
- (c) The person concerned has already been tried for the conduct which is the subject of the complaint and a trial by the court is not permitted under article 20, paragraph 3
- (d) The case is not of sufficient gravity to justify further action by the court.

Article 17 provides for the test to be applied to determine if the case is inadmissible before the ICC. This is a judicial assessment of in-admissibility as opposed to admissibility.³⁵ The general presumption therefore is that every case that does not satisfy the criteria under Article 17 is admissible before the Court. In order to come up with a correct interpretation of the provisions it is essential to analyse the separate elements of the provisions.

3.3.2.1 State which has Jurisdiction

Article 17 (1) (a) and (1) (b) refers to a State that has jurisdiction over the matter. Under (a) there must be a case being investigated or prosecuted by such a State, whereas under (b) a case must have been investigated by such a State. General principles applicable for criminal jurisdiction can be used to determine which State has jurisdiction over a matter. The principles in question being territorial principle, nationality principle, passive personality principle, protective principle and, controversially, the universality principle.³⁶ Since Article

³⁵ Kleffner J (2008) 103; El-Zeidy M (2008) 159-60; Benzinger M (2003) 600-1.

³⁶ Brownlie I *Principles of Public International Law* 5 ed. (1999) 303-308. In relation to universal jurisdiction it is argued that the Article 17 does not specify the form of jurisdiction in question therefore it should be considered as one method of exercising jurisdiction, see Krings BL 'The Principle of 'Complementarity' and

17(1) refers to a case that is investigated or prosecuted or being investigated or prosecuted as such, the State in question is the one that has already established jurisdiction in conformity to international law.³⁷

The reference to State with jurisdiction also raises the question whether it can cater for other mechanisms for dealing with international crimes such as regional courts or internationalized criminal courts amongst others. Different interpretations may be applied considering the unique nature of the mechanism in question. For instance, with regard to internationalised courts, Benzing and Bergsmo argue that teleological interpretation of Article 17 consistent with Article 31 of the Vienna Convention on the Law of Treaties supports the conclusion that internationalised courts can be subsumed under the term national considering that they help the ICC in achieving the object of its establishment, fighting impunity.³⁸ In addition, the involvement of the State in the set up and operation of an internationalised courts is deemed sufficient for them to be considered national for purpose of Article 17.³⁹ According to Kleffner, the appropriate approach would be to consider the degrees in which international and regional organisations assume control over the establishment and the judicial process of that court.⁴⁰ He further suggests that another determinant is the extent in which the respective courts are integrated into the domestic legal system of the state.⁴¹ The suggested criteria may

Universal Jurisdiction in International Criminal Law: Antagonists or Perfect Match?' (2012) 4(3) *Goettingen Journal of International Law* 737-763; Stigen J (2008) 190-6.

³⁷ Kleffner JK (2008) 113.

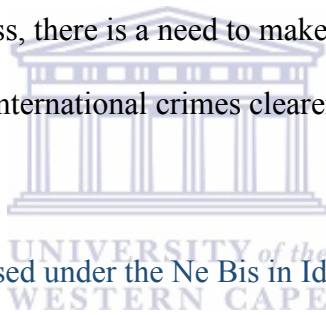
³⁸ Benzing M & Bergsmo M 'Some Tentative Remarks on the Relationship between Internationalized Criminal Jurisdictions and the International Criminal Court' in Romano, Nolkaemper & Kleffner *Internationalized Criminal Courts, Sierra Leone, East Timor, Kosovo, and Cambodia* (2004) 412 (hereinafter Benzing & Bergsmo (2004)); Jackson M 'Regional Complementarity: The Rome Statute and Public International Law' (2016) 14(5) *JICJ* 1062(hereinafter Jackson M (2016)).

³⁹ Benzing & Bergsmo (2004) 412.

⁴⁰ Kleffner JK (2008) 107.

⁴¹ Kleffner JK (2008) 107.

be progressive, but they are more relevant to internationalised courts, whose structure is more integrated in the national system, than to a regional court which is established by States as an independent entity. In fact, the independence of such a court would go to prove the legitimacy of such a tribunal or mechanism. Where a regional court is not independent from the States forming it, its legitimacy is questionable since most probably the perpetrators of atrocities might be people in power in those States and can influence the decisions that it makes. A regional court established under a treaty with the characteristics highlighted by Kaikobad⁴² would be a sui generis entity that cannot be subsumed in the notion of State. However, to the extent that such mechanism has been created to assist the ICC to close the impunity gap, a generous interpretation might consider complementarity as applying to such regional mechanisms. Nevertheless, there is a need to make the relationship between the ICC and regional courts dealing with international crimes clearer within the ICC Statute so as to avoid confusion.



3.3.2.2 Regional Courts Recognised under the Ne Bis in Idem Rule

The ne bis in idem rule generally means that courts are not allowed to prosecute the defendant again for a crime of which he has already been convicted or acquitted of under the ICC Statute, it extends to similar conduct which means it does not necessarily have to be the same crime.⁴³ Article 17 (1) (c) of the ICC Statute provides that a case is inadmissible where the person concerned has already been tried for the conduct which is the subject of the complaint and a trial by the court is not permitted under article 20(3). Article 20(3) provides as follows:

⁴² Kaikobad KH (2007) 238.

⁴³ Ryngaert 'C Horizontal Complementarity' in Stahn C & EL Zeidy MM eds *The International Criminal Court and Complementarity from Theory to Practice* Vol II (2011) 860; Werle G & Jessberger F (2014) 286;

No person who has been tried by another court for conduct also proscribed under article 6, 7 or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

- (a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or
- (b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

The provision refers to a trial by ‘another court’ as opposed to trial by a ‘national court’ it therefore applies to trials concluded by any court with jurisdiction to prosecute whether it is an internationalised or regional court for instance.⁴⁴ The scope is also broader in the sense that Article 20(3) refers to conduct as opposed to case. In this regard, for a case to be inadmissible at the ICC, a person does not have to be prosecuted with similar crimes as at the ICC but rather with conduct that share similar characteristics to the crime under the ICC Statute.⁴⁵ The ICC has in several cases distinguished between case and conduct. For example, the pre-trial chamber in the *Al-Senussi* case decided what would amount to same case as follows:

‘the alleged criminal conduct be sufficiently described with reference to precise temporal, geographic and material parameters, but not that such conduct be invariably composed of one or more incidents of a pre-determined breadth. Indeed, whether in

⁴⁴ Kleffner JK (2008) 118-24.

⁴⁵ Benzing M (2003) 618; Kleffner JK (2008) 119-20; El-Zeidy M ‘The Principle of Complementarity: A New Machinery to Implement International Criminal Law’ (2002) 23 *Michigan Journal of International Law* 933-34; Werle G & Jessberger F (2014) 104-5.

concreto any discrete incident or event, purportedly having narrower factual parameters, is identified because it overlaps fully with the alleged conduct or instead because it is of assistance to prove the alleged conduct to the requisite threshold without however exhausting it, will ultimately depend on the specificities of each case.⁴⁶

The Pre-Trial Chamber illustrated that the fact that some or all incidents or events being considered by the ICC are encompassed in the national proceedings, may be a relevant indicator that the case before the domestic court is the same as that under the ICC. The nomenclature of the crime under the domestic court does not have to be similar to that under the ICC. An example of such a scenario would be a charge with an offence of grievous bodily harm or assault instead of torture as a crime against humanity at the domestic court, is not sufficient to make Article 20(3) applicable and thus does not allow a new trial at the ICC.⁴⁷

Although in this study focus has been on Article 20(3) the *ne bis in idem* rule has other facets that are also found in Article 20. For instance, under Article 20(1) the ICC cannot try a person ‘with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court’. This is what is regarded as the ‘upward’ *ne bis in idem*.⁴⁸ Under Article 20(2) the Statute also prevents trial by ‘another court’ for a person who was convicted or acquitted by the ICC for a crime under Article 5 of the ICC Statute i.e.

⁴⁶ *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* The Judgement on Appeal of Mr Abdullah Al-Senussi against the Decision of the Pre-Trial Chamber I of 11 October 2013, entitled “Decision on the admissibility of the case against Al-Senussi”, ICC-01/11-01/11-565 (27 July 2014) para. 83 (hereinafter *Prosecutor v Al-Senussi*).

⁴⁷ Kleffner JK (2008) 120, Tallgren I ‘Commentary on Article 20’ in Triffterer O *Commentary on the Rome Statute of the International Criminal Court-Observers’ Notes, Article by Article* (1999) 431.

⁴⁸ Kleffner JK (2008) 118.

genocide, crimes against humanity, war crimes and aggression.⁴⁹ This is what is referred to as ‘downward’ ne bis in idem.⁵⁰ In this provision, reference to another court means any court that has jurisdiction over crimes provided for under Article 5 of the ICC Statute. In that regard, a regional court, domestic court, or any tribunal with jurisdiction over international crimes, acts in breach of the ne bis in idem principle if it retries a person of the crimes of which they were already convicted or acquitted by the ICC. It is interesting to note that the provision refers to crimes and not conduct such that what is specifically prohibited is trying a person of the same crimes that are provided for under the Statute.⁵¹ Despite the wording of the provision, it can be argued that the underlying intent of the principle is to prevent double jeopardy, and as such it would still be abominable for a regional court, for example, to try an accused for murder when the ICC had already acquitted or convicted the same person for crimes against humanity of killing on the same set of facts.⁵²

In relation to Article 20(3) it is not automatic that a case would not be admissible because it has been prosecuted by another court. There are criteria to assess the quality of the trial in issue provided under Article 20(3) (a) and (b).⁵³ Under these provisions the test is whether the proceedings in the other court were for shielding the person from responsibility from the crimes within the jurisdiction of the ICC or were not conducted independent or impartially in

⁴⁹ The Crime of Aggression will be applicable after the Kampala Declaration on the Crime of Aggression has been adopted.

⁵⁰ Kleffner JK (2008) 119.

⁵¹ cf Article 17(1)(c) ICC Statute.

⁵² There are different schools of thought on whether trials for ordinary crimes at the domestic level fulfils complementarity or not see Keller KJ ‘A Sentence-Based Theory of Complementarity’ (2012) 53(1) *Harvard International Law Journal* 86-133.

⁵³ Heller KJ ‘The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process’ (2006) 17 (3) *Criminal Law Forum* 255-80 (hereinafter Heller KJ (2006) refers to this as a shadow side of complementarity in that it will enable domestic proceedings to follow some due process in order to avoid the jurisdiction of the ICC; Werle G & Jessberger F (2014) 105.

accordance with the norms of due process. It is difficult to articulate how proceedings for the purpose of shielding would look like. For instance, whether charging a person with a lesser crime would amount to shielding. Another complicated scenario would be where different rules are applied at a regional level as compared to the international level. An example would be the different rules applicable to immunity at the regional level as opposed to under the ICC Statute whereby at the region, Heads of States and Governments are immune from prosecution whereas the ICC does not provide for such immunity. The ICC must consider the circumstances of each case to determine the relevant purpose.⁵⁴

The second exception is under Article 20(3) (b) and relates to the quality of the proceedings. The nature of the proceedings should be marked by independence, impartiality, due process recognised by international law and should be consistent with an intent to bring a person to justice. At the first glance, the provision gives the ICC the power to assess if the procedure being followed against the accused by the State is in compliance with the factors of impartiality, independence, due process as highlighted herein. The jurisprudence of the ICC is enlightening as to the standards to be applied. In the case of *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, the Appeals Chamber held that the text, object and purpose of Article 20(3) is ‘not the one to determine whether the due process rights of the accused have been breached per se’ but that the provision should be understood to refer to sham proceedings aimed at leading the suspect to avoid justice.⁵⁵ The Court however held that where the violations of the rights of the accused are so egregious that the proceedings would

⁵⁴ Kleffner JK (2008) 138.

⁵⁵ *Prosecutor v Al-Senussi* para.2; see also Heller KJ (2006) 255-80; Mégret F & Samson MG ‘Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials’ (2013) 11(3) *JICJ* 571-89. (hereinafter Mégret & Samson (2013)); Stahn C ‘Libya, the International Criminal Court and Complementarity: A Test for Shared Responsibility’ (2012) 10 *JICJ* 325-349.

be incapable of providing genuine justice to the suspect, then it would consider the allegations.⁵⁶

The ne bis in idem rule provides for the possibility of interactions between different regimes prosecuting international crimes in that the ICC cannot prosecute a person convicted or acquitted for international crimes by a regional court. However, the relationship between the ICC and regional courts, should be clarified at every stage of the case, not only for completed cases at the regional level but also for those under investigation at that level. As such, complementarity should be considered before the ICC looks into a situation, whilst looking into a situation and when it is investigating cases.⁵⁷

3.3.2.3 The Gravity Test and the Possibility of Residual Nature of Regional Courts

Article 17(1) (d) provides that a case is inadmissible if it is of insufficient gravity to justify further action by the court. The ICC has jurisdiction over grave crimes, “most serious crimes of international concern”⁵⁸. Therefore, it is important to question whether the gravity test under the Statute adds anything to the criteria on admissibility of cases before the Court. How the concept of gravity and the jurisdiction of the court interact have been left to the discretion of the court.

The jurisprudence of the court so far does not provide a clear guideline on how jurisdiction and gravity should interact.⁵⁹ An attempt to lay down the principles is found in the Pre-Trial

⁵⁶ Prosecutor v Al-Senussi par .3.

⁵⁷ Van der Wilt H ‘Complementary Jurisdiction (Article 46H) in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary of the Malabo Protocol* (2017) 187-202 (hereinafter Van der Wilt H (2017)).

⁵⁸ Article 1 ICC Statute.

⁵⁹ Deguzman M ‘The International Criminal Court Gravity Jurisprudence at Ten’(2013) 12(3) *Washington University Global Studies Law Review* 475-86 (hereinafter Deguzman M (2013)); Kleffner JK (2008) 126 analysing the practice of the ICC suggests that crimes are sufficiently grave when the conduct in question is systematic or undertaken at a large scale; person involved fall within the category of the most senior leaders of the situation under investigation considering his or he position in the organisation under investigation.

Chamber (PTC) and Appeals Chamber decisions in the Lubanga case. The PTC developed a gravity test that was later rejected by the Appeals Chamber. According to the PTC, the ‘shall’ in Article 17(1) (d) of the ICC Statute makes the application of the gravity test mandatory.⁶⁰ It also found that the gravity test is additional to the crimes under the jurisdiction of the Court such that the fact that a case addresses one of the most serious crimes for international concern is not sufficient for the case to be admissible before the ICC.⁶¹ The PTC test was made up of the following three components: (i) the conduct in issue must be systematic and of a large scale and that consideration must be given to the ‘social alarm’ the conduct has caused⁶², (ii) the accused must be the ‘most senior leader’ ‘suspected to be the ‘most responsible’ for international crimes⁶³, and (iii) the accused must be amongst the most responsible for the crime.⁶⁴ This three pronged test was rejected by the Appeals Chamber who held that the requirement for conduct to be systematic or large scale blurred the distinction between war crimes and crimes against humanity since the requirement only applies to crimes against humanity, secondly, that the requirement for social alarm was too subjective; and, lastly, limiting the jurisdiction of the court to the most senior leaders would undermine the deterrence effect of the court since all other perpetrators would be left beyond the ICC’s reach.⁶⁵

⁶⁰ *Prosecutor v. Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, Annex I para. 43 available at <http://www.icc-cpi.int/iccdocs/doc/doc236260.PDF> (accessed on 6 August 2014) (hereafter *Prosecutor v Lubanga Dyilo*).

⁶¹ *Prosecutor v Lubanga Dyilo* para 41.

⁶² *Prosecutor v Lubanga Dyilo* para 46.

⁶³ *Prosecutor v Lubanga Dyilo* para 50.

⁶⁴ *Prosecutor v Lubanga Dyilo* para 50.

⁶⁵ Democratic Republic of Congo, Case No. ICC-01/04-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest,” Article 58, (July 13, 2006) paras. 68-79 available at <https://www.icc-cpi.int/iccdocs/doc/doc183559.pdf> (accessed on 27 January 2016); Deguzman M (2013) 479.

The Prosecutors Policy on Preliminary Examinations highlights that admissibility involves assessing complementarity and gravity.⁶⁶ On complementarity, the assessment involves an examination of existence of national proceedings in relation to the potential cases for investigation by the Office of the Prosecutor (OTP). The Policy adds that the OTP has to bear in mind the OTP's policy of focusing on investigative efforts on those most responsible for the most serious crimes under the court's jurisdiction. With regard to gravity, the assessment considers the scale, nature and manner of commission of the crimes and their impact whilst bearing in mind the potential cases that are likely to arise from the investigation. The reality is the OTP cannot take up every case that arises from a situation. In considering the correct approach of dealing with systematic crime, the ICC Statute reflects the best approach in terms of dealing with the master minders and those in higher echelons, but complementarity entails that other mechanisms should deal with those who carried out the orders of the master minders and implemented them, the foot soldiers, who are no less liable than their masters. Ideally, domestic mechanisms are supposed to deal with such, however, in most cases they may be incapacitated to deal with such cases, it is therefore necessary to consider the importance of other mechanisms such as regional courts as having some residual jurisdiction to deal with individuals that would be unlikely to face justice at the ICC. This approach helps in the maximising of resources for the ICC while at the same time reducing the impunity gap.

⁶⁶ Policy Paper on Preliminary Examinations (November 2013) available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf (accessed on 21 August 2014).

3.3.2.4 Inability and Unwillingness

The test for unwillingness and inability to investigate and prosecute by a State is found in Article 17(2) and (3) of the ICC Statute. Under the test of unwillingness, the Court considers that: (a) if the proceedings are being undertaken or the national decision was being taken for the purpose of shielding the person concerned from criminal responsibility for international crimes; (b) if there is an unjustified delay in the proceedings which in the circumstances is inconsistent with bringing the person to justice; and (c) if the proceedings are not being conducted independently.

However, this test should not be restricted to national proceedings. Where States Parties to the ICC Statute choose to create a regional court dealing with international crimes, the mischief that this provision sought to address at the national level may still apply at the regional level. For instance, a State may refer a situation to a regional court for purposes of shielding the person from liability under the ICC. The solution, therefore, lies in making the test for unwillingness applicable to regional courts in the same manner as it is applicable to national jurisdictions. Regarding inability, both the regional court and the ICC may assume jurisdiction. However, the best approach is to create a systematic working relationship between the two courts that can help avoid conflict of jurisdiction. Another proposed approach is to consider the regional as the first port of call after the domestic and where the regional court has failed to investigate or prosecute, the ICC should assume jurisdiction. However, considering the lack of hierarchical relationship between the regional and international court, any of the two courts may assume jurisdiction. Thus, deliberate cooperation between the different courts will be the best way forward.⁶⁷

⁶⁷ Van der Wilt H (2017) 198.

3.4 Complementarity as a ‘Big Idea’ vis-à-vis Regionalisation

The concept of complementarity as a ‘big idea’ represents another aspect of complementarity and represents a broader understanding of the concept that goes beyond the understanding of complementarity as a technical rule for admissibility.⁶⁸ It is more rhetoric than technical and involves using the term complementarity in its literal meaning as opposed to its legal meaning.⁶⁹

This understanding of complementarity is reflected by the former prosecutor of the ICC, Moreno Ocampo who argues that complementarity has two dimensions, the admissibility dimension and a second related dimension called ‘positive complementarity’.⁷⁰ Whereas the admissibility dimension falls under Article 17 of the Statute and is a judicial issue, positive complementarity has its legal basis among others from Article 93(10) of the ICC Statute.⁷¹ Under the provision the Court may cooperate with and provide assistance to States conducting an investigation into a trial in respect of conduct which constitutes a crime within the jurisdiction of the court or which constitute a serious crime within the law of the State. It is argued that positive complementarity implies a more horizontal relationship with States.⁷² Positive complementarity thus understood, enable States undertake their obligation to investigate and prosecute international crimes at the domestic level with the assistance of the ICC.

⁶⁸ The concept of complementarity as a ‘big idea’ is borrowed from Sarah Nouwen who argues that complementarity has a double life. First as a technical admissibility rule or secondly as a big idea which includes ‘responsibilities’ or obligations for states. See Nouwen S (2013) 11.

⁶⁹ Nouwen S (2013) 11.

⁷⁰ Moreno-Ocampo L ‘A Positive Approach to Complementarity, The Impact of the Office of the Prosecutor’ in Stahn C & El-Zeidy MM eds *The International Criminal Court and Complementarity from Theory to Practice* Vol I (2011) 21 (hereinafter Moreno-Ocampo L (2011)); see also Stahn C (2008) 87.

⁷¹ Moreno-Ocampo L (2011) 23.

⁷² Stahn C & El-Zeidy MM (2011) 24.

Apart from ‘positive complementarity’, complementarity as a big idea can be associated with other terms such as ‘proactive complementarity’.⁷³ Proactive complementarity is said to facilitate a constructive interplay between national and international jurisdictions.⁷⁴ This is said to be the opposite of passive complementarity where the ICC adjudicates cases that it finds admissible and leaves the other issues at the national level to other actors.⁷⁵ It is also argued that there should be a gentle and flexible understanding of complementarity.⁷⁶ The gentle and flexible understanding accords qualified deference to the national or local systems.⁷⁷ It is argued for purposes of admissibility that there be recognition of alternative forms of justice as sufficient for not making a case admissible before the ICC.⁷⁸ The idea is as much as possible, to promote justice for international crimes at the domestic level or other levels such as the region.

Another understanding of complementarity as a ‘big idea’ applies to the interpretation of Article 53 of the Statute. The provision is to the effect that before the Prosecutor decides



⁷³ Arbia S & Bussy G ‘Proactive Complementarity: A Registrar’s Perspective and Plans’ in Stahn C & El-Zeid MM eds *The International Criminal Court and Complementarity from Theory to Practice* Vol I (2011) 52 (hereinafter Arbia & Bussy (2011)); Burke-White WW ‘Proactive Complementarity: The International Criminal Courts and National Courts in the Rome System of International Justice’ (2008) 49 *Harv. Int’L LJ* 53 (hereinafter Burke-White W (2008)).

⁷⁴ Arbia & Bussy (2011) 52; Burke-White W (2008) 57 argues that proactive complementarity entails a Rome system of international justice whereby the national and the international jurisdictions work coherently and in coordination to close the loopholes and fill the gaps that allows impunity gap to flourish.

⁷⁵ Stahn C & El-Zeid MM (2011) 56.

⁷⁶ Drumbl MA ‘Policy through Complementarity: The Atrocity Trial as Justice’ in Stahn C & El-Zeid MM eds *The International Criminal Court and Complementarity from Theory to Practice* Vol I (2011) 197 (hereinafter Drumbl MA (2011)).

⁷⁷ Drumbl MA (2011) 197; see also Kleffner JK ‘The Law and Policy of Complementarity in relation to ‘Criminal Proceedings’ carried out by Non-State Organised Armed Groups (NSOAG) in Stahn C & El-Zeid MM eds *The International Criminal Court and Complementarity from Theory to Practice* Vol II (2011) 707 (hereinafter Kleffner JK (2011)).

⁷⁸ Drumbl MA (2011) 197; Kleffner JK (2011) 707.

whether to initiate an investigation upon analysing the information received proprio motu, or has been made available in the course of referral by a State Party, the Prosecutor must determine whether there is a ‘reasonable basis’ to proceed with or to initiate an investigation. Article 53(1) (b) provides that in making the decision, the Prosecutor shall consider whether the case is or would be admissible under Article 17. In this case, the question of admissibility must be considered by the Prosecutor in the pre-investigative stage of the proprio motu investigations.⁷⁹ Equally, the prosecutor must bear in mind the admissibility criteria at the investigative stage regardless of the trigger mechanism.⁸⁰

The issue however is whether complementarity as a ‘big idea’ or positive complementarity or proactive complementarity as scholars refer to it can also apply to regional courts. Can the Prosecutor within the framework of the law cede his jurisdiction over a case in order for regional court to investigate or prosecute? As far as regionalisation is concerned complementarity as a big idea entails a working relationship between different levels of accountability and acknowledging that the main goal is to close the impunity gap, and that is achievable only if the international court and the regional court complement as opposed to compete each other. Therefore, a purposive interpretation of complementarity would recognise that regional mechanisms are complementary to international mechanism, even though no express relationship is provided in the ICC Statute and in the regional framework.⁸¹

⁷⁹ Kleffner JK (2008) 165.

⁸⁰ Kleffner JK (2008) 165.

⁸¹ Jackson M (2016) 1061-72.

3.5 Proposal for the Amendment of the ICC Statute to incorporate Regional Mechanisms

Article 121(1) of the ICC Statute provides that any State Party to the ICC Statute may propose amendments to the Statute seven years after it entered into force. The Assembly of States Parties to the ICC Statute (ASP) established a Working Group on Amendments to consider amendments proposed under Article 121(1) of the ICC Statute.⁸² In its report to the thirteenth session of the Assembly of States Parties held in New York from 8 to 17 December 2014⁸³, the working group highlights proposals by some States to amend specific provisions of the ICC Statute. Of interest is the proposal by Kenya to amend the preamble to the ICC Statute to extend the principle of complementarity to regional mechanisms.⁸⁴ The amendment in accordance to the AU resolution of October 2013 which requested that States Parties propose relevant amendments to the ICC Statute in accordance to its Article 121.⁸⁵ The proposed amendment by Kenya was to enable the recognition of regional judicial mechanisms, and its precise formulation is as follows:

‘Emphasizing that the International Criminal Court established under this Statute shall be complementary to national and regional criminal jurisdictions.’⁸⁶

The proposal to amend the preamble is the starting point; however, it is not sufficient. As highlighted in the section analysing the principle of complementarity and admissibility provisions some substantive provisions also must be amended, for example, Articles 1, 17 and 20 to expressly provide for regional courts. In Article 1, the proposal for amendment

⁸² Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, eighth session, The Hague, 18-26 November 2011 (ICC-ASP/8/20) Vol I., Part II, ICC-ASP/8/Res.6.

⁸³ Report on the Working Group on Amendments ICC-ASP/13/31 (2014).

⁸⁴ Report of the Working Group on Amendments (2014) 17.

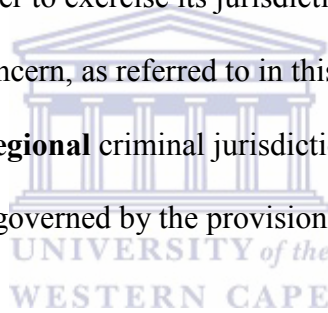
⁸⁵ AU Assembly Decision on Africa’s Relationship with the International Criminal Court(ICC) Ext/Assembly/AU/Dec.1(October 2013) para.10 (vi).

⁸⁶ Report of the Working Group on Amendments (2014) 17, c/f para 10 preamble of the ICC Statute.

would be similar to that in the preamble since the Article also states that the ICC shall be complementary to ‘national criminal jurisdictions’ but does not refer to regional judicial mechanisms. Equally, Article 17 (1) (a) and (b) would also require an amendment since reference is made to “State with jurisdiction over the matter” and no regional mechanisms are envisaged. In the same vein, the inability and unwillingness test under Article 17 (2) and (3) will have to be extended to prosecutions and investigations by regional mechanisms. The proposed formulation of the amendments is as follows:

Article 1

An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national **and regional** criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.



Article 17

(1) Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:

- (e) The case is being investigated or prosecuted by a State **or a regional court** which has jurisdiction over it, unless if the State **or regional court** is unwilling or unable genuinely to carry out the investigation or prosecution.
- (f) The case has been investigated by a State **or regional court** which has jurisdiction over it and the State **or the regional court** has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State **or the regional court** genuinely to prosecute;

- (2) In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
- (a) The proceedings were or are being undertaken or the national **or regional** decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in Article 5;
- (3) In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national **or regional** judicial system, the State or Region is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

A provision that may not require an amendment is Article 20 (3) relating to the ne bis in idem rule since it makes a neutral reference to court and not national courts, and therefore, can be applied to regional courts. Kenya's proposal for amendment was being pushed forward at a time when the regional court in issue has not yet come into existence. In addition, the details of the proposal on amendment are inadequate considering that they do not comprehensively cover all the relevant areas as already discussed. In sum, it was premature for Kenya to propose an amendment whose details are incomplete.

3.6 Conclusion

Regionalism is not provided for in the ICC Statute. However, there are some provisions that have some regional connotations in them, for instance, geographical considerations in the appointment of staff, provisions on the flexibility of the seat of the court which has been interpreted by some to mean that the Court can sit at a regional level, and the non-mandatory requirement for cooperation with inter-governmental organisations.

The ICC was established to be complementary to national criminal jurisdictions, and the principle is central to the ICC Statute. Regional frameworks were not envisaged in the drafting of the Statute as such the Statute emphasizes on the complementary relationship between the ICC and national jurisdictions. In the wake of regionalisation of international criminal justice, it is therefore necessary to expand the scope of the principle in order for it to apply in relationships between the regional courts and the ICC. In this regard, paragraph 10 of the preamble and Articles 1 and 17 of the ICC Statute should be amended as proposed in this chapter to reflect that position. It is also necessary that in the exercise of prosecutorial discretion by the ICC prosecutor, due regard must be given to investigations and prosecutions being undertaken in regional courts, as long as such regional proceedings are not for purposes of shielding perpetrators.



CHAPTER 4

THE HISTORY OF REGIONALISATION OF INTERNATIONAL CRIMINAL JUSTICE IN AFRICA

4.1 Introduction

The history of regionalisation of international criminal justice in Africa does not follow a linear pattern. Nonetheless, this chapter discusses the history of regionalisation of international criminal justice in Africa in two significant periods in the history of the African continental organisation: the efforts to regionalise during the period of the Organisation of African Unity (OAU) and the efforts under the AU. This approach has been adopted for two reasons: first, for its convenience since a clear temporal demarcation can be drawn between the two periods. Secondly, the two periods are considered for their political significance as they represent conceptually different approaches to dealing with atrocities in Africa. The chapter will also analyse the process that led to the drafting and subsequent adoption of the Malabo Protocol.

4.2 Efforts under the OAU

The OAU was established on 25 May 1963 following the adoption of the OAU Charter by 32 African States.¹ The purpose of the Organisation as provided for in Article 2 of the OAU Charter included: the promotion of unity and solidarity among African States, coordinating and intensifying cooperation among African States, to defend the sovereignty and territorial

¹ Charter of the Organization of African Unity (adopted on 25 May 1963 and entered into force 13 September 1963); for the history of the OAU see Mathews K 'The Organisation of African Unity' in Mazzeo D (ed) *African Regional Organisations* (1984) 49-84; Naldi G *The Organisation of African Unity: The Analysis of its Role* (1989) (hereinafter Naldi G (1989)); Telli D 'The Organisation of African Unity in Historical Perspective' (1965) 1(2) *Africa Forum* 7-28.

integrity of African States, eradicate all forms of colonialism from the African continent and promote international cooperation having due regard to the UN Charter and the United Nations Declaration of Human Rights (UNDHR).²

In order to fulfil the highlighted purposes, member States had to adhere to seven underlying principles provided for under Article 3 of the OAU Charter and these were: (1) the sovereign equality of all member States ; (2) the non-interference in the internal affairs of member States; (3) respect for the sovereignty and territorial integrity of each State and its inalienable right to independent existence; (4) peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration; (5) unreserved condemnation of political assassination as well as subversive activities on the part of neighbouring States; (6) absolute dedication to the total emancipation of the African territories which were still dependent; and (7) affirmation of the policy of non-alignment with regard to all blocs.³ These underlying principles represented a compromise on the nature of the organisation that States were willing to have at the continental level. This was a compromise since there were different factions that had proposals of the type of organisation the continent should have. These were the ‘Casablanca Group’ and the ‘Monrovia Group’. The Casablanca Group consisted of Algeria, Egypt, Ghana, Guinea, Libya, Mali, and Morocco was more radical as it promoted complete African Unity with no balkanization. The Monrovia Group consisted of Cameroon, Congo-Brazzaville, Cote d’Ivoire, Dahomey (Benin), Gabon, Upper Volta (Burkina Faso), Madagascar, Mauritania, Niger, the Central African Republic, Senegal and Chad, Ethiopia, Liberia, Nigeria, Sierra Leone, Somalia, Togo, Tunisia and Congo (Kinshasa) promoted a

² Article 2(1) (a)-(e) OAU Charter.

³ Article 3 (1) -(7) OAU Charter.

loose confederation of independent African states and a gradualist approach to African Unity.⁴

The OAU hit the ground running, such that in its very first ordinary session it made different resolutions in line with its objectives. These included the resolution on apartheid in South Africa⁵, the resolution calling for the independence of Southern Rhodesia (now Zimbabwe)⁶, and the resolution for the independence of territories under Portuguese domination.⁷ The OAU resolution on apartheid in South Africa condemned the apartheid as a ‘serious threat to peace and international security’⁸, and ‘incompatible with [South Africa’s] political and moral obligations as a Member State of the United Nations.’⁹

Efforts to regionalise international criminal justice in Africa under the OAU era is interlinked with the development of human rights law in Africa. The basis of this proposition is that the idea for a regional international criminal justice mechanism was first considered within the context of developing a human rights framework in Africa. The idea for a human rights framework in Africa can be traced back to 1961 under the Law of Lagos¹⁰, when it was recommended as follows:

⁴ Bedjaoui M ‘Brief Overview of Steps to African Unity’ in Yusuf A & Ouguerouz F *The African Union: Legal and Institutional Framework, A Manual on the Pan African Organisation* (2012) 16; Naldi G (1989) 4.

⁵ AHG/Res.5 (1). The Resolutions of the First Ordinary Session of the Assembly of Heads of States and Government, held in Cairo, UAR 17-21 July 1964 available at http://www.au.int/en/sites/default/files/ASSEMBLY_EN_17_21_JULY_1964_ASSEMBLY_HEADS_STATE_GOVERNMENT_FIRST_ORDINARY_SESSION.pdf (accessed on 9 March 2015) (hereinafter referred to as Resolution of the First Ordinary Session (1964)).

⁶ AHG/Res.8 (1) Resolution of the First Ordinary Session (1964).

⁷ AHG/Res.9 (1) Resolution of the First Ordinary Session (1964).

⁸ Para 5(1) of AHG/Res.5 (1) Resolution of the First Ordinary Session (1964).

⁹ Para 5(2) AHG/Res.5 (1) Resolution of the First Ordinary Session (1964).

¹⁰ Law of Lagos was a product of a Conference on the Rule of Law in Africa sponsored by International Commission of Jurists held in Lagos Nigeria in 1961. The Conference was attended by 194 Judges, Practising Lawyers and teachers of law from 23 African Nations as well as 9 from other continents see African Conference

‘That in order to give full effect to the Universal Declaration of Human Rights of 1948, this Conference invites African Governments to study the possibility of adopting an African Convention on Human Rights in such a manner that the conclusions of this conference will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made to all persons under the jurisdiction of the signatory States.’¹¹

This recommendation was being made before the establishment of the OAU. However, when the OAU was established two years later, it did not consider the implementation of the recommendation of the Law of Lagos quoted above as an urgent agenda for the Organisation. As its purpose and the principles, the OAU prioritised sovereign equality and non-interference in the internal affairs of each other’s territories.¹² The Organisation’s Charter was more skewed in favour of protection of the State as opposed to individuals, as such, the most important rights under the Charter were the right to self-determination of the people in the context of decolonization and apartheid.¹³ It is clear that the OAU was careful not to include judicial mechanisms in its Charter, such that the first dispute resolution mechanism adopted under it was the OAU’s Commission on Mediation Conciliation and Arbitration.¹⁴

on the Rule of Law January 3-7, 1961(International Commission of Jurists): A Report on the Proceedings of the Conference in Hamalengwa M (ed.) *The International Law of Human Rights in Africa: Basic Documents and Annotated Bibliography* (1988) 37) (hereinafter referred to as Law of Lagos (1961).

¹¹ Law of Lagos 1961 para 4.

¹² Article 3(1) and (2) of the OAU Charter; Dugard (2013) 540.

¹³ The preamble to the Charter of the OAU shows that the Organisation was aimed at liberating the Continent from Colonialism and Apartheid; Murray R *Human Rights in Africa: From the OAU to the AU* (2004) 7; Nmehielle V *The African Human Rights System: Its Laws, Practice and Institutions* (2001) 67 (hereinafter Nmehielle V (2001).

¹⁴ Established in 1964; Naldi G (1989)11 states that a proposal to create a court was shot down during the initial meetings of the OAU.

As such Africa preferred recourse to informal considerations by ad hoc committees and perceived judicial settlement as alien to African culture.¹⁵

The non-interference approach under the OAU made it difficult for the OAU to intervene even when international crimes were committed, a clear example is the genocide in Rwanda in 1994 where the OAU did not intervene despite the high number of killings. The lack of intervention and the apparent tolerance of those leaders who were committing atrocities against their own populations made the OAU be dubbed as a ‘dictators club’.¹⁶ The realities of the changing world in terms of protection and promotion of human rights globally required that the OAU review its objectives. The efforts to review the organisation had already begun in 1979, with the establishment of a Committee on the Review of the OAU Charter.¹⁷ The Committee had the mandate to amend the OAU Charter so that it reflect the realities of the changing world. The Committee was unsuccessful since nothing substantial came out of its work. In that regard, the OAU Charter was amended through decisions of the OAU summit, for example the Cairo Declaration Establishing the Mechanism for Conflict Prevention,

¹⁵ Naldi G (1989) 11.

¹⁶ The OAU tolerated dictators such as Idi Amin of Uganda, who served as the Chairman of the OAU from 1975 to 1976 when in fact he was ruthlessly killing thousands of Ugandans. Other dictators who were part of the OAU were Mengistu Haile Meriam of Ethiopia (OAU Chairman 1983-1984), General Mobutu Seseseko of the then Zaire, Moussa Traore of Mali (OAU Chairman 1988-1989), Ibrahim Babangida of Nigeria (OAU Chairman 1991-1992) and Gaafar Nimeiry of Sudan (Chairman of the OAU 1978-1979); see Mukinda SM & Okumu WF *The African Union: Challenges of Globalisation, Security and Governance* (2008) 30 and also Badejo DL *The African Union* (2008) 33.

¹⁷ OAU Assembly of Heads of State and Government ‘Decision on the Review of the Charter’ (Monrovia, 1979) AHG/Dec.111 (XVI) Rev.1

Management¹⁸ and Resolution and the Abuja Treaty Establishing the African Economic Community.¹⁹

The OAU was not just marked by negatives, some of the positives that came out of the OAU included the organisation's unwavering and strong support in the liberation from colonialism and apartheid of African States.²⁰ In addition, between 1965 and 2002, the Organisation had adopted twenty-three treaties on different areas of International Law, including international security and crimes, several of which form the basis of the crimes provided under the Malabo Protocol.²¹ As early as 1979, there was a proposal by the OAU Council of Ministers for the creation of an African Anti-Crime Organisation but the same was not implemented.²² The

¹⁸ Declaration of the Assembly of Heads of State and Government on the Establishment within the OAU of a Mechanism for Conflict Prevention, Management and Resolution (Cairo, 1993) AHG/DECL.3 (XXIX).

¹⁹ Treaty Establishing the African Economic Community adopted in 1991 and came into force in 1994. The Treaty provided that RECs as the building blocks of the African Economic Community. The existing RECs recognised thereunder were: AMU (The Arab Maghreb Union); ECCAS (Economic Community of Central African States); COMESA (Common Market of Eastern and Southern Africa); SADC (Southern African Development Community); and ECOWAS (Economic Community of West African States).

²⁰ On the successes and failures of the OAU see Legum C 'The Organisation of African Unity-Success or Failure?' (1975) 51(2) *International Affairs* 208-19; Schalk B, Auracombe CJ & Brynard D J 'Successes and Failures of the Organisation of African Unity: Lessons for the Future of the African Union' (2005) 40(3) (2) *Journal of Public Administration* 496-511.

²¹ The figures are derived from an empirical study done by Maluwa T 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2012) 13 *Melbourne Journal of International Law* 2 (hereinafter Maluwa T (2012)). Example of OAU treaties influencing the nature of crimes under the amended ACJHPR Statute are: The Bamako Convention on the Ban and Import in Africa and Control of Trans boundary Movement and Management of Hazardous Wastes within Africa (1991) forms the basis of the offence of Illegal Disposal of Hazardous Wastes under the Protocol; The African Nuclear Weapon Free-Zone Treaty(Treaty of Pelindaba) (1995) forms the basis of the offence of use on nuclear weapons as a war crime; OAU Convention on the Prevention and Combating of Terrorism (1999) forms the basis for the crime of terrorism; The Convention for the Elimination of Mercenarism Africa(1977) form the basis of the crime of terrorism. In total in the 37 years of its existence (1965-2002) the OAU adopted 23 Treaties see Appendix of Treaties adopted under the auspices of the OAU in Maluwa T (2012) 45.

²² Resolution on the Creation of African Anti-Crime Organisation CM Res. 755 (XXX III) Rev.1 (Monrovia, 1979) available at

Council of Ministers was influenced by among other things the need to study the causes of crime in Africa and devise adequate control measures,²³ the need to promote cooperation among member states in the field of crime and its prevention in order to ensure peaceful and secure African societies,²⁴ the necessity to harmonise efforts of member states to curb peddling, trafficking and indulgence in drugs.²⁵ Although this was not pursued further, it showed the acknowledgment of the necessity of dealing with crime through cooperation at the continental level.

One of the most important development, though it came belatedly, was the adoption of the African Charter on Human and Peoples' Rights on 28 June 1981.²⁶ Belatedly in the sense that the proposal for an African Human Rights Charter had been made almost 20 years before under the Law of Lagos. During the OAU 16th Ordinary Session held in Monrovia, from 28 November to 8 December 1979, the OAU made a resolution requesting the Secretary General of the OAU to convene a meeting of highly qualified experts in order to prepare a preliminary draft of the African Charter on Human and Peoples Rights. Several consultative meetings were held and subsequently the Charter was adopted in Kenya in 1981.²⁷

It was during the process of consultations and negotiations for this Charter, that the idea of a regional framework to deal with international crimes was first considered. At a Ministerial Meeting held in Banjul in 1981, Guinea made a proposal for the creation of a court that

http://www.au.int/en/sites/default/files/COUNCIL_EN_6_20_JULY_1979_COUNCIL_MINISTERS_THIRTIETH_THIRD_ORDINARY_SESSION.pdf (accessed on 16 March 2015).

²³ Para 1 Resolution on the Creation of African Anti-Crime Organisation (1979).

²⁴ Para 2 Resolution on the Creation of African Anti-Crime Organisation (1979).

²⁵ Para 3 Resolution on the Creation of African Anti-Crime Organisation (1979).

²⁶ African Charter on Human and Peoples Rights (Banjul Charter) (1985); for detailed analysis on the Charter see Evans & Murray (eds) *The African Charter on Human and Peoples Rights: The System in Practice 1986-2000* (2002).

²⁷ African Charter on Human and Peoples Rights adopted in 1981 and came into force in 1986.

would try crimes against humanity and for the protection of human rights.²⁸ Viljoen suggests that the proposal was made directed at the situation in South Africa, particularly the 1976 Soweto uprising.²⁹ This idea had some support from other states, for instance the Malagasy delegation was of the position that there should be an optional protocol that would be distinct from the charter incorporating the proposal.³⁰ The consensus settled for the creation of a Commission instead of a Court which was in line with the OAU objective of adopting consensual methods of dispute resolution namely, negotiation, conciliation and mediation.³¹ Some other arguments in support of a Commission as opposed to a Court were that the idea of a Court was not in line with the African traditional ways of dispute resolution which prioritise mediation and conciliation.³² A Court was thought to be ‘premature at this stage’, it was stated that the ‘idea is, no doubt, a good and useful one which could be introduced in the future by means of an additional protocol to the Charter.’³³

Regarding the proposal for the creation of a penal court to deal with international crimes, Keba M’ Baye, who was the Rapporteur to the OAU Ministerial Meeting on the Draft African Charter on Human and Peoples’ Rights wrote:

²⁸ Meeting of 1-19 January 1981 quoted in Ougergouz F *The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa* (2003)46 (hereinafter Ougergouz F (2003); see also Viljoen F *International Human Rights in Africa* (2007) 421 (hereinafter Viljoen F (2007)).

²⁹ Viljoen F (2007) 421; Soweto Uprising or massacre of 16 June 1976 refers to protests by students from schools in Soweto, South Africa against the introduction of Afrikaans as the medium of instruction in local schools. Several students were killed by the apartheid police.

³⁰ See Ougergouz F (2003) 46.

³¹ Article 3(4) OAU Charter; Ougergouz F (2003) 72.

³² Nmeielle V (2001) 250 argues that the tenability of that argument remained to be judged against the modern African realities. One wonders why in the area of human rights was tradition more important when most African domestic institutions are not modelled on tradition.

³³ Viljoen F (2007) 412.

‘It should be mentioned that a delegation proposed an amendment according to which the meeting was to draft a text establishing an African Court to judge crimes against mankind and violations of human rights. The participants took note of this amendment but were of the opinion that it was untimely to discuss it.’³⁴

As the excerpt above indicates, the proposal was not adopted and let alone discussed extensively. The idea was not dismissed but it was considered ‘untimely’ as the regional framework that was being contemplated at that time did not have provision for a court but rather a commission.³⁵ In addition, consideration was made to the fact that the International Convention on the Suppression and Punishment of the Crime of Apartheid already provided for an ‘international penal court’ and the UN was considering establishing ‘an international court to repress crime against mankind.’³⁶

Finally, almost four decades from the Law of Lagos (1961), the OAU adopted a Protocol to the African Charter on Human and Peoples’ Rights establishing the African Court on Human and Peoples’ Rights in 1998.³⁷ The starting point to the establishment of the Court was the OAU Heads of States Resolution 230/30 of June 1994 which requested the Secretary General of the OAU to convene a meeting of Government experts and African Commission in order

³⁴ Report of the Rapporteur, OAU Ministerial Meeting on the Draft African Charter on Human and Peoples Rights, Banjul, The Gambia 9-15 June 1980, OAU CAB/LEG/67/Draft Rapt. Rapt(II) Rev.4 see also M’Baye K *Introduction to Draft African Charter on Human and Peoples’ Rights* OAU Doc. CAB/LEG/67/1 para 4 reprinted in Heyns C (ed.), *Human Rights Law in Africa 1999* (2002) 65 (hereinafter Heyns C (2002)).

³⁵ Article 30 (on the establishment of the Commission), Article 45 (on the mandate of the Commission) of the African Charter on Human and Peoples Rights (1986).

³⁶ Heyns C (2002) 95; Abass A ‘Historical and Political Background to the Malabo Protocol’ in Werle G & Vormbaum M(eds.) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 16.

³⁷ Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights adopted in 1998 and entered into force in 2004. On the history see Kioko B ‘The Road to the African Court on Human and Peoples Rights’ (1998) *African Society of International Law and Comparative Law Proceedings of the 10th Annual Conference Proceedings* 70-86; Viljoen F (2007) 420-23.

to enhance the efficiency of the African Commission and consider the establishment of an African Court on Human and Peoples' Rights.³⁸ The consultative meetings were held in Cape Town in September 1995, and Nouakchott, Mauritania in April 1997, and a third Government Legal Experts meeting was held in Addis Ababa, Ethiopia in December, 1997.³⁹ One important issue that came out of these consultations was the nature of the Court to be created. The earlier draft of the Protocol provided for establishment of two chambers consisting of five judges each.⁴⁰ The idea of multiple chambers was rejected and as such the Protocol did not incorporate it. The consultative documents are not clear on what the jurisdiction of the other chamber would have been.

As already stated, the Protocol was adopted in 1998 and came into force in 2004. The Court started functioning in 2006.⁴¹ The Court was established to complement the protective mandate of the Commission.⁴² The competence of the Court is to decide "all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and other relevant Human Rights instruments ratified by States Parties."⁴³ The developments that later ensued regarding the jurisdiction of this court will be considered in a later section of this chapter.

³⁸ OAU Assembly of Heads of States and Governments Resolution on the African Commission on Human and Peoples' AHG/Res 230 (XXX) (Tunis, June 1994) para. 4.

³⁹ Reports and Draft Protocols from the Consultative Meetings are reproduced in Heyns C (ed) *Human Rights in Africa 1999* (2002) 233-93.

⁴⁰ Article 20 of the Cape Town Draft Protocol of the African Charter on Human and Peoples Rights on the Establishment of an African Court of Human and Peoples Rights (1995) reproduced in Heyns C (ed) *Human Rights in Africa 1999* (2002) 239-43; Nmehielle V (2001) 282.

⁴¹ Information on the African Court on Human and Peoples Rights available at <http://www.au.int/en/organs/cj> (accessed on 17 March 2015).

⁴² Article 2 of the Protocol of the African Court of Human Rights.

⁴³ Article 3 of the Protocol of the African Court of Human Rights.

As all these developments were happening in Africa through the OAU, time was catching up with the organisation and there was an urgent need for reform. After the liberation of African States from colonialism and the fall of the apartheid regime in South Africa, it became clear that the OAU was fastly becoming irrelevant in the sense that the original motivation for establishing the organisation, i.e. securing independence of African peoples and uniting against colonialism had become redundant since colonialism had ended and also apartheid had been dismantled.⁴⁴ There was also a need to transform the organisation that was marked with negativities, as succinctly put by Du Plessis that:

‘Increasingly the OAU came to be criticized for its failure to respond to serious conflicts between member states. In addition, several of Africa’s leaders in the fight for independence led their newly liberated nations into totalitarianism, with an ineffectual OAU doing little to put a stop to this African malaise. It did not help that the OAU found itself caught between superpower rivalries during the Cold War, that ideological clashes led to debilitation of the OAU as it failed adequately to respond to civil wars that were fuelled by East/West interests (such as in Angola and Mozambique) and the development and reform programs initiated by the OAU became symbolized by lofty words and promises at the OAU Conferences but were rarely translated into meaningful action.’⁴⁵

Concrete steps towards the change from OAU to AU were made after the OAU 4th Extraordinary meeting to discuss the ways and means of making the OAU effective in order for it to keep pace with the political and economic development taking place in the world.⁴⁶

⁴⁴ Du Plessis M ‘The African Union’ in Dugard J *International Law: A South African Perspective* 4 ed (2012) 543(hereinafter Du Plessis (2012)).

⁴⁵ Du Plessis (2012) 543.

⁴⁶ OAU, Assembly of Heads of State and Government, Sirte Declaration (1999) EAHB/Draft/Decl. (IV) Rev. 1. (hereinafter Sirte Declaration (1999))

After discussions, the OAU adopted the Sirte Declaration, which called for the establishment of the AU.⁴⁷ The declaration was followed by work of different experts in the drafting of the Constitutive Act of the African Union. The Constitutive Act was subsequently adopted in the 6th Ordinary Session of the OAU Assembly of Heads of State and Government held in Lome Togo on 10-12 July 2000.⁴⁸ The AU was formally inaugurated in Durban South Africa, on 9 July 2002.

The OAU era also saw the continental organisation supporting the establishment of the ICC. There are several recommendations by the OAU encouraging member States to support the creation of the ICC.⁴⁹ These recommendations were being derived from workshops conducted across the African regions, in preparation of the establishment of the ICC. For instance, in the SADC region, a regional conference on the ICC was held in Pretoria, South Africa in September 1997 and then in June 1999.⁵⁰ Similarly, West Africa also hosted a Conference on the establishment of the ICC in Dakar, Senegal from which the Dakar Declaration on the ICC was derived.⁵¹ Under the OAU, the justification for supporting the establishment of the ICC can be summed up by the presentation by the OAU representative to

⁴⁷ Para.8(i) Sirte Declaration (1999).

⁴⁸ OAU, Assembly of Heads of State and Government Decision on the Establishment of the African Union and the Pan-African Parliament (2000) AHG/Dec. 143 (XXXVI).

⁴⁹ 34th Assembly of Heads of State and Government of the OAU, meeting at Ouagadougou in June 1998, also adopted the Dakar Declaration on an International Criminal Court; Dakar Declaration for the Establishment of the International Criminal Court (1998); African Commission on Human and People's Rights Resolution on the Ratification of the Treaty on the International Criminal Court the African Commission on Human and Peoples' Rights (Banjul, October 1998).

⁵⁰ Monageng SM 'Africa and the International Criminal Court: Then and Now' in Werle, Fernandez & Vormbaum (eds.) *Africa and the International Criminal Court* (2014) 14-15 (hereinafter Monageng SM (2014)).

⁵¹ Dakar Declaration for the Establishment of the International Criminal Court (1998) available at <http://www.iccnw.org/documents/DakarDeclarationFeb98Eng.pdf> (accessed on 7 January 2016); Monageng (2014) 15.

the Drafting Conference of the Rome Statute, who argued in support of the establishment of the ICC that:

‘The continent has a special interest in the establishment of the ICC because its people had for centuries endured human rights atrocities such as slavery, colonial wars and other horrific acts of war and violence, which continue today despite the post-colonial phase.’⁵²

During the negotiations on the establishment of the ICC, many African States belonged to a group of like-minded States that were interested in having the ICC. They gave overwhelming support to the ICC such that the first State to ratify the ICC Statute was an African State, Senegal. In order for the Statute to come into force, it required 60 ratifications, more than fifty percent of which were African States.

In sum the OAU’s efforts for regionalisation of international criminal justice in Africa, were prompted by the need for accountability for crimes committed by colonialists and the apartheid regime. It is also clear that in this period, there were some African dictators who were committing atrocities against their own people. However, the non-interference and the promotion of sovereign integrity under the OAU Charter meant that the OAU was powerless in prevention and bringing accountability for international crimes. In fact, it is clear that under the OAU era, the idea of establishing a regional court was not a priority, considering the length of time taken for the continent to adopt a Protocol establishing a human rights court in Africa. The idea for a regional mechanism for dealing with international crimes was

⁵² Professor T. Maluwa, Legal Adviser, OAU Secretariat, Statement at 6th Plenary, 17 June 1998.

See *Official Records of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* UN doc. A/CONF.183/13 (Vol. II) 104, 115-118 at para. 116.

not concretised as there were no solid proposals on the actual framework that the mechanism would take at the most it was merely proposed but was not acted upon.

Nonetheless, on a positive note, the OAU era saw the adoption of the African Charter on Human and Peoples' Rights which established the African Commission on Human and Peoples' Rights. Subsequently the Protocol to the African Charter on Human and Peoples' Rights established the African Court of Human and People's Rights which was a significant step in the protection of human rights in the African continent. The period was also marked with support by the OAU of the establishment of the ICC which was viewed as a positive development for fighting impunity in Africa.

4.3 Efforts under the AU

The change from OAU to AU brought with it some conceptual changes in the approach towards dealing with atrocities in the member states as reflected in the Constitutive Act of the African Union.⁵³ The objectives and the principles of the AU are provided for in Articles 3 and 4 of the Constitutive Act of the AU respectively. There are in total sixteen objectives and eighteen principles.⁵⁴ These have been synthesised into six related areas and these are: regional integration, peace and security, protection of human rights, non-intervention, intervention, and respect for democracy and rule of law.⁵⁵

⁵³ Maluwa T 'The Transition from the Organisation of African Unity to the African Union' in Yusuf A & Ougergouz F *The African Union: Legal and Institutional Framework, A Manual on the Pan African Organisation* (2012) 25-52.

⁵⁴ Article 3 (a)-(n) (objectives); Article 4 (a)-(p) (principles).

⁵⁵ Aneme GA 'Introduction to the Norms and the Institutions of the African Union' (2010) available at http://www.nyulawglobal.org/globalex/African_Union.htm#_edn2 (accessed on 4 March 2015); Doumbé-Billé S 'The African Union: Principles and Purposes' in Yusuf A & Ougergouz F *The African Union: Legal and Institutional Framework, A Manual on the Pan African Organisation* (2012) 53-75.

In terms of dealing with international crimes, there are some conceptual differences in the approach under the OAU Charter to that under the AU Constitutive Act. The significant difference lies in that whereas the OAU upheld the principle of non-interference in the internal affairs of member States without an exception, the AU provides for the right of intervention pursuant to the decision of the Assembly of Heads of State, in respect of grave circumstances, namely war crimes, crimes against humanity and genocide.⁵⁶ The AU Constitutive Act sought to address the shortfall under the OAU Charter as it became evident that the non-intervention approach that the OAU adopted was not a progressive policy for purposes of peace and security in the region.⁵⁷

4.3.1 Organs of the AU

The Constitutive Act of the AU expressly establishes nine organs of the AU and these are: the Assembly of the Union; the Executive Council; the Pan-African Parliament; the Court of Justice; the Commission; the Permanent Representatives Committee; the Specialised Technical Committees; the Economic, Social and Cultural Council; and the Financial Institutions.⁵⁸ It also gives the Assembly discretion to establish any other organs it might decide to establish.⁵⁹ The AU also established the Peace and Security Council in its first AU summit, in Durban South Africa.⁶⁰ Before proceeding to consider the process towards regionalisation of international criminal justice under the AU, it is essential to analyse the

⁵⁶ Article 4 (h) of the Constitutive Act of the African Union.

⁵⁷ A clear example of this is reflected in the work of the International Panel of Eminent Personalities that made a finding that the OAU failed to prevent genocide in Rwanda due to lack of political will and resources and it was recommended that Africa as a continent needed to develop in earnest the normative and institutional framework to save the lives of its inhabitants suffering mass atrocities through preventive intervention also called the Right to Protect (R2P).

⁵⁸ Article 5(1) Constitutive Act, AU.

⁵⁹ Article 5(2) Constitutive Act, AU.

⁶⁰ AU Peace and Security Council (PSC) established under the Protocol on Peace and Security Council adopted in 2002 and came into force in 2003.

mandates of some of the organs, in particular those relevant in the process of regionalisation of international criminal justice and as such the organs to be considered are: the Assembly of the Union; the Executive Council, the Pan-African Parliament, the Specialised Technical Committees and the Peace and Security Council. The section will not consider the African Court of Justice since it will be discussed in detail in the later section of this chapter.

4.3.1.1 The AU Assembly

The Assembly is the supreme organ of the Union.⁶¹ It is composed of Heads of States and Governments or their duly accredited representatives.⁶² The Constitutive Act provides that the Assembly shall meet at least once or year.⁶³ However, in its 2004 ordinary summit, the Assembly resolved that it would meet twice a year.⁶⁴ The justification was that there were increasing responsibilities on the Assembly in addressing the challenges facing the continent.⁶⁵ In addition, the Assembly can meet at an extra-ordinary session, at the request of a member State, with the approval of two-thirds majority of member states.⁶⁶

The powers and functions of the Assembly are provided in Article 9 of the Constitutive Act and Rule 4 of the Rules of Procedure of the Assembly.⁶⁷ These include determining the common policies of the Union⁶⁸, receive, consider and take decisions on reports and

⁶¹ Article 6(2) Constitutive Act.

⁶² Article 6(1) Constitutive Act. The AU has 54 member States list available at http://www.au.int/en/member_states/countryprofiles (accessed on 11 March 2015).

⁶³ Article 6 (3) Constitutive Act

⁶⁴ AU Assembly Decision on the Periodicity of the Ordinary Session of the Assembly Assembly/AU/Dec.53 (III) (July 2004).

⁶⁵ Par 3 Assembly/AU/Dec. 53 (III) (July 2004).

⁶⁶ Article 6(3) Constitutive Act.

⁶⁷ Rules of Procedure of the Assembly of the Union Ass/AU/2(1)-a (July 2002); see also Biswaro JM 'The Assembly, Executive Council and Commission' in Yusuf A & Ouguerouz F *The African Union: Legal and Institutional Framework, A Manual on the Pan African Organisation* (2012) 74-94 (hereinafter Biswaro JM (2012)

⁶⁸ Article 9 (1) (a) Constitutive Act; Rule 4 (1) (a) Rules of Procedure of the AU Assembly.

recommendations from other organs of the Union⁶⁹, establish organs of the Union⁷⁰, monitor implementation and ensure compliance with the policies and the decisions of the Union⁷¹, adopt budget of the Union⁷², give directions to the Executive Council on the management of conflicts, war and other emergency situations and restoration of peace⁷³, decides on the intervention in a Member State in respect of grave circumstances such as war crimes, genocide and crimes against humanity⁷⁴, appointment and terminate the appointment of judges of the African Court of Justice (ACJHR when the Protocol come into force).⁷⁵

The decisions of the Assembly are made by consensus, failing which by two-thirds majority of the member-states of the Union.⁷⁶ For procedural matters, decisions are made through simple majority.⁷⁷ Under the rules, abstentions by Member States eligible to vote does not prevent the adoption of decision by consensus.⁷⁸ It is also provided that decisions are only considered after the Commission has provided its financial implications.⁷⁹

4.3.1.2 The Executive Council

The Executive Council is composed of Ministers of Foreign Affairs or such other Ministers as may be designated by member states.⁸⁰ The Executive Council's functions are to

⁶⁹ Article 9 (1) (b) Constitutive Act.

⁷⁰ Article 9 (1) (d) Constitutive Act; Rule 4 (1) (j) Rules of Procedure of the AU Assembly; Biswaro JM (2012) 83.

⁷¹ Article 9 (1) (e) Constitutive Act; Rule 4 (1) (b) Rules of Procedure of the AU Assembly.

⁷² Article 9 (1) (f) Constitutive Act; Rule 4 (1) (i) Rules of Procedure of the AU Assembly.

⁷³ Article 9(1)(g) Constitutive Act; Rule 4 (1) (d) Rules of Procedure of the Assembly.

⁷⁴ Rule 4 (1) (e) AU Assembly Rules of Procedure.

⁷⁵ Article 9 (1) (h) Constitutive Act.

⁷⁶ Article 7 (1) Constitutive Act; Rule 18 (1) AU Assembly Rules of Procedure.

⁷⁷ Article 7 (1) Constitutive Act.

⁷⁸ Rule 18 (4) AU Assembly Rules of Procedure.

⁷⁹ Rule 19 (3) AU Assembly Rules of Procedure.

⁸⁰ Article 10(1) Constitutive Act.

coordinate and decide on areas of common interests to the member states.⁸¹ It is responsible to the Assembly, considers issues referred to it and monitors the implementation of policies formulated by the Assembly.⁸² It may also delegate power to a Specialised Technical Committee.⁸³

4.3.1.3 The Pan-African Parliament

The Pan-African Parliament is aimed at ensuring the full participation of African people in the development and economic integration of the Continent.⁸⁴ It is established under the Protocol to the Treaty establishing the African Economic Community relating to Pan-African Parliament.⁸⁵ The Parliament's ultimate aim is to evolve into an institution with full legislative powers, but currently it only has consultative and advisory powers.⁸⁶ Each Member State of the AU is represented in the Pan-African Parliament by five members of Parliament.⁸⁷ The consultative and advisory powers of the Parliament include to examine, discuss or express an opinion on any matter either on its own motion or at the request of the Assembly or other policy organ and make recommendations it may deem fit;⁸⁸ work towards harmonisation or coordination of laws of member states.⁸⁹

⁸¹ Article 13(1) (a)-(l) Constitutive Act; Biswano JM (2012) 83.

⁸² Article 13 (2) Constitutive Act.

⁸³ Article 13 (3) Constitutive Act.

⁸⁴ Article 17 (1) Constitutive Act; Mohamed SL 'The Pan African Parliament' in Yusuf A & Ouguerouz F *The African Union: Legal and Institutional Framework, A Manual on the Pan African Organisation* (2012) 95-117 (hereafter Mohamed SL (2012)).

⁸⁵ Adopted in Sirte Libya on 2 March 2001 and entered into force on 14 December 2003.

⁸⁶ Article 3(i) Protocol on the Pan-African Parliament; Mohamed SL (2012) 111-2 with only a consultative and advisory mandate it is doubtful whether the Parliament can fulfil its responsibilities.

⁸⁷ Article 4 (2) Protocol on the Pan-African Parliament.

⁸⁸ Article 11(1) Protocol on the Pan-African Parliament; Mohamed SL (2012) 103.

⁸⁹ Article 11(3) Protocol on the Pan-African Parliament; Mohamed SL (2012) 100-101.

4.3.1.4 The Commission

The Commission is the Secretariat of the Union and deals with the operational matters of the Union.⁹⁰ It is composed of a Chairperson, Deputies, Commissioners and other relevant staff members.⁹¹ The Commission has eight portfolios and these are: Peace and Security; Political Affairs; Trade and Industry; Infrastructure and Energy; Social Affairs; Rural Economy and Agriculture; Human Resources, Science and Technology; and Economic Affairs.⁹²

4.3.1.5 The Specialised Technical Committees

Specialised Technical Committees are established under Article 14 of the Constitutive Act and are responsible to the Executive Council. Under the Constitutive Act, there are seven Specialised Technical Committees, however, Article 14(2) of the Constitutive Act gives the AU Assembly to restructure them or to establish other relevant committees.⁹³ They are composed of Ministers or Senior Officials responsible for the sectors falling within their respective area of competence.⁹⁴ The functions of the Specialised Technical Committees include: preparing projects and programs for the Union and submit them to the Executive

⁹⁰ Article 20(1) Constitutive Act; Biswaro JM (2012) 84.

⁹¹ Article 20(2) Constitutive Act. The current Chairperson of the Commission is Dr. Nkosazana Dhlamini Zuma.

⁹² Information on the AU Commission available at <http://www.au.int/en/commission> (accessed on 12 March 2015).

⁹³ The Specialised Technical Committees under the AU Constitutive Act: Committee on Rural Economy and Agricultural Matters; Committee on Monetary and Financial Affairs; Committee on Trade, Customs and Immigration Matters; Committee on Industry, Science and Technology, Energy, Natural Resources and Environment; Committee on Transport, Communications and Tourism; Committee on Health, Labour and Social Affairs; and Committee on Education, Culture and Human Resources. In February 2009, the Assembly decided to reconfigure the STCs into fourteen thematic areas see AU Assembly Decision on Specialised Technical Committees Assembly/AU/Dec.227(XII)(February,2009). One of the Specialised Technical Committees, relevant in the drafting process of legal instruments touching on this thesis is the Specialised Technical Committee on Justice and Legal Affairs. By the AU Assembly Decision on the Specialised Technical Committee Assembly/AU/Dec. 356(XVII) the Commission was requested to make these committees operational from January 2013.

⁹⁴ Article 14(3) Constitutive Act.

Council⁹⁵; supervise, follow-up and evaluate the implementation of decisions taken by the organs of the Union⁹⁶; ensure coordination and harmonisation of projects and programs of the Union⁹⁷; and make reports on its own initiative or at the request of the Executive Council on the implementation of the provisions of the Constitutive Act.⁹⁸

4.3.1.6 The Peace and Security Council

The Peace and Security Council (PSC) is established under the Protocol relating to the Establishment of the Peace and Security Council (PSC Protocol).⁹⁹ The PSC Protocol defines the PSC as “a standing decision-making organ for the prevention, management and resolution of conflicts. The PSC shall be a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.”¹⁰⁰

The Council consist of fifteen members elected on the basis of equal rights, ten elected for a two-year term and five elected for three year terms to ensure continuity.¹⁰¹ The functions of the PSC include: promotion of peace and stability in Africa, peace-making through conciliation, mediation and enquiry, support peace operations and interventions, peace-building and post-conflict restructuring, humanitarian action and disaster management.¹⁰²

The powers of the PSC are provided in Article 7 of the PSC Protocol and they include: anticipating and preventing disputes and conflicts and policies that might lead to genocide

⁹⁵ Article 15 (a) Constitutive Act.

⁹⁶ Article 15(b) Constitutive Act.

⁹⁷ Article 15 (c) Constitutive Act.

⁹⁸ Article 15 (d) Constitutive Act.

⁹⁹ Adopted in Durban, South Africa on 10 July 2002 and entered into force on 26 December 2003.

¹⁰⁰ Article 2 (1) PSC Protocol.

¹⁰¹ Article 5(1) Protocol of the Peace and Security Council. Other criteria for electing members include equitable regional representation and rotation among others see Article 5(2) Protocol of the Peace and Security Council.

¹⁰² Article 6(a)-(f) PSC Protocol; Adjovi R ‘The Peace and Security Council’ in Yusuf A & Ouguergouz F *The African Union: Legal and Institutional Framework, A Manual on the Pan African Organisation* (2012) 143-58.

and crimes against humanity¹⁰³; recommending to the Assembly, an intervention in respect of grave circumstances such as war crimes, crimes against humanity and genocide¹⁰⁴; institute sanctions in case of an unconstitutional change of government¹⁰⁵; ensure the implementation of the OAU Convention on the Combating of Terrorism and other international, regional, continental Conventions on combating terrorism.¹⁰⁶ The PSC submits regular reports to the Assembly on its activities and the state of peace and security in Africa.¹⁰⁷

4.4 The Triggers for Regionalisation of International Criminal Justice under the AU

The decision to regionalise international criminal justice in Africa by the AU is not limited to ICC-Africa relationship, as this section will show that it can also be linked to Africa-Europe relationship and a non-contentious factor i.e. the desire to implement provision requiring the establishing of the offence of unconstitutional change of government per the provisions of the African Charter on Democracy, Elections and Governance (ACDEG).

This section will therefore analyse the triggers for regionalisation of international criminal justice in Africa under three categories: first, triggers linked to AU-EU relationship namely: (a) the recommendations of the Adhoc AU-EU Expert Group on the Principle of Universal Jurisdiction; (b) recommendation of the Committee of Eminent African Jurists in the Hissene Habre Case. Secondly, triggers particularly related to the AU-ICC relationship namely: (a) the indictment and the issuance of an arrest warrant against Sudanese President Omar Al-Bashir; (b) the trials against Kenyatta and Ruto, the President and Vice President of Kenya at the ICC; (c) the role of the UNSC in ICC Trials. The third category relates to other factors

¹⁰³ Article 7(1) (a) PSC Protocol.

¹⁰⁴ Article 7(1) (e) PSC Protocol.

¹⁰⁵ Article 7 (1)(g) PSC Protocol.

¹⁰⁶ Article 7(1)(i) PSC Protocol. Article 7 (1) (a)-(r) provides the full list of the powers of the PSC.

¹⁰⁷ Article 7(1)(q) PSC Protocol.

and in particular the section will highlight the need to implement the provisions of the African Charter on Democracy Elections and Governance as one of the justifications for giving penal jurisdiction to the African Court.

4.4.1 AU-EU Relationship as a Trigger

The AU and the EU are strategic partners in different areas such as peace and security, governance and human rights, trade and regional integration, and key development issues in particular accelerating progress towards the Millennium Development Goals (MDG).¹⁰⁸

However, as far as administration of international criminal justice is concerned, there has been some differences which necessitated dialogue in certain cases in an attempt to create a common understanding. The main bone of contention was the application of universal jurisdiction by some European countries against Africans which the AU termed as “abuse of universal jurisdiction.”¹⁰⁹ It is within the context of the need to address the question of the alleged abuse that proposals for creating a regional framework were made. This section will therefore consider the recommendations of the AU-EU Technical Adhoc Expert Group on the Principle of Universal Jurisdiction as well recommendations from the Committee of Eminent

¹⁰⁸ The Africa-EU Strategic Partnership: A Joint Africa-EU Strategy (2007) available at http://www.africa-eu-partnership.org/sites/default/files/documents/eas2007_joint_strategy_en.pdf (accessed on 17 March 2015). With the phasing out of MDGs and the adoption of Sustainable Development Goals by the UN, the joint Strategy will have to be revised.

¹⁰⁹ AU Assembly Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Assembly/AU/Dec.199 (XI) (June, 2008); AU Assembly Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/AU/Dec.213 (XII) (February, 2009); Jalloh CC ‘Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction’ (2010) 21(1) *Criminal Law Forum* 11-54 (hereinafter Jalloh CC (2010)); Jessberger F ‘On Behalf of Africa’: Towards the Regionalization of Universal Jurisdiction’ in Werle, Fernandez & Vormbaum (eds.) *Africa and the International Criminal Court* (2014) 155-174 (hereinafter Jessberger F (2014)).

Jurists on the case of Hissene Habre. In particular, how and why the question of regionalisation of international criminal justice arose from their recommendations.

4.4.1.1 The Recommendations on the Ad Hoc AU-EU Expert Group on the Principle of Universal Jurisdiction.

The AU was concerned by what it categorised as abuse of universal jurisdiction by some European States and this led to some friction between the AU and some EU States. The exercise of universal jurisdiction by some European States has been a controversial matter for some time. The background to this friction can be traced to the year 2000, when Belgium issued an arrest warrant against DRCs Foreign Minister on the charges of crimes against humanity and war crimes committed in the DRC and with no link whatsoever to Belgium. A legal dispute subsequently arose between Belgium and the DRC before the ICJ, where it was decided that Belgium had violated DRCs sovereign immunity.¹¹⁰ The other cases where there was application of universal jurisdiction against African Senior Government officials are that of Certain Criminal Proceedings in France (*Congo v France*)¹¹¹ and that of Certain Questions of Mutual Assistance in Criminal Matters (*Djibouti v France*).¹¹² Statistically, it is stated that between the late 1990s and 2009, some European Courts particularly in France, Belgium,

¹¹⁰ *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, International Court of Justice (ICJ), 14 February 2002, available at: <http://www.refworld.org/docid/3c6cd39b4.html> (accessed 2 November 2014)

¹¹¹ ICJ, Application of 11 April 2003, the case was brought by the Congo before the ICJ to challenge France's exercise of Universal Jurisdiction following the filing of a French investigating magistrate filed suit in 2001 against 17 Congolese nationals for crimes against humanity and torture allegedly committed in Congo. The individuals concerned included which included Denis Sassou Nguesso, President of the Republic of the Congo, General Pierre Oba, Minister of the Interior, Public Security and Territorial Administration, General Norbert Dabira, Inspector-General of the Congolese Armed Forces, and General Blaise Adoua, Commander of the Presidential Guard. Congo withdrew the case in 2010 see *Congo v France* ICJ Order of 16 November 2010.

¹¹² ICJ Judgment of 4 June 2008.

Britain, the Netherlands and Spain had investigated and issued arrest warrants against a total of approximately sixty African leaders and officials.¹¹³

The epitome of the issue of the alleged abuse of universal jurisdiction was in 2008 when the AU Assembly adopted a decision on the same stating among other things that the abuse could endanger international law, order and security.¹¹⁴ The issue was also raised before the tenth AU-EU Ministerial Troika of September 2008 and both parties agreed to discuss the matter further.¹¹⁵ Nonetheless, on 9 November 2008, Rose Kabuye the Chief of Protocol for the Rwandan President, Paul Kagame was arrested by German Police, at Frankfurt Airport on the basis of an arrest warrant issued by a French Magistrate. She was immediately transferred to Paris, where she appeared before an investigative magistrate and was released on conditional bail. She was charged with “complicit to murder in relation to terrorism” under the French universal jurisdiction laws on the allegation of her involvement in the assassination of the then Rwandan President, Juvenal Habyarimana.¹¹⁶ The AU and sub-regional organisations regarded this arrest “a blatant abuse of universal jurisdiction” on the part of both France and Germany.¹¹⁷ The AU Assembly expressed its disappointment on the failure by the EU to adhere to the moratorium on the arrests warrants as stated in its decision that:

¹¹³ The AU-EU Expert Report on the Principle of Universal Jurisdiction of 16 April 2009 available at http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf (accessed on 2 November 2014) 26-7 (hereinafter AU-EU Expert Report (2009); Jalloh CC (2010) 14.

¹¹⁴ AU Assembly Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction Assembly/AU/Dec. 199(XI) (30 June-1 July 2008).

¹¹⁵ Communique of the Tenth Africa-EU Ministerial Troika Meeting Brussels, 16 September 2008 para. 2(g) available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/102801.pdf (accessed on 1 April 2015).

¹¹⁶ Jessberger F (2014) 155-6; Kinyunyu S Towards and African International Criminal Court? Assessing the Extension of the Jurisdiction of the African Court of Justice and Human Rights to Cover International Crimes, LLM Thesis, University of the Western Cape (October 2011) (hereinafter Kinyunyu S (2011).

¹¹⁷ International Conference on the Great Lakes Region (ICGLR) Statement on the arrest of Ms. Rose Kabuye, 13 November 2008 available at

‘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 issued against Mrs Rose Kabuye, Chief of Protocol to the President of the Republic of Rwanda, thereby creating tension between the AU and the EU.’¹¹⁸

From the decision, it is apparent that the AU expected the EU to halt the judicial processes somehow. However, it is difficult to determine how a moratorium would have been implemented in European countries because the rule of law would require magistrates and judges in EU countries or any other country to follow some due process in disposing cases. Therefore, a moratorium was of no legal consequence, the arrest warrants would still be executed despite the political considerations. Nonetheless, the political consequences of executing the warrants cannot be ignored.

The decision also emphasised that the ‘abuse’ of universal jurisdiction had the consequences of endangering international law, order and security, were a violation of the sovereignty and the territorial integrity of States, had destabilising effect that would negatively impact the political, social and economic development of States and their ability to conduct international relations.¹¹⁹ It further requested the AU 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 African Court being empowered with jurisdiction

<http://www.congoforum.be/en/nieuwsdetail.asp?subitem=41&newsid=150980&Actualiteit=selected> (accessed on 1 April 2015).

¹¹⁸ Para 4 Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/AU/Dec.213(XII) (February 2009)

¹¹⁹ Para 5 (i)-(v) of the Decision on the Report of the Commission on the Abuse of the Principle of Universal Jurisdiction (2008).

over international crimes such as genocide, crimes against humanity and war crimes.¹²⁰ This decision was the foundation for the processes for expanding the jurisdiction of the African Court.

It was further recommended that the AU Commission urgently cause a meeting between the AU and the EU to discuss the matter with a view to finding a lasting solution to this problem and in particular to ensure that those warrants are withdrawn and are not executable in any country.¹²¹ An AU-EU Ministerial Troika agreed to establish an adhoc expert group to report on the principle of universal jurisdiction as understood by the respective continents.¹²² The report highlights both the AU and EU perspective on the principle of universal jurisdiction.¹²³

The precise ambits of the scope of what the principle entails in Africa or Europe have been discussed elsewhere.¹²⁴ However, in this thesis it is crucial to highlight that included in the resolutions was that AU Member States adopt national legislative and other measures for the prevention and punishment of international crimes and also that in line with AU Assembly's Decision 213(XII) of 4 February 2009, the AU Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights was to examine the implications of the expanded jurisdiction of the African Court.¹²⁵

¹²⁰ Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/AU/Dec. 213(XII) (2009) para. 9.

¹²¹ Para 7 of the Decision on the Report of the Commission on the Abuse of Universal Jurisdiction (2008).

¹²² The meetings were held on 16 September 2008 (Brussels) and 20-21 November 2008 (Addis Ababa) respectively.

¹²³ The AU-EU Expert Report on the Principle of Universal Jurisdiction available at http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf (accessed on 2 November 2014).

¹²⁴ Jessberger F (2014) 155-75; Kinyunyu S (2011) 27-31.

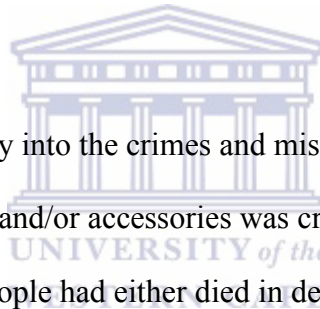
¹²⁵ Recommendations 2 and 3 on the Expert Report.

From the recommendations, it is evident that domestic implementation of international crimes and a regional court dealing with international crimes were considered as some of the solutions to the problem of ‘abuse of universal jurisdiction’.

4.4.1.2 The Recommendation of the Committee of Eminent Jurists in the Hissène Habré Case

The challenges of trying to bring accountability of the former President of Chad, Hissène Habré, led the AU Heads of State and Government in January 2006, to set up a Committee of Eminent African Jurists to provide solutions on how to deal with the problem.¹²⁶ Hissène Habré became a leader after a coup on 7 June 1982. He is accused to have committed atrocities in the eight years of his rule. He was defeated by one of his Generals, Idriss Derby on 1 December 1990 and fled Chad for Cameroon and then Senegal with the entire treasury for Chad.¹²⁷

A National Commission of Inquiry into the crimes and misappropriations committed by ex-President Habré, his accomplices and/or accessories was created in 1990 in Chad. In its report, it estimated that 40,000 people had either died in detention or had been illegally executed between 1982 and 1990.¹²⁸ It also estimated that as a result of Habré’s repression,



¹²⁶ Assembly/AU/Dec.203 (VI); see also Abass A ‘Historical and Political Background to the Malabo Protocol’ in Werle G & Vormbaum M *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 17-18 (hereinafter Abass A (2017)).

¹²⁷ Report of the Commission of Inquiry into the Crimes and Misappropriations Committed by Ex-President Habré, his Accomplices and/or Accessories- Investigations of Crime against the Physical and Mental Integrity of Persons and their Possessions (7 May 1992) available at <http://www.usip.org/sites/default/files/file/resources/collections/commissions/Chad-Report.pdf> (accessed on 2 April 2015) (hereinafter Report of Commission of Inquiry on Chad (1992)).

¹²⁸ Report of the Commission on Inquiry on Chad (1992) 91; see also Fall M ‘The Extraordinary African Chambers: The Case of Hissène Habré’ in Werle, Fernandez & Vormbaum (eds.) *Africa and the International Criminal Court* (2014) 117-31 (hereafter Fall M (2014)).

there were more than 80,000 orphans, 30,000 widows and 200,000 people were left destitute without anyone to support them.¹²⁹

Attempts at making Habré accountable for his crimes and having him prosecuted in Chad was proving difficult. The Chad judicial system and institutions were in a state of ruin after the conflict.¹³⁰ In addition, there was no guarantee of fair trial since Habré still had political enemies in Chad. Nonetheless, a Court in Chad sentenced him to death in absentia in 2008.

Efforts to have him tried in Belgium on the basis of universal jurisdiction also proved futile as Senegal refused to extradite him.¹³¹ Equally, in Senegal, the Dakar Appeals Court ruled that Senegalese courts cannot pursue the charges because the crimes were not committed in Senegal and this decision was confirmed by Senegal's highest Court.¹³²

Following the decisions by the Senegalese Courts, the Interior Minister of Senegal placed Habré at the disposition of the AU seeking direction on what to do about the situation.¹³³ It was this act that led to the constituting of the Committee of African Eminent Jurists (CEAJ) referred to earlier in this section.¹³⁴ The AU Assembly decision gave five benchmarks or terms of reference for consideration by the Committee and these were: adherence to the principles of total rejection of impunity; adherence to international fair trial standards, including independence of the judiciary and impartiality of proceedings; jurisdiction over the

¹²⁹ Report of the Commission on Inquiry on Chad (1992) 91-2.

¹³⁰ Fall M (2014) 117-118.

¹³¹ Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), ICJ Judgment of 20 July 2012.

¹³² *Association des Victimes des Crimes et Répressions Politiques au Tchad (AVCRP) et al. v. Hissène Habré*, Judgment of Supreme Court of 20 March 2001. The judgment is in French but summary available at <http://www.internationalcrimesdatabase.org/Case/751> (accessed on 31 January 2016).

¹³³ Human Rights Watch Chronology on the Habré Case available at <https://www.hrw.org/news/2015/04/27/chronology-habre-case> (accessed on 31 January 2016).

¹³⁴ Para. 2 AU Assembly Decision on the Hissène Habré Case and the African Union, Assembly/AU/Dec. 103(VI) (2006) (hereafter AU Decision on the Hissène Habré Case (2006)).

alleged crimes for which Habre should be tried; efficiency in costs and time of trial; accessibility to the trial by alleged victims and witnesses; and priority of African mechanisms.¹³⁵ The Assembly requested the Committee to finalize its work and submit a report by July 2006.¹³⁶

The Committee recommended that in order to deal with international crimes in the future, they observed of the possibility of conferring criminal jurisdiction on the African Court of Justice and Human Rights to make the respect for human rights at national, regional and continental level a fundamental aspect of African governance.¹³⁷ The report provided a general direction for regionalisation of international criminal justice. It is interesting to note that in favour of regionalisation, the Committee observed that there is 'room in the Rome Statute for such a development and that it would not be duplication to the work of the ICC.'¹³⁸ The report does not mention the exact provision of the ICC Statute providing for regionalisation. Although it expressly provided for the expansion of jurisdiction of the African Court of Justice and Human Rights, it did not give specifics on how the jurisdiction over international crimes would be exercised alongside the ICC considering that it recognised that Africa has to operate in a global environment and not in isolation.¹³⁹

Upon considering the report of the CEAJ, the AU Assembly recommended that Senegal was to prosecute Habré 'on behalf of Africa, by a competent Senegalese court with guarantees for a fair trial.'¹⁴⁰ Hissène Habré was tried and convicted for crimes against humanity, war

¹³⁵ Para. 3 AU Decision on the Hissène Habré Case (2006).

¹³⁶ Para. 5 AU Decision on the Hissène Habré Case (2006).

¹³⁷ *Report of the Committee of Eminent African Jurists on the case of Hissene Habre* available at http://www.peacepalacelibrary.nl/ebooks/files/habreCEJA_Report0506.pdf (accessed on 19 December 2013) paras. 34 and 35.

¹³⁸ Report of Eminent Jurists on the case of Hissene Habré para. 35.

¹³⁹ Report of Eminent Jurists on the case of Hissene Habré para12; Murungu CB (2011) 1077.

¹⁴⁰ AU Assembly, Decision on the Hissene Habré Trial and the African Union Doc. Assembly/AU/3 (VII) 2006.

crimes, torture, sexual violence and rape by the Extraordinary African Chambers created by an agreement between the AU and the Government of Senegal signed on 22 August 2012.¹⁴¹

The Habré Case has shown that the AU's insistence of an African solution to dealing with impunity led to the establishment of the Extra Ordinary African Chambers. The recommendation by the CEAJ for the expansion of the jurisdiction of the African Court to deal with international crimes has since been adopted through the Malabo Protocol. In addition, the successful prosecution of Hissène Habré by the Extra Ordinary African Chambers indicates the commitment on the African Continent to prosecute international crimes committed in Africa.

4.4.2 ICC versus AU

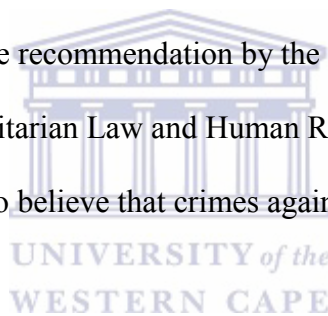
The relationship between the ICC and the AU can be described as being initially smooth and followed by a fall off. In the early days of the adoption of the ICC Statute and the establishment of the ICC, the relationship between the ICC and the AU was promising. Africa constituted and still constitutes the highest number of States Parties to the ICC Statute. In addition, some African States referred situations in their States to the ICC namely: Uganda, the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Ivory Coast and Mali. However, the relationship between the ICC and Africa has been rocked by challenges due to some triggers that will be analysed in this section within the context of regionalisation of international criminal justice in Africa. African States through the AU accuse the Court of being biased against Africans hence in the words of some African

¹⁴¹ See Fall M (2014) 117-31 (For the history and the structure of the Extraordinary Chambers). For the progress of the case see Human Rights Watch 'Hissène Habre' available at <https://www.hrw.org/tag/hissene-habre> (accessed on 23 July 2016), *Ministere Public v. Hussein Habre* (Judgment of 30 May 2016) available at http://forumchambresaficaines.org/docs/JugementCAEd%27Assises_Penal&Civil_.pdf (accessed on 29 August 2017) (There is no English version of the judgment).

Leaders the Court is accused of ‘race-hunting’¹⁴², being a ‘fraudulent institution’ reminiscent of colonialism and imperialism.¹⁴³ This thesis will not focus on the relationship between Africa and the ICC and the merit of the allegations save to the extent that the downturn in relationship between the ICC and the AU played a role in the call for regionalisation of international criminal justice in Africa.¹⁴⁴

4.4.2.1 The Indictment of Al Bashir

The genesis of the Al-Bashir controversy began with the UN Security Council resolution 1593 referring the situation in Sudan to the ICC.¹⁴⁵ The UNSC after determining that the situation in Sudan constituted a threat to international peace and security and in the exercise of their power under Chapter VII of the UN Charter referred the situation to the ICC.¹⁴⁶ The resolution was made following the recommendation by the Commission of Inquiry on Violation of International Humanitarian Law and Human Rights Law to refer Darfur to the ICC because there were reasons to believe that crimes against humanity and war crimes had been committed in Darfur.¹⁴⁷



¹⁴² Per Ethiopian Prime Minister Haile Mariam Desalegn during the AU Summit in 2013 see BBC Report African Leaders accuse ICC of hunting Africans, 13 May 2013 available at <http://www.bbc.com/news/world-africa-22681894> (accessed on 5 March 2015).

¹⁴³ Kezio-Musoke D Kagame tells why he is against ICC Charging Bashir African Press International, 5 August 2008 available at <http://africanpress.me/2008/08/05/kagame-tells-why-he-is-against-icc-charging-bashir/> (accessed on 5 March 2015).

¹⁴⁴ For details on the relationship between the AU and the ICC see Werle G, Fernandez L & Vormbaum M *Africa and the International Criminal Court* (2014); also Jalloh CC ‘Africa and the International Criminal Court: Collision Course or Cooperation?’ (2012) 34 *North California Central Law Review* 203-29; Maunganidze O & Du Plessis A ‘The ICC and AU’ in Stahn C (ed.) *The Law and the Practice of the International Criminal Court* (2015) Ch. 4; Murungu CB (2011)1067-1088.

¹⁴⁵ S/RES/1593 (2005)

¹⁴⁶ par 1 S/RES/1593 (2005).

¹⁴⁷ Report of the International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur S/2005/60.

Following the referral, the ICC issued the first arrest warrant against Al-Bashir on 4 March 2009 and a second arrest warrant was issued on 12 July 2010.¹⁴⁸ The African Union raised issues against the referral of the Sudan situation to the ICC and the subsequent arrest warrants and indictment in various resolutions.¹⁴⁹ The AU reservation on the referral and the subsequent arrest warrants were that they undermined the delicate nature of the peace process that was being undertaken in Sudan in order to facilitate the early resolution of the conflict in Sudan.¹⁵⁰ On the basis of this concern, the AU tried to seek the UNSC to defer the proceedings against Al Bashir on the basis of Article 16 of the ICC Statute but the same was not considered by the UNSC.¹⁵¹

As far as the AU was concerned, the arrest warrants issued by the ICC against Al Bashir were a violation of international law on immunity and as such, the AU directed its members not to cooperate with the ICC in arresting or surrendering Al Bashir to the ICC. This position put some of its members, who are also States Parties to the ICC Statute in an awkward position. On one hand, they must abide by their obligations under the ICC Statute, whereas on the other hand they must respect the decisions of the regional body, the AU. Some AU member States such as Malawi, Chad, DRC and South Africa were found non-compliant after they

¹⁴⁸ Situation in Darfur, Sudan The Prosecutor v. Omar Hassan Ahmad Al Bashir Case No. ICC-02/05-01/09, case information sheet available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/AlBashirEng.pdf> (accessed on 7 April 2015).

¹⁴⁹ See Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan Assembly/AU/Dec.221 (XII) (1-2 February 2009); Odero S 'Politics of International Criminal Justice, the ICC's Arrest Warrant for Al Bashir and the African Union's Neo-Colonial Conspirator Thesis in Murungu C & Biegon J *Prosecuting International Crimes in Africa* (2011).

¹⁵⁰ 12th Ordinary Session AU Assembly/ AU/Dec.221 (XII) (1-2 February 2009) para 2.

¹⁵¹ UNSC Resolution 1828 (2008) [on the deployment of the African Union-United Nations Hybrid Operation in Darfur] (31 July 2008), AU Peace and Security Council Communique, PSC/PR/COMM. (CLXXV), 5 March 2009.

hosted Al Bashir in their respective states.¹⁵² In previous cases South Africa had opted to respect their obligations under the ICC, hence South Africa could not host Al Bashir for the 2010 World Cup because they could not guarantee him not being transferred to the ICC. However, South Africa has failed to be consistent in its position of not hosting Al-Bashir as it invited him for the AU Summit that was held in South Africa in June 2015. The South African North Gauteng High Court in *The Matter between Southern Africa Litigation Centre v Minister of Justice and Others*¹⁵³ held that failure by the respondent (Government of South Africa) to arrest and detain Al Bashir was inconsistent with the Constitution of South Africa. After this, South African Government issued a notice of their intention to withdraw from the ICC.¹⁵⁴ The decision to withdraw had to be reconsidered following a decision of the High Court declaring that the notice of withdrawal from the Rome Statute signed by the Minister of International Relations without prior parliamentary approval was unconstitutional and invalid.¹⁵⁵



¹⁵² See *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-139 (12 December 2011); *The Prosecutor v Omar Hassan Ahmad Al Bashir* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir ICC-02/05-01/09-140 (13 December 2011); *The Prosecutor v Omar Hassan Ahmad Al Bashir* Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of South Africa to Comply with the Request by the Court for the Surrender and Arrest of Omar Al Bashir ICC-02/05-01/09-302 (6 July 2017); Tladi D ‘The ICC Decisions on Chad and Malawi: On Cooperation, Immunities, and Article 98’ 11(1)*JICJ* (2013)199-221; Boschiero N ‘The ICC Judicial Finding on Non-cooperation Against the DRC and No Immunity for Al-Bashir Based on UNSC Resolution 1593’ 13 (3)*JICJ* (2015) 625-653; Tladi D ‘The Duty on South Africa to Arrest and Surrender President Al-Bashir under South African and International Law: A Perspective from International Law’ 13(5) *JICJ* (2015) 1027-1047.

¹⁵³ Case Number 27740/2015.

¹⁵⁴ South Africa Withdrawal Notification available at <https://treaties.un.org/doc/Publication/CN/2016/CN.786.2016-Eng.pdf> (accessed on 1 September 2017).

¹⁵⁵ *Democratic Alliance v. Minister of International Relations & Others* High Court Gauteng Division Case No. 83145/2016; Withdrawal of Notification of Withdrawal available at <https://treaties.un.org/doc/publication/CN/2017/CN.121.2017-Eng.pdf> (accessed on 1 September 2017).

The issue of regionalisation of international criminal justice is reflected in the AU Assembly resolution highlighting the concerns on how Al Bashir's indictment had undermined the delicate peace process being undertaken in Sudan, regretting the failure to hear or act upon by the UNSC of the request on the AU to defer proceedings against Al Bashir.¹⁵⁶ In its subsequent resolution, the AU Assembly then proceeded to call for the early implementation of the decision mandating the Commission in consultation with the African Commission on Human and Peoples' Rights to examine the implications of the Court being empowered to try serious crimes of international concerns such as genocide, crimes against humanity and would be complementary to national jurisdictions.¹⁵⁷

4.4.2.2 ICC Cases against Uhuru Kenyatta and William Ruto

The Kenya situation is another trigger for regionalisation of international criminal justice in Africa. The Kenya situation arose from the 2007-2008 post-election violence in which it is alleged that 1300 people were killed.¹⁵⁸ The ICC Prosecutor opted to exercise his proprio motu powers under Article 15 of the ICC Statute for the investigation of crimes against humanity committed in Kenya. Before exercising his proprio motu powers, the prosecutor had given Kenya an opportunity to conduct domestic investigations and prosecutions but Kenya proved unwilling and unable to do so.¹⁵⁹

On 15 December 2010, the ICC Prosecutor named six individuals as suspects namely, Francis Mathaura, Uhuru Kenyatta, Mohammed Ali, William Ruto, Henry Kosgey and Joshua Sang.

¹⁵⁶ AU Assembly, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of the Sudan Assembly/AU/Dec.221(XII) (February 2009) para. 1.

¹⁵⁷ Para. 5 AU Assembly, Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Assembly/AU/13(XIII) (July 2009).

¹⁵⁸ ICC Case information sheet available at <http://www.icc-cpi.int/iccdocs/PIDS/publications/RutoKosgeySangEng.pdf> (accessed on 7 March 2015)

¹⁵⁹ Materu S.F *The Post-Election Violence in Kenya: Domestic and International Legal Responses* (2015) 74-5 (hereinafter Materu SF (2015)).

Among the suspects, Uhuru Kenyatta and William Ruto were Deputy Prime Minister and suspended Minister of Higher Education respectively.¹⁶⁰ After the 2010 elections they were voted as President and Vice President of Kenya.

Kenya has pulled all stops to prevent the ICC from prosecuting post-election violence cases. On 31 March 2011, the Government of Kenya filed an application challenging the admissibility of the case before the ICC. The application was rejected by Pre-Trial Chamber II on 30 May 2011 and was confirmed by the Appeals Chamber on 30 August 2011.

The fact that Uhuru Kenyatta and William Ruto had become the President and Vice President of Kenya had a negative tow on the ICC proceedings. At the AU level, the proceedings against Uhuru Kenyatta and his deputy were labelled as “politicization and misuse of indictment against African leaders by the ICC.”¹⁶¹ The AU underscored that the trial of a Head of State undermined the stability, sovereignty and peace in Kenya.¹⁶² From the resolution, the AU emphasised that national laws and customary international law grants immunity to sitting Heads of State and other Senior State Officials during the tenure of their office.¹⁶³ The AU then decided among other things that: “in order to safeguard constitutional order, stability and integrity of member states, no charges shall be commenced or continued before any international Court or Tribunal against any serving AU Head of State.”¹⁶⁴ This resolution was a political statement with no legal consequence since international Courts such as the ICC do not defer to the decisions of the AU. It was also decided by the AU Assembly that:

¹⁶⁰ Materu (2015) 178.

¹⁶¹ Para 4 Decision on Africa’s Relationship with the International Criminal Court (ICC) Ext/Assembly/AU/Dec.1 (October.2013) (hereinafter Decision on Africa’s Relationship with the ICC).

¹⁶² Para 5 Decision on Africa’s Relationship with the ICC.

¹⁶³ Para 9 Decision on Africa’s Relationship with the ICC.

¹⁶⁴ Para 10(i) Decision on Africa’s Relationship with the ICC.

‘The trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are the current serving leaders of the Republic of Kenya, should be suspended until they complete their term of office.’¹⁶⁵

The mere political relevance of these decisions is shown by the fact that President Kenyatta still had to appear before the ICC on 7 October 2014. On 5 December 2014, the ICC Prosecutor withdrew the case against President Kenyatta for lack of evidence.¹⁶⁶

With regard to the regional justice mechanism, the AU called for the fast tracking of the process of expanding the jurisdiction of the African Court on Human and Peoples’ Rights to try international crimes.¹⁶⁷ The resolution reflected that the AU Assembly was interested in granting international criminal jurisdiction to the African Court as fast as possible. However, it is yet to be seen whether the sense of urgency can be replicated by African States in ratifying the amended Protocol as currently the Protocol has been signed by 10 States i.e Benin, Chad, Comoros, Congo, Ghana, Guinea-Bissau, Kenya, Mauritania, Sierra Leone, and Sao Tome & Principe and Uganda.¹⁶⁸ There are no ratifications yet and the Protocol requires 15 ratifications to enter into force.¹⁶⁹

4.4.2.3 The Role of the UNSC in Cases before the ICC

The role of the UNSC in referring cases to the ICC has been controversial from the drafting of the ICC Statute. There were fears that giving it too much power would polarize the court’s

¹⁶⁵ Para 10 (ii) Decision on Africa’s Relationship with the ICC.

¹⁶⁶ Information on Kenyatta case available at <https://www.icc-cpi.int/kenya/kenyatta> (accessed on 3 May 2017).

¹⁶⁷ Par 10(iv) & (v) of the Decision on Africa’s Relationship with the International Criminal Court.

¹⁶⁸ Status List available at https://au.int/sites/default/files/treaties/7804-sl-protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf (accessed on 24 October 2017).

¹⁶⁹ Article 11 Malabo Protocol.

work and would call the overall credibility into question.¹⁷⁰ A compromise was made to give the UNSC power to refer situations to the ICC.¹⁷¹ It is the application of this role by the Security Council that partially forms the basis of the tussle existing between the ICC and the AU.¹⁷²

The first time the UNSC exercised its discretion under Article 13(b) was in referring the situation in Darfur, Sudan to the ICC under Resolution 1593. The AU attempted seek the UNSC to use its power under Article 16 of the ICC Statute to defer the situation in Sudan from investigation and prosecution but this request was not acted upon. The UNSC exercised its discretion under 13(b) again in referring the situation in Libya. A request to defer the Libya situation under Article 16 was also not acted upon. A deferral was also requested by the AU for the Kenya situation. The requests were made, according to the AU, as a way of balancing the interests of peace and justice in the affected areas through promoting of reconciliation. However, it has been argued that the requests were made to protect the African leaders from prosecution by the ICC.¹⁷³

The UNSC is accused by the AU of playing double standards considering that there are other situations, such as the one in Palestine that it could have also referred to the ICC but did not.¹⁷⁴ During the Extraordinary Summit of the AU of October 2013, Ethiopian Prime

¹⁷⁰ Moss L 'The UN Security Council and the International Criminal Court: Towards a More Principled Relationship' *International Policy Analysis* (March 2012) 3.

¹⁷¹ Article 13(b) ICC Statute where it is provided that the UNSC can refer situations to the ICC acting under Chapter VII of the UN Charter.

¹⁷² UN Security Council Resolution 1593 of 2005 referred the situation in Sudan (a non-State Party to the ICC) to the Prosecutor and Resolution 1970 of 2011 referred the situation in Libya (another non-State Party to the ICC) to the Prosecutor. The African Union was against the position taken by the UN Security Council in both cases.

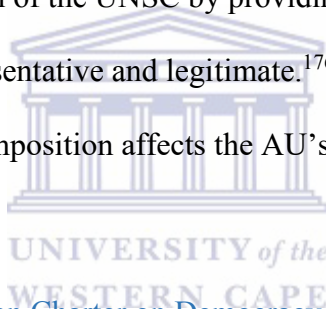
¹⁷³ Okoth J 'Africa, the United Nations Security Council and the International Criminal Court: The Question of Deferrals' in Werle, Fernandez & Vormbaum (2014) 203-6.

¹⁷⁴ Dugard J 'Palestine and the International Criminal Court: Institutional Failure or Bias?' (2013) 11(3) *JICJ* 563-70. The situation in Palestine is now under Preliminary Examination by the office of the Prosecutor after

Minister, Haile Mariam Dessalegn, the then Chairperson of the AU accused the ICC as well as the United Nations Security Council (UNSC) of double dealing and bias where he stated that:

‘On a number of occasions, we have dealt with the issue of the ICC and expressed our serious concern over the manner in which the ICC has been responding to Africa’s considerations. The double standard that both the United Nation’s Security Council and both the ICC have displaced in regards to AU’s request for deferral for prosecution in a number of cases has been particularly worrisome.’¹⁷⁵

It is important to note that the AU’s concerns against the UNSC are not just for the matters at the ICC. The AU seeks the reform of the UNSC by providing for seats for African States so as to make the UNSC more representative and legitimate.¹⁷⁶ The questioning of the legitimacy of the UNSC in its composition affects the AU’s response to the Councils actions in cases before the ICC.



4.4.3 Giving Effect to the African Charter on Democracy Elections and Governance

The other factor that fall outside the AU-ICC, AU-Europe or AU-UNSC category is found in the provisions of African Treaties. Deya¹⁷⁷, one of the consultants in the drafting of the

Palestine on 1 January lodged a declaration per Article 12(3) of the ICC Statute accepting the jurisdiction of the Court over alleged crimes committed "in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014" see

http://www.icccpi.int/EN_Menu/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx (accessed on 7 February 2015).

¹⁷⁵ Usman T ‘African Union Accuses International Criminal Court of Double Standards’ Premium Times News (12 October 2013) available at <http://www.premiumtimesng.com/news/146497-african-union-accuses-international-criminal-court-double-standards.html> (accessed on 7 February 2015).

¹⁷⁶ Dugard (2012) 566; see The Common African Position on The Proposed Reform of the United Nations: The Ezulwini Consensus (March, 2005).

¹⁷⁷ Deya D ‘Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes’ Issue 2 *OpenSpace* (February 2012) 22(hereinafter Deya D (2012)).

Protocol highlighted that there was a need to give effect to Article 25 (5) of the African Charter on Democracy, Elections and Governance (ACDEG) which provides that:

‘Perpetrators of Unconstitutional Change of Government may also be tried before the competent court of the Union.’

Based on this provision of the ACDEG, there was a need to create a crime of unconstitutional change of government and also give jurisdiction to an AU court to try the crime. In this regard, the amended Protocol is said to cover the need since the crime is one of the fourteen crimes provided thereunder.¹⁷⁸

4.5 The Process of Expanding the Jurisdiction of the African Court

The previous section has highlighted the possible triggers for the proposal to regionalise international criminal justice in Africa. This section will analyse the legal process undertaken in order to have a legislative framework (the Malabo Protocol) granting international criminal jurisdiction to the African Court. The section will start by analysing the judicial institutions of the AU, the African Court of Justice and the African Court on Human and Peoples’ Rights, the section will subsequently analyse the process undertaken in order to merge the two judicial institutions and subsequently the amendments that followed in order to give the merged court’s jurisdiction over international crimes. The idea is to clarify the complex and somewhat confusing treaty making process that has been undertaken in order create the international crimes chamber and reflect on the legal consequences of the same.

4.5.1 A Synopsis of existing AU Judicial Institutions

The AU judicial institutions relevant in this section are the African Court on Human and Peoples’ Rights and the African Court of Justice. As previously mentioned in the history

¹⁷⁸ Abass A (2017)18-20.

section of this chapter, the African Court on Human and Peoples' Rights was established under the Protocol to the African Charter on Human and Peoples' Rights to complement the work of the African Commission on Human Rights.¹⁷⁹ The jurisdiction of the court is to decide on cases or disputes concerning the application and interpretation of the African Charter, the Protocol establishing the Court and other human rights instruments.¹⁸⁰

As already stated, the Protocol creating the Court came in force in 2004 and the Court was inaugurated in 2006. The other Court in issue, the African Court of Justice is established under the Constitutive Act of the African Union which provides that such a Court shall be established and the statute composition and functions to be defined in a relevant Protocol.¹⁸¹

The Protocol creating the African Court of Justice was adopted in 2003 and entered into force in 2009.¹⁸² Under the Protocol, the Court is established as the principal judicial organ of the African Union.¹⁸³ It is not clear what this entail in practice but a plausible interpretation is that that the Court is superior and as Magliveras and Naldi puts it, a 'hierarchically superior court' to any other judicial organ under the African Union framework.¹⁸⁴ The Court has jurisdiction over interpretation and application of the Constitutive Act¹⁸⁵; the interpretation, application or validity of AU treaties and all subsidiary legal instruments¹⁸⁶; any question of international law¹⁸⁷; all acts, decisions, regulations and directives of the organs of the AU¹⁸⁸;

¹⁷⁹ Article 1, Protocol to the African Charter on Human and Peoples Rights (2004).

¹⁸⁰ Article 3 Protocol to the African Charter on Human and Peoples Rights (2004).

¹⁸¹ Article 18 (1), (2) Constitutive Act of the African Union.

¹⁸² Protocol of the Court of Justice of the African Union available at

http://www.au.int/en/sites/default/files/PROTOCOL_COURT_OF JUSTICE_OF THE AFRICAN UNION.pdf (accessed on 20 January 2015).

¹⁸³ Article 2(2) of the Protocol of the Court of Justice.

¹⁸⁴ Magliveras KD & Naldi GJ 'The African Court of Justice' (2006) 66 *ZaöRV* 193.

¹⁸⁵ Article 19 (1) (a).

¹⁸⁶ Article 19 (1) (b).

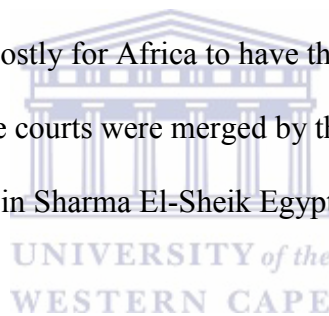
¹⁸⁷ Article 19 (1) (c).

¹⁸⁸ Article 19 (1) (d).

matters relating to interstate agreements or those between the States and AU¹⁸⁹; matters relating to breach of an obligation owed to State Party or to the AU¹⁹⁰; and matters of reparations for breach of obligations.¹⁹¹ In terms of composition, each court is supposed to have eleven judges.¹⁹²

4.5.2 The Merger and Subsequent Amendments

The AU Assembly made a decision in 2004 to merge the African Court of Justice and the African Court on Human and Peoples' Rights.¹⁹³ This decision itself was marked with controversies as it was considered in one hand as a blow to human rights promotion and protection in Africa since it was viewed as undermining a functioning and effective African Court on Human and Peoples' Rights.¹⁹⁴ On the other hand, the merger was a necessary cost cutting measure since it was too costly for Africa to have the two courts operating simultaneously.¹⁹⁵ Regardless, the courts were merged by the decision of the AU Assembly in its 11th Ordinary Summit held in Sharm El-Sheik Egypt on 1 July 2008.¹⁹⁶ The



¹⁸⁹ Article 19 (1) (e).

¹⁹⁰ Article 19 (1) (f).

¹⁹¹ Article 19 (1) (g).

¹⁹² Article 3 Protocol of the African Court of Justice and Article 11 of the Protocol on the African Human Rights Court, Article 3 ACJHPR Statute.

¹⁹³ Decision on the Merger of the African Court on Human and Peoples Rights and the Court of Justice of the African Union, A.U Doc. Assembly/AU/Dec.83(V) (2005).

¹⁹⁴ Amnesty International 'African Union: Assembly's Decision should not undermine the African Court' available at <http://www.amnesty.org/ar/library/asset/IOR30/020/2004/ar/bcb9e323-d5a2-11dd-bb24-1fb85fe8fa05/ior300202004en.html> (accessed on 21 January 2015); Viljoen F & Baimu E 'Courts for Africa: Considering the Co-existence of the African Court on Human and Peoples Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly of Human Rights* 244.

¹⁹⁵ Udombana NJU 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?' (2003) 28 *Brooklyn Journal of International Law* 811.

¹⁹⁶ Protocol on the African Court Statute: Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples Rights and the African Court of Justice, AU Doc Assembly/AU/13(XI) (1 July 2008).

implication of the merger as reflected in the Protocol on the Statute of the African Court of Justice and Human Rights is that the Protocol establishing the African Court on Human and Peoples' Rights and the Protocol on the Court of Justice of the AU would be replaced and a single court would be established under the name "The African Court of Justice and Human Rights".¹⁹⁷ Before the merged court came into effect, the AU Assembly again agreed an amendment to the Protocol on the Statute of the African Court of Justice and Human Rights in order to give it jurisdiction over international crimes. The decision was made at an AU Summit held in Addis Ababa in February 2009 whereby The AU Assembly requested the African Union Commission, in consultation with the African Commission on Human and People's Rights, to examine the implications of the African Court of Justice and Human Rights being empowered to try international crimes such as genocide, war crimes and crimes against humanity.¹⁹⁸ This decision was made within the context of a resolution on the implementation of the decision on what the Assembly regarded as the abuse of universal jurisdiction by some European States.¹⁹⁹ According to the decision, the Commission was to report to the Assembly on the issue in 2010.

The issue of the expansion of the jurisdiction of the African Court of Justice and Human Rights became part of the AU Assembly's subsequent decisions and resolutions. For instance, in its 13th Ordinary Session, the AU Assembly raised the issue within the context of the decision against the issuing of an indictment by the ICC Pre-trial Chamber against the

¹⁹⁷ Article 1 & 2 Protocol on the Statute of the African Court of Justice and Human Rights as adopted in 2008.

¹⁹⁸ Assembly of the African Union 12th Ordinary Session, Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction Assembly/AU/Dec.213 (XII) (February 2009) para 9.

¹⁹⁹ Council of the European Union, *The AU-EU Technical Ad-Hoc Expert Group on the Principle of Universal Jurisdiction* (2009) available at

http://ec.europa.eu/development/icenter/repository/troika_ua_ue_rapport_competence_universelle_EN.pdf (accessed on 4 March 2013) highlights AU and EU understanding of the principle of universal jurisdiction.

Sudanese President Omar Al-Bashir.²⁰⁰ The language was slightly different from the previous decision in that it exhibited characteristics of urgency. In this decision, the Assembly requested for the ‘early implementation’ of the decision Assembly/Dec.213 (XII) adopted in February 2009 mandating the Commission in consultation with the African Commission on Human and Peoples Rights to examine the implications of the Court being empowered to try serious cases of international concern such as genocide, crimes against humanity and war crimes which would be complementary to national jurisdictions and the processes of fighting impunity.

In this decision, complementarity under the regional mechanism would take a different form in that it refers to complementarity between the regional chamber and national jurisdictions, a concept that was not envisaged under the ICC Statute. In the same vein there is mention of complementarity to processes of fighting impunity.²⁰¹ It is not clear what these processes are in the African context however this can be linked to the peace and justice debate whereby under certain circumstances the interests of peace may require the non-prosecution of international crimes.

The process of coming up with the Protocol and the Statute of the ACJHPR annexed thereto can be summarised as follows: The starting point was the series of decisions by the AU Assembly calling for the expansion of the jurisdiction of the merged court to cover international crimes.²⁰² The following step was the appointment of Pan-African Lawyers Union (PALU) by the African Union Commission (AUC) as its consultant in February 2010

²⁰⁰ Assembly of the African Union 13th Ordinary Session, Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC) Assembly/AU/Dec. 245 (XIII).

²⁰¹ Assembly of the African Union 13th Ordinary Session, Decision on the Meeting of the African States Parties to the Rome Statute of the International Criminal Court (ICC) Assembly/AU/Dec. 245 (XIII) par.5.

²⁰² Assembly/Dec.213 (XII) (2009); Assembly/AU/Dec.245 (XIII) (2010).

to do the necessary study and ultimately draft the Protocol.²⁰³ In June 2010, the first draft of the Protocol was submitted to the Office of the Legal Counsel, African Union Commission (OLC-AUC) which gave directives and recommendations for amendments.²⁰⁴ Between June and July 2010, PALU worked on the recommended revisions and in August 2010, PALU submitted the second draft report and the instrument incorporating the directives of the OLC-AUC.²⁰⁵

Following this process, the AU Commission conducted two validation workshops in South Africa in August and October-November 2010 which brought together the AUC and Legal Counsels or Advisors of all AU Organs and Institutions, Legal Counsels or Advisors of the Regional Economic Communities (RECS), and the draft legal instruments were amended to incorporate suggestions from the validation meetings.²⁰⁶

Between May 2010 and May 2012 there were four Government Experts meetings and one meeting for Ministers of Justice and Attorneys' General who endorsed the Draft Protocol in May 2012.²⁰⁷ In its Ordinary Session of July 2012, the AU Assembly did not adopt the draft protocol, instead it requested the Commission in collaboration with the African Court of Human Rights to prepare a study on the financial and structural implications that may result

²⁰³ See the Process as enumerated in Deya D (2012) 23-4; see also a presentation by Don Deya, CEO Pan African Lawyers Union (PALU) entitled 'The Future African Court: Progress, Prospects, Challenges-So what are you going to do?' available at www.lawyersofafrica.org (accessed on 17 March 2015) (hereinafter Deya D Presentation).

²⁰⁴ Deya D (2012) 24.

²⁰⁵ Deya D (2012) 24.

²⁰⁶ Deya D (2012) 24.

²⁰⁷ Deya D Presentation p. 6; Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights- Revisions up to 15th May 2012 Exp/Min/IV/Rev.7 available at <http://africlaw.files.wordpress.com/2012/05/au-final-court-protocol-as-adopted-by-the-ministers-17-may.pdf> (accessed on 2 January 2013).

from the expansion of the jurisdiction.²⁰⁸ Another outstanding issue was the need to clarify the definition of the offence of unconstitutional change of government, in order to clarify if popular uprisings would constitute an unconstitutional change of government.²⁰⁹

The AU Commission conducted an expert meeting from 19th-20th December 2012 in Arusha Tanzania, to consider the AU Assembly's requests. It was decided during the experts' meeting that there was no need to amend the Draft Protocol with regard to the offence of unconstitutional change of government.²¹⁰ As regarding the financial and structural implications, the experts agreed that the only additional expenses will be in the expanded structure and operations of the African Court on Human and Peoples' Rights.²¹¹ In its extraordinary session of October 2013, the AU Assembly made a decision calling for the fast tracking of the process of expanding the mandate of the African Court of Justice and Human Rights to try international crimes.²¹² It also called upon the AU Commission to expedite the process of expansion of the African court in accordance with the decision of policy organs of the AU and also invited the member States to support the process.²¹³ The Commission was to report on the implementation of the decision in the ordinary session of the AU Assembly in

²⁰⁸ Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Assembly/AU/Dec.427 (XIX) (July 2012).

²⁰⁹ Assembly/AU/Dec.427 (XIX) para 3. The question to be clarified was whether the offence would cover change of government through popular uprisings as was the case in Tunisia, Libya and Egypt

²¹⁰ Report on the Workshop on the Definition of Crime of Unconstitutional Change of Government and Financial and Structural Implications (Arusha, 19-20 December 2012) AfCHPR/LEGAL/Doc. 3, at 4 available at [http://webmail.africa-union.org/AddisJanuary2013/Assembly%20AU%2010%20\(XX\)%20_E.pdf](http://webmail.africa-union.org/AddisJanuary2013/Assembly%20AU%2010%20(XX)%20_E.pdf) (accessed on 7 April 2015) (hereinafter Report on UCG Definition (2012)).

²¹¹ Report on UCG Definition (2012) 5.

²¹² Decision on Africa's Relationship with the International Criminal Court Ext/Assembly/AU/Dec.1 (Oct. 2013) para 10(iv).

²¹³ Ext/Assembly/AU/Dec.1 (Oct.2013) para 10(v).

January 2014.²¹⁴ In May 2014, the Specialised Technical Committee (STC) on Justice amended and cleared the draft for adoption and subsequently the final draft of the amended Protocol was presented to the AU Assembly which finally adopted it on 27 June 2014, in Malabo Equatorial Guinea. The Protocol is named “The Protocol on Amendments to the Protocol of the Statute of the African Court of Justice and Human Rights.”

4.5.3 The Implications of Multiple Instruments

The multiplicity of instruments adopted by the AU brings into question which of the instruments States should ratify? The courts are broken down into four, the African Court of Human and Peoples Rights, The African Court of Justice, The Merged African Court of Justice and Human Rights, and the African Court of Justice and Human and Peoples Rights established under the recent amendment. In elucidating the state of affairs, Deya²¹⁵ and Maluwa²¹⁶ argue that the second (the African Court of Justice) and the third court (the merged African Court of Justice and Human Rights) may not be practically be established but rather regarded as merely a ‘transition’ from the existing court the African Court on Human and Peoples’ Rights to the fourth Court the African Court of Justice and Human and Peoples’ Rights. In the event that the third or the fourth Court does not come into existence, the first

²¹⁴ Ext/Assembly/AU/Dec.1 (Oct.2013) para 11 see also Decision on the Progress Report of the Commission on the Implementation of the Decisions on the International Criminal Court Assembly/AU/Dec.493 (XXII) (January 2014) para 13 requesting the Commission in collaboration with all stakeholders to speed up the process of extending the jurisdiction of the African Court of Justice and Human Rights.

²¹⁵ Deya D (2012) 23.

²¹⁶ Presentation by Maluwa T ‘The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice: Development of the Draft Protocol Granting Jurisdiction over International Crimes to the African Court, with focus on Definition of Crimes and the Link with other Courts especially the ICC’ International Criminal Law Conference, Nuremberg (4-6 October 2012) 4-5 available at http://wayamo.com/sites/default/files/pdfs/Tivanjana_Maluwa.pdf (accessed on 22 January 2015).

court will continue being operational. There is no way to ascertain when these instruments will come into force, however the AU Commission concluded that:

‘Treaties that enter into force more quickly tend to be those that deal with non-controversial subjects, whose negotiation did not attract a substantial number of reservations, and those that are not perceived as affecting state sovereignty.’²¹⁷

However, based on empirical study on the policy and practice of ratification of OAU/AU Treaties, Maluwa concludes that OAU/AU treaties most likely to be ratified and implemented are those that are less disruptive to the domestic legal structures and preferences of the domestic state.²¹⁸ In addition, acts of ratification can be undertaken on the basis of external peer pressure or for reputational value as opposed to well-deliberated national policy.²¹⁹ The later point is more likely to influence the ratification of the Protocol granting criminal jurisdiction considering the peer pressure that had been exhibited by the AU and the influencing of States not to cooperate with the ICC. However, at this stage the statistics show that only 10 States have signed the Protocol and there has been no ratification which signifies the lack of urgency on the part of States to have the expanded jurisdiction in force.

4.6 Conclusion

The proposal for the regionalisation of international criminal justice can be analysed as having been a reactive process in the two phases under consideration. Under the OAU, it was a reaction to the apartheid policies in South Africa and the need to achieve accountability for such. Under the AU proposals for regionalisation of international criminal justice were a

²¹⁷ Report of the AU Commission on the Status of OAU/AU Treaties, AU Doc EX.CL/707/Rev.1 (16 January 2012) 6; see also Maluwa T ‘Ratification of African Union Treaties by Member States: Law, Policy and Practice’ (2012) 13 *Melbourne Journal of International Law* 27 (hereinafter Maluwa T (2012)).

²¹⁸ Maluwa T (2012) 41.

²¹⁹ Maluwa T (2012) 28.

reaction to the administration of international criminal justice by the ICC and some EU Member States. Under the OAU, there was little momentum for the establishment of a regional framework to deal with international crimes and the scope of the crimes envisaged was limited. In this phase, the proposal is considered in the context of the development of human rights law in Africa. In this period, where state-centric approach was more favourable, it was difficult to push forward an idea for individual criminal liability for international crimes. In addition, there was resistance towards judicial mechanism for accountability for human rights violations. This explains the decision in favour of establishing a Commission instead of a Court. Further, the scope of the crimes envisaged was limited to crimes against humanity, this was based on circumstantial approach, which was necessitated by the need to address the problem of apartheid in South Africa. The OAU's efforts did not yield any tangible results in terms of establishing a regional court dealing with international crimes, however, it was a period of overwhelming African support to the establishment of the ICC.

Under the AU, there is an increased momentum for the establishment of the regional framework and the scope of the crimes envisaged are broader. There are several factors that influence the momentum, the main one being the dwindling relationship between Africa and the ICC. This is due to the indictment of some African Presidents that is; Al Bashir, Kenyatta and the late Gaddafi. The role of the UNSC cannot be ignored. The AU was of the view that there was some bias in the way the UNSC refer cases to the ICC, in addition Africa has always expressed its reservations on the legitimacy of the UNSC. As such, the ICC is caught up within the disagreement when it exercises jurisdiction on the basis of UNSC referrals.

This chapter has shown that politics of identity played a role in influencing proposals for regionalisation of international criminal justice in Africa. Africa, through the AU, views herself as a victim of the abuse of jurisdiction by the EU, ICC and the UNSC, thus regionalisation is considered as a way out from the perceived victimisation.

CHAPTER 5

THE STRUCTURE AND THE JURISDICTION OF THE EXPANDED AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS

5.1 Introduction

The chapter gives an overview on the structure of the expanded African Court of Justice Human and Peoples' Rights in particular the organs which are: The Presidency, Office of the Prosecutor, Office of the Defence, and the Registry. Further, the chapter will also analyse the jurisdiction of the Court particularly its temporal, personal, territorial and subject matter jurisdiction. Finally, the chapter discusses other areas relevant in the exercise of jurisdiction over international crimes and these are: trigger mechanisms, complementarity, deferral mechanism, the rights of the accused, penalties and sanctions, cooperation and judicial assistance, and annual reporting.

5.2 The Structure of the Proposed Court

5.2.1 Organs of the Court

The court shall be composed of four organs: the presidency, the office of the prosecutor, the registry and the defence office.¹ It shall have three sections: a General Affairs Section, a Human and People's Rights Section and an International Criminal Law Section.² The General Affairs Section has the competence to hear cases submitted under Article 28 of the ACJHPR Statute except those assigned to the Human and Peoples' Rights Section and the International

¹ Art 2 Malabo Protocol.

² Article 16 ACJHPR Statute.

Criminal Law Section.³ Article 17 (2) of the Statute clarifies which cases fall within the Human and Peoples Rights Section and provides that the section has the competence to hear cases relating to human and peoples' rights. Whereas, Article 17(3) provides that the International Criminal Law Section is competent to hear cases relating to crimes specified in the Statute.

The Criminal Law Section shall have three chambers: The Pre-Trial Chamber, Trial Chamber and an Appellate Chamber.⁴ The powers and the functions of the chambers of the International Criminal Law Section are found in Article 19 Bis of the Statute. A look at the provision shows that Article 19 Bis(1) does not make sense and need to be amended in that it provides that the Pre-Trial Chamber shall exercise the functions provided for in Article 46 F of the Statute yet Article 46 F of the Statute provides for trigger mechanisms.⁵ The Pre-Trial Chamber powers include issuing orders and warrants upon the request of the Prosecutor.⁶ It also has the power to make orders for the protection of privacy of witnesses and witnesses, orders for presentation of evidence and the protection of arrested persons.⁷ The Trial Chamber is responsible for conducting trials of the accused persons.⁸ It is also responsible for hearing appeals from the Pre-Trial Chamber.⁹ The Appeals Chamber will be receive and conduct appeals from the Trial Chamber.¹⁰

³ Article 17(1) ACJHPR Statute.

⁴ Article 16(2) ACJHPR Statute.

⁵ Article 46 F provides that the Court may exercise its jurisdiction with respect to crimes under the Statute in cases of (1) State-referral (2) referral by the Assembly of Heads of States or Peace and Security Council of the Union (3) Exercise of Proprio Motu powers by the Prosecutor.

⁶ Article 19 Bis (2) ACJHPR Statute.

⁷ Article 19 Bis (3) ACJHPR Statute.

⁸ Article 19 Bis (4) ACJHPR Statute.

⁹ Article 19 Bis (5) ACJHPR Statute.

¹⁰ Article 19 Bis (6) ACJHPR Statute.

5.2.2 Composition

The Court shall have 16 Judges who are nationals of States Parties.¹¹ The criteria for qualification of judges are persons who are impartial and independent, persons of high moral character, who possess the qualifications required in their respective countries for the appointment of highest judicial offices, or are juris-consults of recognised competence and experience in international law, international human rights law, international humanitarian law and international criminal law.¹² The judges are selected from three alphabetical list of candidates identified as Lists A, B, and C. List A contains names of candidates with recognised competence and experience in international law, List B contains names of candidates with recognised competence in international human rights law and international humanitarian law and List C contains names of candidates having recognised competence and experience in international criminal law.¹³ Candidates are nominated by States Parties and they shall also indicate in which list their candidate may be placed.¹⁴ As to the number of judges to be selected a total of 16 Judges shall be selected, five each from Lists A and B and six from Lists C.¹⁵ The Chairperson of the Commission shall communicate the three lists to Member States at least thirty days before the Ordinary Session where elections of judges will take place.¹⁶

¹¹ Article 3 (1) ACJHPR Statute.

¹² Art 4 ACJHPR Statute.

¹³ Article 6 (1) ACJHPR Statute.

¹⁴ Article 6(2) ACJHPR Statute.

¹⁵ Article 6 (3) ACJHPR Statute.

¹⁶ Article 6 (4) ACJHPR Statute.

The tenure of the judges is a non-renewable nine year term.¹⁷ For five judges elected at the first election, it will end after three years and the terms of other five judges will end after six years.¹⁸ The determination as to which judges term expires after three years and which ones after six years will be determined by lot drawn by the Chairperson of the Assembly or the Executive Council immediately after the first election.¹⁹ All the judges, save for the President and Vice President, shall perform their functions on a part-time basis.²⁰ However, the Assembly on the recommendation of the Court can decide when all judges shall perform their functions on a full time basis.²¹ Having judges on a part-time basis is a cost-cutting measure, however, where the workload of the Court will necessitate them to be on full-time basis, then the Court can recommend the Assembly to change the status.

5.2.3 Office of the Prosecutor

The functions of the Office of the Prosecutor are provided in Article 22A of the Statute. The Office shall be responsible for investigations and prosecution of crimes under the Statute and shall act independently as a separate organ of the Court without receiving instructions from any State Party or any other source.²² The office shall comprise of a Prosecutor and two Deputy Prosecutors.²³ The Prosecutor and Deputies are elected by the Assembly among the candidates nominated by State Parties.²⁴ The Prosecutor's tenure is a single non-renewable seven year term, whilst the Deputy Prosecutors shall serve a four year term renewable once.²⁵

¹⁷ Article 8(1) ACJHPR Statute.

¹⁸ Article 8 (1) ACJHPR Statute.

¹⁹ Article 8 (2) ACJHPR Statute.

²⁰ Article 8 (4) ACJHPR Statute.

²¹ Article 8 (5) ACJHPR Statute.

²² Article 22 A (6) ACJHPR Statute.

²³ Article 22 A (1) ACJHPR Statute.

²⁴ Article 22 A (2) ACJHPR Statute.

²⁵ Article 22 A (3) & (4) ACJHPR Statute.

The Prosecutor and Deputies shall be persons of high moral character, highly competent with extensive practical experience in conducting investigations, trial and prosecution of criminal cases.²⁶ The Prosecutor can appoint other staff members to assist in his/her functions and they will be appointed according Staff Rules and Regulations of the AU.²⁷ The Office of the Prosecutor has power to question suspects, victims and witnesses, collect evidence as well as conducting on-site investigations.²⁸ The remuneration and the conditions of service of the Prosecutor and Deputy will be determined by the Assembly, with recommendation of the Court made through the Executive Council.

5.2.4 Office of the Defence

The ACJHPR has a detailed provision on the office of the Defence Office. The Court shall establish the Defence Office for the purpose of ensuring rights of suspects, accused or any other person entitled to legal assistance.²⁹ It shall be an independent and a separate organ from the court and is responsible for protecting rights of the defence, providing support and assistance to the Defence Counsel and any person entitled to legal assistance.³⁰ It shall be headed by a Principal Defender who shall be appointed by the Assembly.³¹ The Principal Defender is expected to be a person of high moral character with high level of competence and experience in criminal matters, with a minimum of ten years' experience of practice before a national court or international court and admitted to practice law in a recognised

²⁶ Article 22 A (5) ACJHPR Statute.

²⁷ Article 22 A (8) & (9) ACJHPR Statute.

²⁸ Article 22 A (7) ACJHPR Statute.

²⁹ Article 22 C (1) ACJHPR Statute.

³⁰ Article 22 C (2), (3) ACJHPR Statute; Under Article 22 C (8) the Principal Defender at the request of a Judge, Chamber, Registry, Defence, on his/ her own motion have the right of audience in relation to matters of general interest to the Defence teams, the fairness of the proceedings and the rights of a suspect or accused.

³¹ Article 22 C (4) ACJHPR Statute.

jurisdiction.³² It is not clear what ‘recognised jurisdiction’ means in this provision, it presupposes existence of some unrecognised jurisdiction, there is need to clarify the criteria on this point. In order to ensure the fair rights of the accused, the Principal Defender can adopt regulations and practice directions necessary to effectively carry out the functions of the defence office.³³ He or she shall for all purposes of pre-trial, trial and appellate process enjoy an equal status with the Prosecutor in respect of rights, audience and negotiations inter partes.³⁴ He or she also has the power to appoint some other staff in accordance with AU Staff Rules and Regulations to perform some functions at the defence office.³⁵ There is a provision that the Defence office may include one or more public defenders but there is no clear criteria on how the public defenders may be appointed.³⁶ There is also no provision for tenure of office for the Principal Defender or Public Defenders under the Statute it is necessary that it is made clear how long the Principal Defender shall hold that office.³⁷

5.2.5 Registry

The registry shall comprise of a Registrar and three Assistant Registrars appointed by the Court in accordance to the Staff Rules and Regulations of the AU.³⁸ The Registrar shall serve a single non-renewable term of seven years and the Assistant shall serve for a four year term renewable once.³⁹ The Registrar is the head of the Registry and under the direction of the President, is responsible for the non-judicial aspects of the Court’s work and servicing of the

³² Article 22 C (4) ACJHPR Statute.

³³ Article 22 C (5) ACJHPR Statute.

³⁴ Article 22 C (7) ACJHPR Statute.

³⁵ Article 22 C (6) ACJHPR Statute.

³⁶ Article 22 C (2) ACJHPR Statute.

³⁷ One would suggest that the same tenure as that of the Prosecutor be applied.

³⁸ Article 22 B (1), (2) ACJHPR Statute.

³⁹ Article 22 B (3), (4) ACJHPR Statute.

documents.⁴⁰ He or she shall be the principal administrative and accounting officer of the Court and shall ensure that proper books of accounts are kept in accordance to the AU rules and regulations.⁴¹ In terms of character, the Registrar and his or her Assistants shall be person of high moral character, highly competent with extensive practical managerial experience.⁴² The Registrar shall be assisted by other staff appointed by the Court in accordance with the AU Staff Rules and Regulations.⁴³ The salaries and conditions of service for the Registrar, Assistance and other staff members of the registry shall be determined by the Assembly on the proposal by the Court through the Executive Council.⁴⁴

The Registrar has power to set up some two units within the Registry: A Victims and Witnesses Unit⁴⁵ and A Detention Management Unit.⁴⁶ The Victims and Witnesses Unit shall provide in consultation with the Court and the Office of the Prosecutor, protective measures, security arrangements, counselling and other appropriate assistance for witnesses and victims who appear before the court or any person who might be at risk on account of their testimony.⁴⁷ In order to fulfil these functions, the unit shall include experts in the management of trauma.⁴⁸ The Detention Management Unit shall manage the conditions of detention of suspects and accused persons.⁴⁹

⁴⁰ Article 22 B (5) ACJHPR Statute.

⁴¹ Article 22 B (5) ACJHPR Statute.

⁴² Article 22 B (6) ACJHPR Statute.

⁴³ Article 22 B (7), (8) ACJHPR Statute.

⁴⁴ Article 22 B (10) ACJHPR Statute.

⁴⁵ Article 22 B (9) (a) ACJHPR Statute.

⁴⁶ Article 22 B (9) (b) ACJHPR Statute.

⁴⁷ Article 22 B (9) (a) ACJHPR Statute.

⁴⁸ Article 22 B (9) (a) ACJHPR Statute.

⁴⁹ Article 22 B (9) (b) ACJHPR Statute.

5.3 Jurisdiction of the Court

5.3.1 Temporal Jurisdiction

The jurisdiction of the Court will be prospective in that it will only have jurisdiction over crimes that will be committed after the Protocol and the Statute come into force.⁵⁰ The ICC also has prospective jurisdiction, whilst the ICTY and the ICTR had retrospective jurisdiction in that they had jurisdiction over crimes that were committed before their Statutes came into force. The ACJHPR Statute provides that for a State that becomes a party to the Protocol and the Statute after they have entered into force, the Court can only exercise its jurisdiction over the crimes committed after the entry into force of the Protocol and the Statute for that State Party.⁵¹ In addition, a non-State Party may lodge a declaration with the Court in order for it to exercise jurisdiction.⁵² Wills argues that non-State Parties can lodge a declaration giving the court to exercise its jurisdiction retrospectively.⁵³ However, the Court will have to determine whether it can exercise jurisdiction retrospectively as opposed to prospectively as is the case for States Parties.



5.3.2 Territorial Jurisdiction

The Court will exercise jurisdiction over crimes committed in the territory of the State Party.⁵⁴ The territory of the State extends to a vessel or an aircraft registered in a country which is a State Party to the Protocol and the Statute.⁵⁵ It is an uncontroversial form of jurisdiction and as Akerhurst puts it:

⁵⁰ Article 46 E bis (1) ACJHPR Statute.

⁵¹ Article 46 E bis (2) ACJHPR Statute.

⁵² Article 46 E bis (3) ACJHPR Statute this is similar to Article 12 (3) ICC Statute.

⁵³ Wills A 'Old Crimes, New States and the Temporal Jurisdiction of the International Criminal Court' (2014) 12(3) *JICJ* 407-435.

⁵⁴ Article 46 E bis (2)(a) ACJHPR Statute.

⁵⁵ Article 46 E bis (2)(a) ACJHPR Statute which is similar to Article 12(2) (a) ICC Statute.

‘One of the main functions of a State is to maintain order within its own territory, so it is not surprising that the territorial principle is the most frequently invoked ground for criminal jurisdiction.’⁵⁶

5.3.3 Active Personality Jurisdiction

The Court will exercise jurisdiction based on the nationality of the accused person. If the accused is a national of a State Party, the court will exercise jurisdiction.⁵⁷ This is similar to the jurisdiction conferred to the ICC under Article 12(2)(b) of the ICC Statute.

5.3.4 Passive Personality Jurisdiction

The Statute confers jurisdiction on the Court to exercise jurisdiction of crimes committed against a national of a State Party.⁵⁸ Some States such as the United States (US) and the United Kingdom consider the exercise of jurisdiction against their nationals on the basis of passive personality as a dubious means of acquiring jurisdiction.⁵⁹ For the ICC, the US objected to the exercise of jurisdiction of nationals of non-State Parties without the consent of the non- Party.⁶⁰ This position reflects an attitude against accountability at the international level on the part of the US.⁶¹ However, the African Court will be able to exercise jurisdiction over nationals of non-State Parties within the continent and without as long as the victims are nationals of a State Party.

⁵⁶ Akehurst M ‘Jurisdiction in International Law’ (1972-73) *British Yearbook of International Law* 152; Nerlich V ‘Preconditions to the Exercise of Jurisdiction (Article 46E bis) Exercise of Jurisdiction (Article 46 F) and the Prosecutor (Article 46 G) in Werle G & Vormbaum M (eds.) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 166 (hereinafter Nerlich (2017)).

⁵⁷ Article 46 E bis (2) (b) ACJHPR Statute; Nerlich V (2017) 166.

⁵⁸ Article 46 E bis (2) (c) ACJHPR Statute; Nerlich V (2017) 167; Shaw M *International Law* 5 ed (2003) 589.

⁵⁹ Shaw M (2003) 590.

⁶⁰ Akande D ‘The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits’ (2003)1 *JICJ* 619.

⁶¹ See Scharf M.P ‘The ICC’s Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S Position’ (2001) 64 (1) *Law Contemporary Problems* 67-117.

5.3.5 Protective Principle

The Court will exercise jurisdiction over extra territorial acts by non-nationals which threaten the vital interests of a State Party.⁶² What constitute vital interests of a State varies. It may be security, economic or any factor that the State in question may determine. This fluidity makes the exercise of jurisdiction on the basis of protective principle controversial.⁶³ The assessment of 'States vital interests' is a political assessment which domestic jurisdictions often undertake.⁶⁴ However, in the case of the African Court, there is no set procedure or criteria that the Court can follow and as such it is not equipped to undertake that assessment.⁶⁵ Nerlich suggests that the solution is for the Court to only exercise jurisdiction on the basis of protective principle in cases where a State whose vital interests has been affected refers the situation to the Court.⁶⁶ Such an approach would save the court from making political assessments.

5.3.6 Subject Matter Jurisdiction

The Court will have jurisdiction over fourteen crimes. Article 28A of the ACJHPR Statute provides as follows:

Subject to the right of appeal, the International Criminal Law Section shall have power to try persons for the crimes provided hereunder:

- 1) Genocide
- 2) Crimes against Humanity
- 3) War Crimes

⁶² Article 46 E bis (2) (d) ACJHPR Statute.

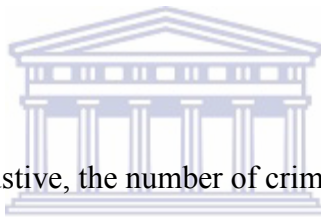
⁶³ Nerlich V (2017) 167-68.

⁶⁴ Nerlich V (2017) 168.

⁶⁵ Nerlich V (2017) 168.

⁶⁶ Nerlich V (2017) 168.

- 4) The Crime of Unconstitutional Change of Government
- 5) Piracy
- 6) Terrorism
- 7) Mercenarism
- 8) Corruption
- 9) Money Laundering
- 10) Trafficking in Persons
- 11) Trafficking in Drugs
- 12) Trafficking in Hazardous Wastes
- 13) Illicit Exploitation of Natural Resources
- 14) The Crime of Aggression



The fourteen crimes are not exhaustive, the number of crimes may be extended pursuant to Article 28 A (2) of the ACJHPR Statute which gives authority to the AU Assembly of Heads of States to incorporate additional crimes to reflect developments in international law. All the crimes within the jurisdiction of the court are not subject to statute of limitations.⁶⁷ The ACJHPR Statute describes all the crimes as ‘international crimes’ although some of the crimes are ‘transnational crimes’.⁶⁸ There are different approaches in defining what constitutes an international and a discussion on such will be done in the next chapter.

⁶⁷ Art 28 A (3) ACJHPR Statute; Nerlich V (2017) 177.

⁶⁸ See Jalloh CC ‘The Nature of the Crimes in the African Court’ (2017) *JICJ* 799-826 argues that the codification of both transnational and international crimes illustrate that some states are less concerned with adherences to crime categories and interested in proscribing whatever causes threat to their peace and security.

5.4 Other Areas Relevant in the Exercise of Jurisdiction

5.4.1 Trigger Mechanisms

Trigger mechanisms deal with the question of the circumstances in which the Court may exercise jurisdiction. The relevant provision dealing with this is in Article 46 F of the ACJHPR Statute where it is provided that:

‘The Court may exercise its jurisdiction for crimes in three circumstances and these are:

1. A situation in which one or more crimes under the Statute appears to have been committed is referred to the Prosecutor by a State Party.
2. A situation in which one or more such crimes appear to have been committed is referred to the Prosecutor by the Assembly of Heads of State and Government of the AU or the Peace and Security Council of the AU.
3. The prosecutor has initiated an investigation in respect of such a crime in accordance with Article 46 G.’

At first glance, one may conclude that there are three ways in which cases may be brought before the court. However, a closer look into the provision shows that under Article 46 F (2) there are two ways in which cases can be referred to the Court and these are by the AU Assembly of Heads of States and Government or by the Peace and Security Council. So, there are actually four trigger mechanisms which are: State Party referral under Article 46 F (1), AU Assembly of Heads of State and Government referral under Article 46 F (2), AU Peace and Security Council referral under Article 46 G (2), and exercise of proprio motu powers by the Prosecutor under Article 46 G (3) of the Statute. Another viewpoint is to consider that the AU Assembly and the AU Peace and Security Council are supposed to exercise their power in the alternative, such that where the AU Assembly has exercised

jurisdiction the Peace and Security Council cannot. This might have been the intention but it does not come clear from the provision.

The bringing in of the AU Assembly of Heads of State has the potential of politicising the triggering process. The AU Assembly is a political organ as such it would have been preferable if it has limited influence in the operations of the Court. This thesis argues that the AU Peace and Security Council is a sufficient body to recommend cases before the Prosecutor since it has specialised mandate on peace and security generally and on international crimes specifically and its decisions are made based on in-depth research. To avoid politicising the jurisdiction of the court, the AU Assembly should have been excluded from the trigger mechanisms.⁶⁹

Regarding State Party referrals, it would be interesting to see if the trend of self-referral as is the case at the ICC would continue at the regional court. In relation to the exercise of proprio motu powers, the Prosecutor has to follow the procedure under Article 46 G of the Statute. First, the Prosecutor is required to analyse the seriousness of the information that he or she has received and may seek additional information from States, Organs of the AU or UN, intergovernmental or NGOs, or other reliable sources that he or she deems appropriate.⁷⁰ Secondly, if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit a request for authorisation of an investigation to the Pre-Trial Chamber.⁷¹ In submitting the request for authorisation, the Prosecutor shall include any supporting material collected and victims may also be represented in accordance to the rules of the Court.⁷² Then the Pre-Trial Chamber, upon examination of the request for authorisation

⁶⁹ A similar viewpoint by Nerlich V (2017) 179.

⁷⁰ Article 46 G (2) ACJHPR Statute.

⁷¹ Article 46 G (3) ACJHPR Statute.

⁷² Article 46 G (3) ACJHPR Statute.

and the supporting material and concluding that there is a reasonable basis and the case appears to fall in the jurisdiction of the Court, it shall authorise the commencement of the investigation, without prejudice to subsequent determination of the Court with regard to jurisdiction and admissibility.⁷³ The refusal by the Pre-Trial Chamber to authorise an investigation does not preclude the Prosecutor to bring a subsequent request on the basis of some new facts and evidence.⁷⁴ If on the analysis of the information received, the Office of the Prosecutor concludes that the information does not constitute a reasonable basis for an investigation, it shall inform those who provided the information.⁷⁵ This does not preclude the Prosecutor to consider further information submitted to him or her regarding the same situation.⁷⁶

5.4.2 Deferral in the Exercise of Jurisdiction in the interest of Peace

One of the crucial areas to consider in relation to the exercise of international criminal justice in Africa by the ICC is the need to balance peace and justice.⁷⁷ The ACJHPR Statute does not capture how the balance between peace and justice can be attained. It has adopted a similar approach to that of the ICC, as such the issue of peace and justice will also likely arise in relation to the African Court.

Musila highlights three schools of thought with regard to peace and justice in the administration of international criminal justice.⁷⁸ The first category is pro-justice and that takes the view that peace and justice are complementary as such one cannot be achieved

⁷³ Article 46 G (3) ACJHPR Statute.

⁷⁴ Article 46 G (5) ACJHPR Statute.

⁷⁵ Article 46 G (6) ACJHPR Statute.

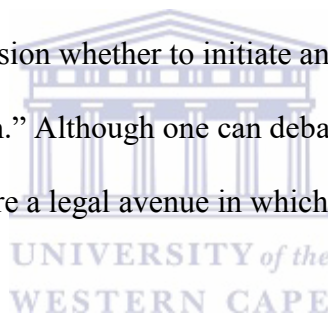
⁷⁶ Article 46 G (6) ACJHPR Statute.

⁷⁷ AU Panel of the Wise “Peace, Justice and Reconciliation in Africa: Opportunities and Challenges in the Fight against Impunity” *The African Union Series* (2013) (hereinafter Report of the AU Panel of the Wise (2013)).

⁷⁸ Musila G ‘African Union and the Evolution of International Criminal Justice in Africa: Challenges, Controversies and Opportunities’ (2013) *Trust Africa Publications on ICJ 15* (hereinafter Musila G (2013))

without the other.⁷⁹ The second category is pro-peace which is to the effect that in certain circumstances, forgoing justice is necessary in order to achieve peace.⁸⁰ The third category is that of sequencing which advocates for prioritising peace and subsequently pursuing justice.⁸¹

The peace versus justice has been an issue in certain situations under the ICC jurisdiction such as the Darfur situation whereby the AU had requested for a deferral in the exercise of jurisdiction by the ICC in the interest of peace.⁸² The point to be emphasised is that the African Court is just as judicial as the ICC and in certain cases the issue of peace and justice will arise, just as it arose under the ICC. In the case of the ICC, there is a deferral mechanism under Article 16 ICC Statute by the UNSC and the power of the Prosecutor to reconsider an investigation as provided under Article 53(4) ICC Statute which provides that “the Prosecutor may at any time reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.” Although one can debate on the practical application of these provisions, the provisions are a legal avenue in which the interests of peace can be considered.



⁷⁹ Musila G (2013) 15.

⁸⁰ Musila G (2013)15.

⁸¹ Musila G (2013) 15; Report of the AU Panel of the Wise (2013) 8; AU Draft Transitional Justice Policy Framework (annexed to the Report of the AU Panel of the Wise) (2013) para 18.

⁸² AU Assembly Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC) Assembly/AU/13(XIII) (July, 2009).

Surprisingly, under the ACJHPR Statute there is no provision for deferral or the possibility of the Prosecutor reconsidering the decision to initiate an investigation or prosecution. In other words, there is no leeway for peace versus justice considerations under the Statute. The solution can lie in including a provision similar to Article 53(4) of the ICC Statute giving the Prosecutor some leeway to reconsider whether to initiate an investigation or prosecution based on new facts or information. In order to avoid abuse, the power to assess whether the interest of peace requires pending investigations or prosecution should lie in Pre-Trial Chamber or Trial Chamber depending on the stage of the case. It is important to note that the Statute is currently under ratification process and any proposed amendments must be considered when it comes into force. Nonetheless, balancing the interest of peace and justice was supposed to have been reflected in the Statute and the suggested proposal can be a starting point on how that can be reflected in the provisions of the Statute in the future.

5.4.3 Complementarity

Complementarity as a principle under the ICC Statute has already been highlighted in chapter three of this thesis. Under the ACJHPR Statute, complementarity is provided for in Article 46H of the Statute where it states that the jurisdiction of the court shall be complementary to that of national courts and courts of the RECs where they specifically provide for such.⁸³ In that case, complementarity does not exist between the Court and RECs Courts which do not provide for such. At present, there is no REC Court providing for international criminal jurisdiction.

The general principle is that States have the primary jurisdiction over international crimes, in this case the fourteen crimes under the jurisdiction of the court. The primary jurisdiction can

⁸³ Article 46 H ACJHPR Statute; Van der Wilt H 'Complementary Jurisdiction (Article 46 H) in Werle G & Vormbaum M (eds.) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 188-202 (hereinafter van der Wilt H (2017)).

only be effectively carried out where the States have legislation to deal with the crime under the Statute. Complementarity therefore assumes that the States Parties to the Statute have everything in place, that is legislation, an effective prosecution and judicial system to exercise jurisdiction.

The ICC Statute provides that States must ensure that they have mechanisms to enable them prosecute cases at the national level. On the contrary, the ACJHPR Statute does not have a similar obligation and this is a shortfall on the part of the ACJHPR Statute. The idea behind complementarity is that States themselves can take up prosecution of the relevant international crimes. Prosecution at the domestic level should be encourage so that the regional court is not reduced into a court of first instance since States are unable to investigate or prosecute international crimes. In addition, the court will be able to save resources where more national jurisdictions take up cases. Therefore, an obligation for States to have legislative framework for international crimes is relevant.

The rules for admissibility of a case are provided under Article 46 H (2) of the Statute. The tests applied are almost verbatim to those existing between States and the ICC. Under Article 46 H (1) of the ACJHPR Statute, the Court shall determine that a case is inadmissible where:

- (a) the case is being investigated or prosecuted by a State which has jurisdiction over it unless the State is unwilling or unable to carry out the investigation or prosecution;
- (b) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute.
- (c) the person concerned has already been tried for conduct which is the subject of the complaint;
- (d) the case is not of sufficient gravity to justify further action by the court.

A significant difference to the formulation under Article 17 of the ICC Statute is that Article 46 H ACJHPR Statute leaves out the adverb ‘genuinely’ in relation to carrying out investigations or prosecution.⁸⁴ The inclusion of ‘genuinely’ increases the threshold of inadmissibility.⁸⁵ Thus, the position under Article 46 H ACJHPR Statute creates a situation where States would exploit the Court and bringing cases which could otherwise have been prosecuted at the domestic level, thus making it a regional Court, a court of first instance.⁸⁶

The admissibility criteria under 46 H does not cater for RECs despite the provision that the Court shall be complementary to them. The situation reveals a disconnection between the complementarity criteria and the proposed criteria for admissibility. If at any point the Court will seek to be complementary to both national Courts and RECs, then it makes sense to include the RECs in the admissibility criteria.

The test to determine whether a State is unwilling or unable is almost verbatim to that under the ICC Statute and is provided under Article 46 H (3) of the ACJHPR Statute where is provided that the court shall consider having regard to principles of due process recognised by international law, whether one or more of the following exist:

- (a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the concerned individual from responsibility;
- (b) there has been an unjustified delay in the proceedings which is inconsistent with the intent of bringing the person concerned to justice;

⁸⁴ Van de Wilt H (2017) 192.

⁸⁵ Van de Wilt H (2017) 195.

⁸⁶ Van de Wilt H (2017) 195.

(c) the proceedings were or are not being conducted independently or impartially, and they are or were being conducted in a manner, which in the circumstances, is inconsistent with an intent of bringing the person concerned to justice.

The test for inability is verbatim that under the ICC Statute such that in Article 46 H (4) it is provided that in order to determine that a State is unable to investigate or prosecute in a particular case, the court shall consider whether due to a total or substantial collapse or unavailability of its judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings. It is interesting to note that under the Statute, there are no procedure for States to challenge the admissibility of a case before the regional Court. This is a shortfall that can be rectified through an amendment.

5.5 Cooperation and Judicial Assistance

Just as the ICC does not have a police force to investigate cases for it, equally the regional mechanism also does not have a police force. It will rely on the willingness of member States to cooperate with the Court. In Article 46 L (1) there is a mandatory obligation of States Parties to cooperate with the Court in the investigation and prosecution of persons accused of committing the crimes under the Statute. The States Parties are mandated to comply without undue delay for any request for assistance or order issued by the Court , which include: identification and location of persons; taking of testimony and production of evidence; service of documents; the arrest, detention or extradition of persons; the arrest or the transfer of the accused to the Court; and the identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for purposes of eventual forfeiture, without prejudice to the rights of bona fide third parties.

The issue of cooperation and judicial assistance is crucial if the court is to be effective. However, apart from providing for mandatory obligation for cooperation and judicial assistance, there are no precise provision on how the cooperation can be done. As a comparison, the ICC includes a provision with precise details on how the cooperation shall be undertaken.⁸⁷ There is no provision under the ACJHPR Statute requiring that for availability of procedures at national level to facilitate cooperation.⁸⁸ It is necessary States Parties to have mechanisms available for cooperation in their laws so that the request for cooperation by the regional court should not be impinged through judicial challenges at the domestic level. There is no provision under the ACJHPR Statute on how to deal with competing requests.⁸⁹ It is presumptuous to assume that such may not arise considering that some of the crimes under the Statute attract universal jurisdiction and as such the possibility of several jurisdictions seeking cooperation is not remote. The ACJHPR Statute is silent on complementarity with the ICC Statute, nonetheless, Article 46 L (3) ACJHPR Statute provides that:

‘the Court shall be entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or cooperating partners of the African Union and may conclude agreements for that purpose.’

Under this provision, there is a possibility for cooperation between the regional court and the other international courts such as the ICC. The scope of the cooperation must be determined by an agreement between the parties.

⁸⁷ See for example Article 87 of the ICC Statute on requests for cooperation. It provides specifics on how it shall be done.

⁸⁸ c/f Article 88 of the ICC Statute which requires State Parties to have procedures available at national level to ensure cooperation with the ICC.

⁸⁹ Article 90 of the ICC Statute guides States Parties on handling competing requests a similar provision could have been included under the ACJHPR Statute.

5.6 Penalties and Enforcement

The penalties under the international criminal jurisdiction are provided for in Article 43A of the Statute. The Statute gives a wide discretion to sentencing to the Court as it provides that the Court can impose sentences or penalties other than death.⁹⁰ The Court has jurisdiction to pass prison sentences and or pecuniary fines.⁹¹ The sentences are to be pronounced in public and wherever possible in the presence of the accused.⁹² In sentencing the Court is directed to consider the gravity of the offence and the circumstances of the convict.⁹³ The Court also has the power to order the forfeiture of any property, proceeds or any assets or illegally acquired assets and return them to the appropriate owners or Member State.⁹⁴ Regarding the enforcement of sentences, Article 46 J the Statute provides that sentence of imprisonment shall be served in a State designated by the Court from a list of States that have indicated their willingness to accept sentenced persons.⁹⁵ Another aspect on enforcement is regarding fines and forfeitures ordered by the Court.⁹⁶ States parties are obligated to give effect to fines or forfeitures ordered by the Court without prejudice to the rights of bona fide third parties and in accordance to the procedure provided for in their national laws.⁹⁷ The requirements for forfeiture is important considering the fact that the Statute provides for money laundering which is aimed at removing profit from the crime. However, it is important that States have effective regulations for forfeiture at the domestic level if forfeiture orders by the Court are to be implemented. In Article 46 J *bis* (2) it is provided that: ‘if a State Party is unable to give

⁹⁰ Article 43 A (1) ACJHPR Statute.

⁹¹ Article 43A (2) ACJHPR Statute.

⁹² Article 43 A (3) ACJHPR Statute.

⁹³ Article 43 A (4) ACJHPR Statute.

⁹⁴ Article 43 A (5) ACJHPR Statute.

⁹⁵ Article 46 J (1), (2) ACJHPR Statute.

⁹⁶ Article 46 J bis ACJHPR Statute.

⁹⁷ Article 46 J bis (1) ACJHPR Statute.

effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.’ The Court will have to come up with rules on how to deal with real or moveable property obtained by the State as a result of its enforcement of judgment or order.⁹⁸ In the event that the law of the State in which the convicted person is imprisoned there is provision for pardon or commutation of sentence and the convicted person is eligible, the State shall notify the Court accordingly and pardon or commutation of sentence shall only be after the decision of the Court on the basis of interest of justice and general principles of the law.⁹⁹

5.7 Trust Fund, Compensations and Reparations

Article 46 M the Statute puts the duty to establish a trust fund to the AU Assembly.¹⁰⁰ The trust fund shall be for legal aid and assistance for the victims of crimes or human rights violations or families of the victims.¹⁰¹ It makes sense to include victims of human rights violations since the court has a human rights section. The issue however, is that the human rights section should have powers to order reparations for human rights violations and those found in breach should channel the reparations through the trust fund. The funds for the Trust Fund can be derived from fines or forfeited property.¹⁰² The AU Assembly will determine the criteria in which the fund will be managed.¹⁰³

The specific procedure on reparations and compensations it is provided for in Article 45 of the Statute. The Court has the power to establish in the rules of the Court principles of

⁹⁸ Article 46 K ACJHPR Statute.

⁹⁹ Article 46 K ACJHPR Statute.

¹⁰⁰ Article 46 M (1) ACJHPR Statute.

¹⁰¹ Article 46 M (1) ACJHPR Statute.

¹⁰² Article 46 M (2) ACJHPR Statute.

¹⁰³ Article 46 M (3) ACJHPR Statute.

reparations which includes restitution, compensation and rehabilitation in respect of victims.¹⁰⁴ The Court will have to determine upon request or in exceptional circumstances on its own motion, the scope and the extent of any damage, loss or injury to victims.¹⁰⁵ The Court may make an order directly against a convict specifying appropriate reparations to or in respect of victims including restitution, compensation and rehabilitation.¹⁰⁶ Before making an order the Court may consider representations from or on behalf of the convicted person, victims, other interested persons or interested States.¹⁰⁷ The Statute further provides that nothing in the article on compensation and reparations should be interpreted as prejudicing the rights of victims under national or international law.¹⁰⁸

5.8 The Rights of the Accused

Article 46 A provides for the rights of the accused before the Court. The rights guaranteed are equality before the law, where it states that “all accused shall be equal before the Court”¹⁰⁹; the right to fair trial and public hearing, subject to measures on witness and victims protection.¹¹⁰ In determining the charge against the accused, he or she shall be entitled to the following guarantees: (a) to be informed promptly in the language he or she understands, the nature of the charges against him or her; (b) adequate time to prepare defence and the right to Counsel of his or her choice; (c) trial without undue delay; (d) no trial in absentia, the accused shall be tried in his or her presence and defend himself or herself in person or through legal counsel. In the event that he or she does not have legal assistance to be

¹⁰⁴ Article 45(1) ACJHPR Statute.

¹⁰⁵ Article 45(1) ACJHPR Statute.

¹⁰⁶ Article 45 (2) ACJHPR Statute.

¹⁰⁷ Article 45 (3) ACJHPR Statute.

¹⁰⁸ Article 45 (4) ACJHPR Statute.

¹⁰⁹ Article 46 A (1) ACJHPR Statute.

¹¹⁰ Article 46 A (2) ACJHPR Statute.

provided one even without payment; (e) to cross examine witnesses against him or her and to obtain the attendance of witnesses on his or her behalf under the same condition as witnesses against him or her; (f) to have free assistance of an interpreter if he or she cannot understand or speak the language of the Court; (g) not to do anything self-incriminating either through testifying of confession; (h) to have judgment pronounced publicly; and (i) to be informed of his or her right of appeal.

5.9 Annual Reporting

The Court is obligated to submit annual activity report specifying pending and concluded investigations, prosecutions and decisions, cases of non-compliance with judgment, sentence, order or penalty of the Court.¹¹¹ The provision does not provide any further steps that the Assembly can take in the case of non-compliance being brought before it.

5.10 Conclusion

The Chapter has provided an overview of the structure of the Court as provided under the ACJHPR Statute. It has highlighted that the Court has organs such as the Presidency, Office of the Prosecutor and the Registry which are similar to those under the ICC Statute. A unique organ that the African Court has introduced in its structure is that of the Office of the Defence. The fact that the Defence Counsel will enjoy an equal status in respect of rights, audience and negotiations guarantees the protection of the rights of the accused person by the Court. It is essential however, that the Statute incorporate a provision on deferrals as a mechanism of balancing the interests of peace over justice in applicable cases. Failure to incorporate such a provision is a shortfall as there is no provision to apply if in the interest of peace, prosecution at the Court must be halted.

¹¹¹ Article 57 ACJHPR Statute.

The structure of the Court mirrors that of the ICC and it is comprehensive enough to support the operations of the Court. However, there is a need for comprehensive rules of procedure to clarify the procedural aspects of prosecuting international crimes. Thus, the next step to be considered when the Statute comes into force is the development of rules of procedure relevant to the prosecution of international crimes.



CHAPTER 6

AN OVERVIEW AND ANALYSIS OF THE CRIMES UNDER THE ACJHPR STATUTE

6.1 Introduction

This chapter is an overview and analysis of the substantive provisions of the ACJHPR Statute, especially the definitions of crimes. It will briefly discuss the history of each of the fourteen crimes provided under the ACJHPR Statute and analyse their definitions and how they compare with the definitions in other international instruments. The chapter highlights the progressive and retrogressive aspects in the definition of crimes and where necessary, it will make recommendations for improvement.

The ACJHPR Statute confers jurisdiction to the International Criminal Law section over a total of fourteen crimes. The crimes consist of international crimes and transnational crimes or treaty crimes. It is therefore essential to analyse the definition of international crime against transnational crime or treaty crime.

6.2 What Constitutes an International Crime?

Bassiouni enumerates the different nomenclature used for international crimes or crimes under international law as: international crimes *largo* or *stricto sensu*, transnational crimes, international delicts, *jus cogens* international crimes and core crimes.¹ The existence of different labels is as a result of a lack of agreement among scholars on the criteria relevant for

¹ Bassiouni MC *Introduction to International Criminal Law: Second Revised Edition* (2013) 143 (hereinafter Bassiouni MC (2013)).

an offence to be regarded an international crime.² The definition of international crime can therefore be broad or specific. The distinction between these two categories is that whereas the broad category is more all-encompassing, with a large number of offenses qualifying as international crimes, the specific category is more restrictive and the number of crimes qualifying as international crimes are restricted to the core crimes under the ICC Statute.

Cassese, Werle and Jessberger adopt the specific approach in their definition of crimes under international law. They stipulate three conditions that should exist for an offence to be considered an international crime as: (i) it must entail individual criminal responsibility and be subject to punishment ; (ii) the norm must be part of the body of international law; and (iii) the offence must be punished regardless of whether it has been incorporated into domestic law.³ In similar terms, Cassese defines international crimes as breaches of international rules entailing personal criminal liability of the individual concerned.⁴ He argues that they are characterised by the following cumulative elements: (i) they consist of violations of international customary rules as well as treaty provisions codifying customary law; (ii) such rules are intended to protect values considered important by the whole international community and consequently binding all states and individuals; (iii) there exists a universal interest in repressing the crimes. In this regard, perpetrators may be prosecuted by any state despite the territory of commission or any territorial link with the perpetrator or victim; (iv) if the perpetrator acted in an official capacity as de jure or de facto state official, the state on whose behalf he committed the offence is barred from claiming the jurisdiction of immunity

² Bassiouni MC (2013) 143; O'Keefe R *International Criminal Law* (2015) 47 argues that International Criminal Law has muddled through the defining an international crime with no common understanding being reached.

³ Werle G & Jessberger F (2014) 45-48.

⁴ Cassese A *Fundamentals of International Criminal Law* 2ed (2008) 11(hereafter Cassese A (2008)); Cassese, Gaeta, Baig et al *Cassese's International Criminal Law* (2013) 18-21 (hereafter Cassese, Gaeta et al (2013)).

from civil or criminal jurisdiction of foreign states accruing under customary law to state officials acting in the exercise of their functions.⁵

According to Werle and Jessberger, crimes under international law are genocide, war crimes, crimes against humanity and aggression, the core crimes under the ICC Statute.⁶ They make reference to the fact that the core crimes are of concern to international community as a whole as such it is controversial to consider other crimes such as drug trafficking and terrorism as international crimes, although they consider that certain acts of terrorism may be prosecuted as crimes against humanity if they fulfil the elements of crimes under international law.⁷ For Cassese, international crimes are war crimes, crimes against humanity, genocide, torture (distinguishing it from torture as a war crime or crimes against humanity), aggression and some extreme forms of international terrorism.⁸ However, considering the strict definition he proposed, torture and terrorism cannot fall in the definition of international crime. The Torture and the Terrorism Convention do not provide for direct criminal responsibility for the crimes and thus these two cannot fall into the enumeration of international crime. Cassese further argues that the concept does not apply to piracy since piracy is not punished to protect community value.⁹ All states are authorised to capture on the high seas and bring to trial pirates in order to fight common danger and consequent damage.¹⁰ Thus, piracy can as well be considered as a simple matter of theft on the high seas although it

⁵ Cassese A (2008) 11; Cassese, Gaeta et al (2013) 18-21.

⁶ Article 5 ICC Statute, Werle G & Jessberger F (2014) 46.

⁷ Werle G & Jessberger F (2014) 47.

⁸ Cassese A (2008) 12; Cassese, Gaeta et al (2013) 21.

⁹ Cassese A (2008) 12; Cassese, Gaeta et al (2013) 21.

¹⁰ Cassese A (2008) 12; Cassese, Gaeta et al (2013) 21.

usually involves nasty conduct such as making sailors to walk the plank murdering or raping passengers of the ship attacked or mutilating members of the crew of the attacked ship.¹¹

In line with the specific approach to defining international crimes, Cassese explicitly states that the following offences would not qualify as international crimes: (i) illicit trafficking in narcotic drugs and psychotropic substances; (ii) unlawful arms trade; (iii) the smuggling of nuclear and other potentially deadly materials; (iv) money laundering; (v) slave trade or (vi) trafficking in women as the listed crimes are often committed by private individuals or criminal organisations and states usually fight against them either individually or in cooperation with other states when the crimes affect different states, although this joint action or cooperation does not entail that the crimes are of concern to the world community as a whole.¹² He further argues that the listed crimes are provided for in international treaties or resolutions and not in customary international law.¹³ Based on this criteria, even apartheid is excluded as an international crime despite the fact that it is included in Article 7(1) (j) of the ICC Statute.¹⁴

A broader approach defining what offences qualify to be regarded as international crimes is reflected in Bassiouni's work.¹⁵ He lays down five criteria for the policy of international criminalisation and these are: (i) prohibited conduct affects a significant international interests and in particular if it constitutes a threat to international peace and security; (ii) the prohibited conduct constitute egregious conduct deemed to be offensive to the shared common values of the world community; (iii) the prohibited conduct has transnational implications in that it involves more than one state in the planning, preparation or

¹¹ Cassese A (2008) 12.

¹² Cassese A (2008) 12.

¹³ Cassese A (2008) 12.

¹⁴ Cassese A (2008) 12.

¹⁵ Bassiouni MC (2013) 140-55.

commission, either through diversity of the nationalities of the perpetrators or victims, or the means employed transcend national boundaries; (iv) the conduct is harmful to an international protected person and (iv) the conduct violates an internationally protected interest but it does not rise to the level required by (i) and (ii), because of its nature it can best be prevented and suppressed by international criminalization.¹⁶ Bassiouni's approach as long as a crime is provided for under an 'international criminal law convention' it qualifies to be regarded as an international crime.¹⁷ On the basis of his proposed criteria, Bassiouni identifies 281 Conventions which fulfil the criteria, and out of which he establishes 27 international crimes.¹⁸

¹⁶ Bassiouni MC (2013) 142-3.

¹⁷ Bassiouni MC (2013) 143 ten penal characteristics in an international criminal law Convention are : (1) explicit or implicit recognition of proscribed conduct as constituting an international crime, or crime under international law or crime; (2) implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish etc.; (3) criminalisation of the proscribed conduct; (4) duty or right to prosecute; (5) duty or right to prosecute or punish the proscribed conduct; (6) duty or right to extradite; (7) duty or right to cooperate in prosecution, punishment(including judicial assistance); (8) establishment of a criminal jurisdictional basis; (9) reference to the establishment of an international criminal court or international tribunal with penal characteristics; and (10) no defence of superior orders. This criterion is not cumulative as different Conventions only reflect some of the highlighted features.

¹⁸ The 27 international crimes are: aggression, genocide, crimes against humanity, war crimes, unlawful possession, use, emplacement, stockpiling and trade of weapons including nuclear weapons, nuclear terrorism, apartheid, slavery, slave-related practices, and trafficking in human beings, torture and other forms of cruel, inhuman and degrading treatments, unlawful human experimentation, enforced disappearances and extra-judicial executions, mercenarism, piracy and unlawful acts against the safety of maritime navigation and the safety of platforms on the high seas, aircraft hijacking and unlawful acts against international air safety, threat and use of force against internationally protected persons and United Nations personnel, taking of civilian hostages, use of explosives, unlawful use of the mail, financing terrorism, unlawful trafficking in drugs and related drug offences, organised crime and related specific crimes, destruction and/or theft of national treasures, unlawful acts against certain internationally protected elements of the environment, international trafficking in obscene materials, falsification and counterfeiting, unlawful interference with international sub marine cables, and corruption and bribery of foreign public officials. See Bassiouni MC (2013) 143.

Regarding the two approaches, the ACJHPR Statute in defining what constitutes an international crime for the purposes of the jurisdiction of the African Court, adopted the broader and all-encompassing approach as reflected in Bassiouni's work as opposed to the specific and approach as reflected in the work of Cassese and Werle and Jessberger. The crimes under the ACJHPR Statute are derived from different international and regional Conventions. Apart from the core crimes i.e genocide, crimes against humanity, war crimes and aggression, the rest of the crimes under the ACJHPR Statute are not international crimes in the strict sense. O'Keefe argues that an international court exercises subject matter jurisdiction accorded to it by its constituent instrument and exercises jurisdiction over offences that States establishing the court so wish.¹⁹ Thus, even though treaty crimes are supposed to fall within the jurisdiction of national courts, there is nothing to prohibit States from establishing a court with such jurisdiction.²⁰

The question of nomenclature depends on the school of thought and in the case of the ACJHPR Statute a broader approach to international crimes does not restrict the definition of an international crime to those offences giving rise to individual criminal responsibility under international law but incorporates crimes under international law, whether customary or Conventional.²¹ In addition, the choice of crimes reflect what offences are prevalent or of concern to the region. However, it makes sense to distinguish between international and transnational crimes as the former are of concern to the whole world as opposed to a region and correct nomenclature would have divided the crimes under the Statute into the two categories.

¹⁹ O'Keefe R (2015) 54.

²⁰ O'Keefe R (2015) 54.

²¹ O'Keefe R (2015) 56, see also Jalloh CC 'The Nature of the Crimes in the African Court' (2017) *JICJ* 799-826.

6.3 Analysing the Crimes under the ACJHPR Statute

As a background to the analysis, it is essential to highlight that structurally, a crime can be understood as bi-partite based on the common law understanding of a crime constitution an offence and defence.²² The offence in this case constituting the mens rea and the actus reus of a crime.²³ The structure can also be considered as tripartite or three fold constituting the actus reus, mens rea, and defence.²⁴ Nonetheless the nomenclature is of little significance considering that both the bipartite and the tri partite have the same elements; the actus reus, mens rea and defence. Therefore, in analysing the structure of the crimes, these elements will be highlighted.

6.3.1 Genocide

6.3.1.1 Brief History

The term ‘genocide’ was coined by , Raphael Lemkin, during World War II to describe the crimes that were committed against the Jews by the Nazis.²⁵ Etymologically, it is formed from Greek genos for race and Latin caedere for killing.²⁶ Until Lemkin’s seminal work, the phenomenon of genocide was “a crime without a name.”²⁷ Lemkin described genocide as not necessarily meaning the destruction of a nation, except for cases of mass killings of all members of a nation but as signifying a coordinated plan of different actions aiming at the destruction of the essential foundations of the life of the national groups, with the aim of

²² Ambos K (2013) 99; Werle G & Jessberger F (2014) 168.

²³ Ambos K (2013) 99-100; Werle G & Jessberger F (2014) 169.

²⁴ Ambos K (2013) 100.

²⁵ Lemkin R *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government Proposals for Redress* (1973) 79 (hereafter Lemkin R (1973)).

²⁶ Lemkin R (1973) 79.

²⁷ Winston Churchill, former British Prime Minister, during his WWII speech of 24 August, 1941 the transcript available at <http://www.ibiblio.org/pha/policy/1941/410824a.html> (accessed on 22 September 2014)

annihilating the groups themselves.²⁸ According to Lemkin, the objectives of such a plan would be the disintegration of the political and social institutions of culture, language, national feeling, religion, and the economic existence of national groups, and destruction of personal security, liberty, health, dignity and even the lives of individuals belonging to such groups.²⁹

Historically, the crime predates the holocaust in that in 1915, there was extermination of about 500,000 to 1 million Armenians living in Turkey.³⁰ It is estimated that more than 6 million Jews were exterminated during the holocaust which occurred during the Third Reich between 1933 and 1945.³¹ In African History, several examples of acts of genocide can be mentioned, one example is the “Zulu Genocide.” Literature shows that between 1810 and 1828, the Zulu Kingdom in South Africa under their leader, Shaka Zulu, waged a campaign of expansion and annihilation against none Zulu tribes.³² This resulted in what is known as *Mfecane* which literally means a great crushing, which was the mass exodus of people fleeing from Shaka’s reign and they settled in modern day Zimbabwe, Malawi, Tanzania, Kenya and Uganda.³³

Another example of genocide in Africa was the Herero and Namaqua genocide in German-South West Africa (now Namibia) between 1904 and 1907 in which 80 percent of the Herero

²⁸Lemkin R (1973) 49.

²⁹ Lemkin R (1973) 49.

³⁰ Chalk F & Jonassohn K *The History and Sociology of Genocide: Analyses and Case Studies* (1990) 249 (hereinafter Chalk & Jonassohn (1990); see also Ambos K *Treatise on International Criminal Law Vol II: The Crimes and Sentencing* (2013) 1-5 (hereafter Ambos K Vol II (2013).

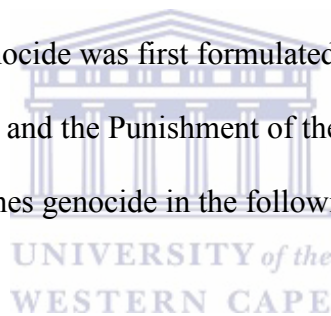
³¹ Werle & Jessberger (2014) 289.

³² Chalk & Jonassohn (1990) 223; Mahoney M.R ‘The Zulu Kingdom as a Genocidal and Post Genocidal Society c.1810 to Present’ (2003) 5(2) *Journal of Genocide Research* 251-68.

³³ Chalk & Jonassohn (1990) 223. Certain tribes in these countries can trace their descent back to refugees who fled Shaka’s warriors.

population and 50 percent of the Nama people were killed in an extermination campaign by a German General, Lothar von Trotha.³⁴ It is estimated that between 24,000 and 100,000 Hereros were killed, whereas about 10,000 Namas were killed.³⁵ In Rwanda in 1994 it is estimated that about 500, 000 to 1 million civilians, mostly Tutsis were killed in 100 days.³⁶ Other cases were in Burundi where in 1972 between 100,000-300,000 Hutu's were killed by the Tutsi and in 1993, over 100,000 civilians, predominantly Tutsi, were killed³⁷, and currently there are allegations of genocide having been committed in Sudan.³⁸ The highlighted examples show the negative consequences resulting from the crime in African societies as such it is imperative that the crime be proscribed at any level of international governance, including the regional level.

The definition of the crime of genocide was first formulated under an international treaty in the Convention on the Prevention and the Punishment of the Crime of Genocide of 1948.³⁹ Article II of the Convention, defines genocide in the following manner:



³⁴ Chalk & Jonassohn (1990) 230-43, 459; Sarkin J *Colonial Genocide and Reparations Claims in the 21st Century: The Social-Legal Context of Claims under International Law against Germany for Genocide in Namibia, 1904-1908* (2009) 26-62. Schaller DJ 'From Conquest to Genocide: Colonial Rule in South West Africa and Germany in East Africa' in Dirk Moses A (ed.) *Empire, Colony Genocide: Conquest, Occupation and Subaltern Resistance in World History* (2008); Weiser M *The Herero War-The First Genocide of the 20th Century?* (2006).

³⁵ Chalk & Jonassohn (1990) 231.

³⁶ Morris V & Scharf MP *The International Criminal Tribunal for Rwanda* (1998) 48.

³⁷ Chalk & Jonassohn (1990) 384-93; Lemarchand R 'The Burundi Killings of 1972' available at <http://migs.concordia.ca/documents/The-Burundi-Killings-of-1972Lemarchand.pdf> (accessed on 9 April 2017).

³⁸ See *The Prosecutor V. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir")* The Second Arrest Warrant PTC I ICC-02/05-01/09 of 12 July 2010.

³⁹ 78 U.N.T.S (1949).

‘In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.’

The same provision was adopted verbatim in the ICTY⁴⁰, ICTR⁴¹, and ICC.⁴² The protected groups under the Convention and as reflected in other international instruments are ‘national’, ‘ethnic’, ‘racial’ or ‘religious’ groups. These groups are regarded as permanent and stable because group membership is generally determined by birth.⁴³ In that regard, such groups as political groups which are considered not of permanent nature are not part of the protected groups.⁴⁴ Another special feature to the crime of genocide is the genocidal intent reflected in the part of the provision that states that ‘an intent to destroy in whole or in part, a national, ethnical, racial or religious groups’. This aspect of the crime entails that the victim is not

⁴⁰ Article 4 (2) ICTY Statute.

⁴¹ Article 2(2) ICTR Statute.

⁴² Article 6 ICC Statute.

⁴³ Ambos K Vol. II (2013)7; The *Prosecutor v. Jean-Paul Akayesu* (Trial Judgment) ICTR-96-4-T, (2 September 1996) 511 (hereafter Jean-Paul Akayesu Judgment) refers to them as “stable groups” whose membership is constituted at birth.

⁴⁴ Some jurisdictions recognise political groups as protected groups e.g. Article 281 of the Ethiopian Penal Code (1957).

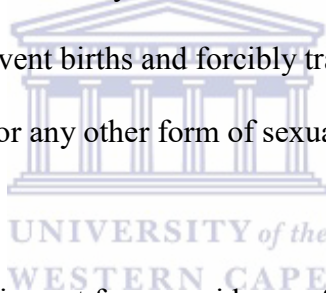
attacked based on his or her individual characteristics, but only because they are a member of a protected group.⁴⁵

6.3.1.2. Elements of Genocide under the ACJHPR Statute

The following elements can be highlighted in defining genocide under the ACJHPR Statute.

6.3.1.2.1 Rape as Genocide

The definition of genocide under the ACJHPR Statute substantially reflects what is provided for under the Genocide Convention and the ICC Statute. The protected groups provided for are ‘national’, ‘ethnic’, ‘racial’ and ‘religious’ groups just as under the Genocide Convention and the ICC Statute. The genocidal intent is also a requirement for proof of genocide under the ACJHPR Statute. However, in relation to the underlying acts, apart from providing for killing, causing serious bodily or mental harm, inflicting destructive conditions for life, imposing measures to prevent births and forcibly transferring children, the ACJHPR Statute introduces “[a]cts of rape or any other form of sexual violence” as part of the individual acts for genocide.⁴⁶



The concept of rape as an underlying act for genocide was first developed in the ICTR in the case of *Prosecutor v Jean-Paul Akayesu*.⁴⁷ At the beginning of the trial, rape had not been part of the charges brought against Akayesu, however as the trial progressed and evidence was being presented, that acts of rape committed against women on the grounds of their ethnicity became evident such that the prosecutor had to amend the charges to include the crime. The

⁴⁵ Cassese (2008) 137.

⁴⁶ Article 28 B (f) ACJHPR Statute; see also Ambos K ‘Genocide (Article 28B), Crimes against Humanity (Article 28C), War Crimes (Article 28D) and the Crime of Aggression (Article 28M)’ in Werle G & Vormbaum M *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 39-40 (hereinafter Ambos K (2017)).

⁴⁷ *The Prosecutor v. Jean Paul Akayesu (Judgment)*, Case No. ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), (2 September 1998) (hereinafter Jean Paul Akayesu Judgment).

crime is often referred to as ‘genocidal rape’ in literature.⁴⁸ Rape was considered as falling under the underlying act of imposing measures intended to prevent births within the group. This can be accomplished through raping women belonging to a particular group by members of another group to change the ethnic composition of the other group. For example, in patriarchal societies, where children are considered as belonging to the father’s ethnic group rape can be used as an instrument of changing the ethnic composition of a society.⁴⁹ The ICTR held that rape can also be considered as an act directed to prevent births where the woman raped subsequently refuses to procreate.⁵⁰

The ICTR defined rape broadly as opposed to the definitions of most national jurisdictions. The Tribunal noted that whilst in national jurisdictions, it is regarded as non-consensual sexual intercourse, there are variations as to the form of rape which may include acts which involve insertion of objects and or use of bodily orifices not considered to be intrinsically sexual.⁵¹ According to the Tribunal, rape is a form of aggression whose central elements cannot be captured in a mechanical description of objects and body parts.⁵² The Tribunal also describes what constitute sexual violence in that it includes rape and any act of sexual nature committed on a person under circumstances which are coercive.⁵³ As such, sexual violence is said not to be limited to physical invasion of the human body and may include acts which do

⁴⁸ See De Brouwer AM *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 41-83 (on sexual violence as genocide) (hereinafter De Brouwer (2005)); Russell-Brown S ‘Rape as an Act of Genocide’ (2000) 21 *Berkeley J. Int’L* 350-74 (hereafter Russell-Brown (2000)).

⁴⁹ Cassese & Gaeta (2013) 116; Jean Paul Akayesu Judgment par. 507.

⁵⁰ Jean Paul Akayesu Judgment par 508; *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda (Judgement and Sentence)*, ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR), (6 December 1999) para.53.

⁵¹ Jean-Paul Akayesu Judgment para 686.

⁵² Jean-Paul Akayesu Judgment para 687.

⁵³ Jean-Paul Akayesu Judgment para 688; Short J.M ‘Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court (2002-2003) 8 *Mich. J. Race & L.* 503-26.

not include penetration or even physical contact.⁵⁴ The Tribunal made a finding that these acts constitute genocide in the same way as any other act if they were committed with an intent to destroy in whole or in part, a particular group targeted as such.⁵⁵

The definition of genocide under the ICC Statute does not include rape as an act of genocide, it maintains the definition under the Genocide Convention.⁵⁶ However, the Elements of Crimes which is an interpretive tool of the ICC Statute in elaborating what constitutes ‘serious bodily and mental harm’, states that the conduct may include, but not necessarily restricted to acts of torture, rape, sexual violence or inhumane and degrading treatment.⁵⁷ This interpretation follows the Akayesu judgment in that rape can be genocide if it falls within the underlying act of genocide such as causing serious bodily and mental harm. It is proposed that the ICC Statute should be amended to include explicitly as an underlying act of genocide rape, sexual slavery, enforced sterilisation or any forms of sexual violence of similar gravity as is the case with crimes against humanity and war crimes.⁵⁸ This proposal makes sense considering that the ICTR already established the reality of sexual violence with a genocidal intent and its devastating consequences to the victims.

The ICTR considered rape not as an individual or separate underlying act for the crime of genocide, but rather as already stated, as part of imposing measures to prevent birth or as constituting causing of serious bodily and mental harm to the members of a protected group. Similarly, the Elements of Crime of the ICC Statute provides an interpretation to the effect that rape can fall under the underlying act of causing serious bodily and mental harm. The ACJHPR Statute adopts a different approach from the ICC Statute and all the previous

⁵⁴ Jean-Paul Akayesu Judgment para 688.

⁵⁵ Jean-Paul Akayesu Judgment para 731.

⁵⁶ Article 6 ICC Statute.

⁵⁷ Article 6 (b) interpretation in Elements of Crime (2011).

⁵⁸ De Brouwer (2005) 83; Russell-Brown (2000) 371-73.

international instruments providing for the crime of genocide by explicitly putting acts of rape as a separate underlying act for genocide. This is progressive in that any act of rape or sexual violence committed with a genocidal intent, against a protected group will suffice as genocide without establishing whether there was serious bodily or mental harm or that as a result of the said rape or sexual violence, the victim has been prevented from giving birth. In addition, it incorporates into an international instrument the landmark developments from the ICTR that acknowledged genocidal rape.

6.3.1.2.2 Killing members or a member of a group?

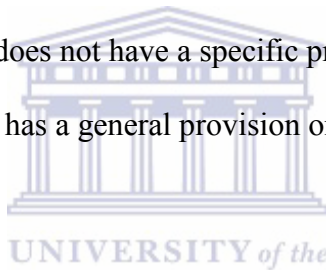
Jurisprudence from the ICTR in particular in the *Akayesu* Judgment shows that that killing only one single member of a group suffices as genocide.⁵⁹ This is despite the fact that international Conventions providing for the crime are drafted in the plural form by referring to ‘members’. In the drafting of the ACJHPR Statute, this clarification has not been incorporated. As such, although it would have been expected that the formulation of the provisions would be more precise and use the singular ‘member’ as opposed to ‘members’ provided under the Genocide Convention and the ICC Statute, the ACJHPR Statute maintains the plural “members”. This does not have any negative impact in the interpretation of the provision as international law already establishes that killing a single member suffices. However, for a Statute being drafted way after the clarification, it is reasonable to expect that it adopts a different approach from the Genocide Convention or ICC Statute.

⁵⁹ Jean-Paul Akayesu Judgment para 521; Schabas W *Genocide in International Law: The Crime of Crimes* (2009) 179 (hereafter Schabas W (2009)); Werle G & Jessberger F (2014) 303; A different position is adopted by Cassese, Gaeta et. al (2013) 117 who argue that the interpretation in the Akayesu judgement which suggests that killing a single member of a protected group with genocidal intent suffices as genocide is inconsistent with the text and norms of genocide which speaks instead of “members of a group” therefore signifying plurality of members of the group This is a restrictive approach based on literal interpretation of the provision, genocide against a single member suffices as long as the elements for the crime are satisfied.

6.3.1.2.3 No Provision for Incitement to Commit Genocide

The ACJHPR Statute does not provide for a separate offence for incitement to commit genocide even though it exists as a separate offence under the Genocide Convention, ICTR and even the ICC Statute.⁶⁰ Historically, the crime of incitement to commit genocide can be traced to the Nuremberg Trial where Julius Streicher was charged for acts that can today fall in the category of incitement to commit genocide. Julius Streicher was the founder and editor of an anti-Semitic magazine called *Der Stürmer* which spread anti-Jewish propaganda. The IMT found that by means of such hate propaganda, Streicher incited the German people to active persecution. Since at that time genocide was not provided under the IMT Charter, Streicher was convicted of the crime of persecution.⁶¹

The ACJHPR Statute although it does not have a specific provision on the crime of incitement to commit genocide, it has a general provision on incitement under the modes of liability which states that:



‘an offence is committed by any person who, in relation to any of the crimes or offences provided for in this Statute...incites...’⁶²

The question is whether the general provision on incitement is sufficient to cater for the incitement to commit genocide. The jurisprudence of the ICTR distinguishes between incitement as a general form of participation and incitement to commit genocide in that the latter has to be committed publicly and directly, whereas the former does not have to

⁶⁰ Article III (c) Genocide Convention; Article 2(3) (c) ICTR Statute; Article 25(3) (e) ICC Statute.

⁶¹ Nuremberg judgment, *France and ors v Göring (Hermann) and ors*, Judgment and Sentence, [1946] 22 IMT 203, (1946) 41 AJIL 172; Schabas W (2009) 47-48; Timmermann W & Schabas WA ‘Incitement to Genocide’ in Behrens P & Henham R *Elements of Genocide* (2013) 145 (hereafter Timmermann & Schabas (2013)); Werle G & Jessberger F (2014) 321-22.

⁶² Article 28N (i) ACJHPR Statute.

necessarily be committed in such a manner.⁶³ The important element for the crime of incitement to commit genocide, which is absent in the general incitement provision is that it must be ‘direct and public’.⁶⁴ In the Akayesu Judgment, the ICTR defined direct and public incitement as follows:

‘directly provoking the perpetrators to commit genocide, whether through speeches, shouting or threats uttered in public spaces or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audio-visual communication.’⁶⁵

The direct incitement requires that the perpetrator calls for the commission of genocide expressly but it does not need to be express as long as it is done in a way that is unmistakable to the addressee.⁶⁶ Hence the direct element of incitement to commit genocide should be viewed in light of the cultural and linguistic context, in particular, whether the persons for whom the message was intended grasped the implications thereof.⁶⁷

⁶³ *The Prosecutor v. Jean-Paul Akayesu (Appeal Judgment)*, ICTR-96-4-A (1 June 2001) para. 474. Under the ICTR Statute, incitement to commit genocide was provided under Article 2 (3) (c) and general incitement (instigation) under Article 6 (1). For analysis of the jurisprudence of the ICTR on incitement see Agbor AA ‘The Substantial Contribution Requirement: The Unfortunate Outcome of an Illogical Construction and Incorrect Understanding of Article 6 (1) of the Statute of the ICTR’ (2012) 12 *ICLR* 155-91; Benesch S ‘Vile Crime or Inalienable Right: Defining Incitement to Genocide 48(3) *Virginia Journal of International Law* (2008) 485-528 (hereinafter Benesch S (2008)).

⁶⁴ Article III (c) Genocide Convention; Article 2(3) (c) ICTR Statute; Article 25(3)(e) ICC Statute

⁶⁵ Jean-Paul Akayesu Judgment para 559.

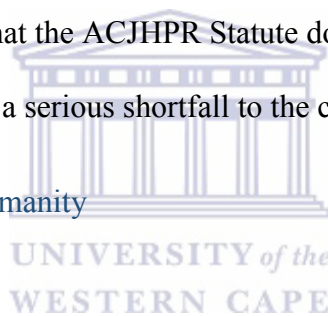
⁶⁶ See *The Prosecutor v. Nahimana, Barayagwiza, & Ngeze* ICTR Appeals Chamber, Judgment Case No. ICTR-99-52 (28 November 2007) also referred to as the Media Trial Case para.697; Agbor A (2012); Timmermann & Schabas (2013) 155-59; Zahar A ‘The ICTR ‘Media’ Judgement and the Reinvention of Direct and Public Incitement to Commit Genocide (2005) 16 *Criminal Law Forum* 33-48.

⁶⁷ Jean-Paul Akayesu Judgment para 557-8; The Media Trial Judgment (Trial Chamber) para 1011; Benesch S (2008) 520; Incitement should not be limited to speech, in the case of *The Prosecutor v. Simon Bikindi*, Case

The crime of incitement to commit genocide is complete regardless of whether the incitement was acted on or not.⁶⁸ On the contrary, the interpretation of the general incitement provision through case law show that it is only imposed where an individual participation contributed to the commission of an international crime.⁶⁹ The elements direct and public are important in the definition of incitement to commit genocide and distinguishes it from the ordinary incitement as a mode of criminal responsibility. In addition, the offence of incitement to commit genocide is important in that it acknowledges that incitement plays a role in dissemination genocidal propaganda or messages which can influence a large population to commit the actual genocide. The history of the crime of genocide attest to this fact as emphasised in the Nuremberg Judgment in the case against Streicher and in the Media Trial judgment in the ICTR. The fact that the ACJHPR Statute does not provide for the offence of incitement to commit genocide is a serious shortfall to the content of the Statute.

6.3.2 Crimes against Humanity

6.3.2.1 Brief History



The concept of crimes against humanity can be traced to the year 1915 when it was used by the French, British and Russian Government to refer to the mass killings of the Armenians in

No. ICTR-01-72-T (Judgment of 2 December 2008) the ICTR Trial Chamber decided that a song might constitute incitement to commit genocide Some of Bikindi's songs had content that directly incited genocide against the Tutsi In fact, his songs were chanted by Rwandan genocidaires as they hacked their victims. See also Benesch S 'The ICTR's Prosecution of a Pop Star: The Bikindi Case' (2012) *African Yearbook of International Law* 447-61.

⁶⁸ The Media Trial Judgment para 723.

⁶⁹ For a critique of this interpretation see Agbor AA (2012); and Timmermann WK 'Incitement in International Criminal Law' (2006) Vol. 88 No. 864 *International Review of the Red Cross* 838-52.

the Ottoman Empire.⁷⁰ The crime was first included in an international instrument in the Nuremberg Charter and was defined as:

‘murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’⁷¹

Under the Nuremberg Charter, crimes against humanity were linked to ‘crimes within the jurisdiction of the court’, i.e. war crimes and crimes against peace. This link was dropped in subsequent instruments such as the Control Council Law No. 10 and the ICC Statute. The link however was reflected in the ICTY Statute, which provides that the crime must occur ‘in conflict, whether international or non- international in character.’⁷² This formulation is justified by the situational nature of the tribunal which was established to deal with a specific conflict situation. The link to armed conflict is not a requirement under customary international law.⁷³

The formulation of crimes against humanity has developed, in the ICC Statute it is provided for in Article 7(1) and constitutes of underlying acts and the contextual element.⁷⁴ The

⁷⁰ Although historically the concept of humanity was first used in the Martens Clause in the preamble of the 1899 and the 1907 Hague Conventions. On the analysis of the history of the crime see Ambos K Vol II (2013) 46-48; Cassese, Gaeta et al (2013) 84-90; Schwelb E ‘Crimes Against Humanity’ (1946) *The British Year Book of International Law* 178-226; and Werle G & Jessberger F (2014) 327-32.

⁷¹ Article 6 (c) of the Nuremberg Charter.

⁷² Article 5 ICTY Statute.

⁷³ Cassese, Gaeta et al (2013) 90; Werle G & Jessberger F (2014) 330.

⁷⁴ Article 7(1) (a)-(k) enumerates the underlying acts as: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against an

contextual element entails that the crime has to be committed ‘as part of the widespread or systematic attack directed at any civilian population’. The relevance of the contextual element in crimes against humanity, is to distinguish them from ordinary crimes at the national level and as such the contextual element is regarded as the international element in crimes against humanity.⁷⁵ An attack on civilian population is defined in Article 7 (2) (a) as multiple commission of underlying acts in furtherance of a State or organisational policy.

6.3.2.2 Crimes against humanity under the ACJHPR Statute

Crimes against humanity are provided under Article 28C of the ACJHPR Statute. It is substantially formulated in a similar manner to the ICC Statute in that in most respects the wording of the provision in the ACJHPR Statute and the ICC Statute are the same. However, there are differences that can be highlighted. For example, the contextual element for crimes against humanity under the ACJHPR Statute is drafted as follows:

‘crimes against humanity means any of the following acts when committed as part of widespread or systematic attack or enterprise directed against any civilian population, with knowledge of the attack or enterprise.’⁷⁶

The contextual element introduces a concept of enterprise in the definition of crimes against humanity, as such, under the ACJHPR Statute, crimes against humanity are committed as part of a widespread or systematic attack or enterprise.⁷⁷ The ACJHPR Statute has a definition of

identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of similar character intentionally causing great suffering, or serious injury to body, mental or physical health.

⁷⁵ Ambos K Vol II (2013) 55; Bassiouni MC *Crimes against Humanity* (1999) 243; Werle G & Jessberger F (2014) 337-40.

⁷⁶ Article 28C (1) ACJHPR Statute.

⁷⁷ Ambos K (2017) 40-41.

what constitutes an attack on civilian population, but does not define enterprise. Regarding attack, it defines it in a similar manner as under Article 7 (2)(a) of the ICC Statute as follows:

‘Attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack’⁷⁸.

In the absence of a definition of what enterprise for purposes of crimes against humanity entails it is difficult to state its significance. One of the difficulties with regard the concept is whether ‘widespread or systematic’ will also apply to it just as it applies to an attack. At the first glance of the Article 28C of the ACJHPR Statute, it may appear that widespread or systematic would apply to either attack or enterprise. However, upon analysing the meaning of enterprise or the usage of the word in international criminal law, such interpretation would be absurd. Enterprise is used in determining collectivity of criminal act or to denote some plan, organised criminality.⁷⁹ The concept applied is usually Joint Criminal Enterprise (JCE) and it is a form of a mode of liability.⁸⁰ In fact, JCE is controversial in its manner of assigning criminal responsibility such that the ICC jurisprudence opts for doctrines of indirect perpetration and co-perpetration as opposed to JCE.⁸¹ The ACJHPR Statute is referring to

⁷⁸ Article 28 C (2) (a) ACJHPR Statute.

⁷⁹ For instance, in a letter addressed to President Franklin D. Roosevelt on 22 January 1945, The US Secretaries of State, War and the Attorney General wrote:

“The criminality of the German Leaders and their Associates does not consist solely of individual outrages, but represents the result of a systematic and planned reign of terror... We are satisfied that these atrocities were perpetrated in pursuance of a premeditated criminal plan or enterprise which either contemplated or necessarily involved their commission’ see Agbor AA (2012) 174; Ambos K (2017) 41.

⁸⁰ *Prosecutor v Tadić*, No IT-94-1-A, Appeals Chamber Judgment (15 July 1999) para. 195.

⁸¹ *Prosecutor v Lubanga*, Decision on Confirmation of Charges, No. ICC-01/04-01/06, ICC Pre-Trial Chamber I (29 January 2007); see also Jain N *Perpetrators and Accessories in International Criminal Law* (2014) 15-98

‘enterprise’, which might be conceptually different from JCE hence the need for it to provide a definition of what it entails. In addition, the ACJHPR Statute is just complicating the definition of crimes against humanity by adding a concept that does not appear in any previous Statutes providing for the crimes against humanity, without proffering any definition. As a solution, the ACJHPR Statute should define enterprise or simply be amended to remove it from the definition of crimes against humanity.

However, Ambos in his analysis of the crimes against humanity under the ACJHPR, argues that the inclusion of enterprise might have been in order to clarify that ‘legal persons, too, can commit crimes against humanity.’⁸² This is based on the Black’s Law dictionary meaning of enterprise as an ‘organization or venture, especially for business purposes.’⁸³ It is not clear whether this interpretation is what the drafters intended bearing in mind that the Statute already provides for corporate criminal liability.⁸⁴ Apart from that the use of the word in provision relates more to an act as opposed to an entity that is, an underlying act committed as part of an attack or enterprise. The plausible definition is that which defines enterprise as an act and the closest is that of criminal enterprise relating to commission of crimes through a collective or group⁸⁵

In relation to attack, the ACJHPR Statute maintains the policy element as reflected in the ICC Statute whereby an attack should be pursuant to a State or organisational policy. The policy element does not reflect the customary international law position on crimes against humanity

(who analyses the history and development of the JCE concept); Ohlin JD ‘Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise’ (2007) 5 *JICJ* 69-90.

⁸² Ambos K (2017) 41.

⁸³ Garner BA Black’s Law Dictionary 8 ed (2004) 572.

⁸⁴ Article 46C ACJHPR Statute.

⁸⁵ An example of criminal enterprise would be illegal groups such as militia, drug traffickers and groups of similar nature. Article 9 IMT Charter referred to ‘criminal organisation’.

as it was not a requirement.⁸⁶ The ICC jurisprudence shows that with regard to the term ‘organization’, it is not ‘the formal nature of a group and the level of its organisation’ were decisive, but rather ‘a distinction should be drawn whether a group has capability to perform acts which infringe on basic human values.’⁸⁷ The policy element was included in the ICC Statute as part of the compromise for having an alternative as opposed to cumulative relationship between the requirements “widespread” and “systematic”.⁸⁸ The ACJHPR Statute has maintained the formulation under the ICC Statute and there is nothing in the travaux préparatoires to explain why the policy element had to be maintained.

The underlying offences under the ACJHPR Statute are worded in the same manner as under the ICC Statute except for the crime of torture whereby cruel, inhuman and degrading treatment or punishment has been added.⁸⁹ The crime of inhuman or cruel treatment is a catch all phrase that incorporates other serious injuries that cannot be defined as torture and in this manner, it broadens the scope of the crime.⁹⁰

In conclusion, although the definition of crimes against humanity follows in most respects the ICC Statute, there are certain elements of the definition of the crime under the ACJHPR Statute that require review. In particular, the concept of enterprise introduced in the contextual element of the crime, the maintenance of organisational element in the definition of the crime and the broadening of the crimes against humanity of torture to include inhuman and degrading treatment or punishment.

⁸⁶ Werle G & Jessberger F (2014) 340.

⁸⁷ *Situation in The Republic of Kenya* No. ICC-01/09-19 par. 90.

⁸⁸ Werle G & Jessberger F (2014) 340.

⁸⁹ Article 28 C (f) ACJHPR Statute.

⁹⁰ Ambos K (2017) 42.

6.3.3 War Crimes

6.3.3.1 A Brief History

War crimes can be understood to describe the crimes under international law committed in connection with armed conflict.⁹¹ The crimes are a violation of international humanitarian law that create direct criminal responsibility under international law.⁹² They are commonly categorised as crimes derived from the ‘Law of Geneva’ and from ‘The Law of the Hague.’⁹³ The law of The Hague was intended to protect soldiers by prohibiting means and methods of warfare that are particularly atrocious or dangerous and the starting point was the St Petersburg Declaration of 1868 where parties pledged not to use certain ammunition in conflict that was particularly devastating for soldiers.⁹⁴ The primary purpose of the law of Geneva was to protect persons not or no longer taking part in hostilities.⁹⁵ There are growing overlaps and similarities between the law of Geneva and The Hague law.⁹⁶ The modern challenge in the defining of war crimes is the extent in which they can be made adaptable or applied to non-state conflicts, civil wars, wars of national liberation, acts of terrorism among others.

Under the ICC Statute, war crimes are defined in Article 8. The Statute distinguishes between crimes in international conflict and crimes in non-international armed conflict. As such,

⁹¹ Werle G & Jessberger F (2014) 391.

⁹² Cassese, Gaeta et al (2013) 65; Werle G & Jessberger F (2014) 391.

⁹³ Werle G & Jessberger F (2014) 397.

⁹⁴ Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles, Saint Petersburg, 29 November/11 December 1868 available at

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C> (accessed on 7 March 2016).

⁹⁵ The first Geneva Convention was adopted in 1864 and is referred to as Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864 available at <https://www.icrc.org/ihl/INTRO/120?OpenDocument> (accessed on 7 March 2016).

⁹⁶ Werle G & Jessberger F (2014) 397.

Article 8(2) (a) adopts the grave breaches of Geneva Conventions, Article 8(2) (b) consists of crimes regarded as serious violations of the laws and customs of war and all crimes arising from other sources of law and applicable to international armed conflict. Article 8(2) (c) contains crimes found in Common Article 3 of the Geneva Convention. Article 8(2) (e) encompasses crimes from the sources other than the Geneva Convention and applicable to non-international armed conflict.

Emerging thoughts are that the categorisation of war crimes under The Hague and Geneva Law has become antiquated due to the increasing convergence between international and non-international conflict as such it makes more sense to define the crimes on a substantive point of view i.e. distinction between protection of persons and property on one hand, and the forbidden means and methods of warfare on the other.⁹⁷

6.3.3.2 Definition of war crimes under the ACJHPR Statute

War crimes are provided for in Article 28D of the ACJHPR Statute. They are structured in the same manner as under the ICC Statute in that they fall under similar categories of grave breaches of the Geneva Conventions⁹⁸, Grave breaches of the First Additional Protocol and other violations of laws and customs applicable to international armed conflicts⁹⁹, in armed conflict not of international character, serious violations of Article 3 common to the Geneva Conventions.¹⁰⁰ In addition, similar to the ICC, the African Court will have jurisdiction over war crimes committed “as part of a plan or policy or as part of a large commission of such

⁹⁷ Werle G & Jessberger F (2014) 397; see also Ambos K Vol 1 (2013) 13 who defines it as “assimilation” between international and non-international armed conflict which entails it no longer matters whether a serious violation has occurred within an international or non-international armed conflict; and Odermatt J ‘Between Law and Reality: ‘New Wars’ and Internationalised Armed Conflict’ (2013) 5 (3) *Amsterdam Law Forum* 19-32.

⁹⁸ Article 28 D (a) ACJHPR Statute.

⁹⁹ Article 28 D (b) ACJHPR Statute.

¹⁰⁰ Article 28 D (c) ACJHPR Statute.

crimes.”¹⁰¹ This is an unnecessary limitation of the war crimes provision that the drafters of the ACJHPR Statute could have excluded.¹⁰²

Some areas of divergence with the ICC Statute are discussed below:

6.3.3.2.1 Use of Nuclear Weapons as a War Crime

In Article 28 D (g), the ACJHPR Statute makes use of nuclear weapons and other weapons of mass destruction a war crime. Under the ICC Statute, the use of nuclear weapons or weapons of mass destruction is not expressly criminalised. The proposals for criminalisation of use of nuclear weapons under the ICC Statute was a controversial issue during the negotiations of the Statute, in particular there was opposition by States with nuclear weapons to expressly criminalise the use of nuclear weapons.¹⁰³ There have been debates on whether the ICC Statute should expressly criminalise the use of nuclear weapons under the ICC Statute, with proponents arguing that explicit criminalisation would make those responsible for launching nuclear attack more reluctant to do so for fear that they would be held individually responsible for doing so.¹⁰⁴

However, others argue that there is no need to expressly provide for criminalisation of nuclear weapons under the ICC Statute because Article 8 (2)(b)(xx) of the Statute already prohibits the use of weapons that would violate rules on distinction and proportionality.¹⁰⁵

¹⁰¹ The Chapeau to Article 28 D ACJHPR Statute; Ambos K (2017) 43.

¹⁰² Ambos K (2017) 43.

¹⁰³ Burroughs J ‘The International Criminal Court, Weapons of Mass Destruction, NGOs and other Issues: A Report on the Negotiation of the Statute available at <http://lcnp.org/global/icc.htm> (accessed on 26 November 2014).

¹⁰⁴ Kaldor M ‘Dismantling the global nuclear infrastructure’ *Open Security*, 11 August 2009, available at <https://www.opendemocracy.net/article/dismantling-the-global-nuclear-infrastructure> (accessed on 30 November 2014); on arguments on the criminalisation of proliferation of WMD see Kellman B ‘WMD Proliferation: An International Crime?’ (2001) *The Non-Proliferation Review* 93-101.

¹⁰⁵ Hugo TG ‘Nuclear Weapons and the International Criminal Court: Why efforts to include an explicit reference to nuclear weapons in the definition of War Crimes under the Statutes of the International Criminal

However, the annex to the ICC Statute made pursuant to this provision of the ICC Statute does not include nuclear weapons in the list of prohibited weapons, projectiles and materials, and methods of warfare and this shows that they are not criminalised under the current law.¹⁰⁶

The ICJ in its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* decided that there is no conventional rule nor customary rule specifically proscribing the threat or use of nuclear weapons.¹⁰⁷ At the regional level, Africa has a Nuclear Weapon-Free Zone Treaty also known as the Pelindaba Treaty.¹⁰⁸ From this Treaty, it is clear that Africa adopts a denuclearisation approach that considers nuclear-weapon-free zones as one of the means for preventing proliferation.¹⁰⁹ The Pelindaba Treaty has provisions on renunciation of nuclear explosive devices,¹¹⁰ prevention of stationing of nuclear explosive devices,¹¹¹ and prohibition of testing of nuclear explosive devices among other prohibitions.¹¹² It however encourages peaceful activities as defined under Article 8, which include the use of nuclear science and technology for economic and social development. The Pelindaba Treaty is a non-proliferation treaty and does not criminalise the use of nuclear weapons or weapons of mass destruction. Thus, the criminalisation of nuclear weapons is a further step that the region has taken regarding the use of nuclear weapons and evinces a regional consensus that is not present in the earlier treaties relating to the matter.

Court should not be a priority' Nuclear Weapons Project, Policy Paper No.2 (2012) available at http://nwp.ilpi.org/wp-content/uploads/2012/03/PP02-12_NW-ICC.pdf (accessed on 26 November 2014).

¹⁰⁶ Ambos K (2017) 48.

¹⁰⁷ I.C.J. Reports 1996, p. 226.

¹⁰⁸ African Nuclear Weapon-Free Zone Treaty (Pelindaba Treaty) (2001).

¹⁰⁹ Paras 1-4 Pelindaba Treaty (2001); see also Adeniji O *The Treaty of Pelindaba on the African Nuclear-Weapon-Free Zone* (2002).

¹¹⁰ Article 3 Pelindaba Treaty.

¹¹¹ Article 4 Pelindaba Treaty.

¹¹² Articles 5, 6 Pelindaba Treaty.

6.3.3.2.2 Minimum age of Child Soldiers is 18

In comparison to the ICC Statute which puts the minimum age for enlisting or conscripting child soldiers at 15, the ACJHPR Statute increases the age to 18.¹¹³ The criminalisation of conscription, enlistment and use of child soldiers is important in that it emphasises the protection of children. The negative consequences of children participating in conflict include sexual exploitation, trauma, interruption of education, and that the child soldiers often represent danger to other people since their actions are often unpredictable.¹¹⁴ The first decision by the ICC in *Prosecutor v. Thomas Lubanga Dyilo* was solely on recruitment and use of child soldiers.¹¹⁵

International instruments such as the Convention on the Rights of the Child (CRC), Additional Protocol I and II puts the age of 15 years as the minimum age for recruitment or participation in armed conflict.¹¹⁶ The current recommendations in relation to the age of recruitment is that it should be raised from the age of 15 to 18.¹¹⁷ The African Charter on the Rights and Welfare of the Child defines a child as every human being below the age of 18 years.¹¹⁸ The African Children Charter mandates States parties to take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain recruitment of

¹¹³ c/f Article 8(2)(b)(xxvi); Article 8(2)(e) (vii) ICC Statute with Article 28D(b)(xxvii) and Article 28D (e) (vii) of the Protocol.

¹¹⁴ Graca Machel UN Report on The Impact of Conflict on Children (26 August 1996) available at http://www.unicef.org/graca/a51-306_en.pdf (accessed on 29 November 2014); Werle (2009) 414.

¹¹⁵ *Prosecutor v. Thomas Lubanga Dyilo* ICC-01/04-01/06-2842 Judgment Pursuant to Article 74 of the Statute (Mar. 14, 2012)

¹¹⁶ Article 77(2) Additional Protocol I; Article 4(3) (c) Additional Protocol II; and Article 38(3) CRC.

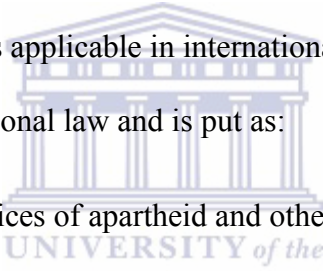
¹¹⁷ *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 25 May 2000, for detailed analysis see Sheppard A 'Is the Optional Protocol Evidence of an Emerging "Straight -18" Consensus?' (2000) 8 *International Journal of Children's Rights* 37-70.

¹¹⁸ Article 2 of the Charter also referred to as African Children Charter adopted in Addis Ababa Ethiopia on 11 July 1990 and entered into force on 29 November 1999.

children.¹¹⁹ The ACJHPR Statute therefore upholds the minimum age of 18 as provided for under the African Children Charter and in comparison to the ICC Statute is more progressive as it implements recommendations on setting the minimum age of child soldiers at 18 years. However, the provision criminalising the conscripting and enlisting of child soldiers would have been improved by extending it to non-state actors, particularly militia groups who in practice are the perpetrators of the crime.¹²⁰

6.3.3.2.3 Practices of Apartheid as a War Crime

The ICC Statute provides for the crime of apartheid as a crime against humanity. Under the ACJHPR Statute the crime of apartheid is included both as a crime against humanity and as a war crime where it falls under grave breaches of the Additional Protocol and other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law and is put as:


'wilfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.'¹²¹

The provision reflects Article 85 of the Additional Protocol I of 1977, which includes practices of apartheid as a war crime. The ICC Statute did not include this provision but the ACJHPR Statute includes it as a crime. During the drafting of the ICC Statute, a proposal was made by some African States to include the crime of "Practices of Apartheid" within the list of war crimes but it was not proceeded with as such there is no reference to it in Article 8 of the ICC Statute.¹²² As such including it in the ACJHPR Statute caters for what could not be

¹¹⁹ Article 22 African Children Charter.

¹²⁰ Ambos K (2017) 45.

¹²¹ Article 28D (b) (xxix).

¹²² Article 85 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), (8 June 1977), 1125 UNTS 3; Eden P 'The Practices of Apartheid as a War Crime: A Critical Analysis' (2013) *Yearbook of International Humanitarian Law* 89-117.

achieved at international level. Practices of apartheid incorporates a wide range of acts as long as they are based on racial discrimination. Crimes of apartheid as a crime against humanity is defined in the same manner in Article 28C (2) (h) of the ACJHPR Statute and Article 7(2)(h) of the ICC Statute as inhuman acts ‘committed in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups....’ However, there is no definition for the crime of practices of apartheid as a war crime. For purposes of consistency, a definition of apartheid similar to that provided for apartheid as a crime against humanity should be proffered the only distinction will be that apartheid as a war crime can only be committed in the context of a conflict. Thus, practices of apartheid as a war crime means: ‘acts committed in the context of conflict by an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.’¹²³



6.3.3.2.4 Additional war crimes on Armed Conflict of Non-International Character

In Article 28 D (e) providing for serious violations of laws and customs applicable in armed conflicts of non- international character, the ACJHPR Statute has the following additional crimes that are not part of a similar provision in the ICC Statute :¹²⁴ intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable for their survival, including wilfully impeding relief supplies¹²⁵; utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations¹²⁶; launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental loss, injury or

¹²³ c/f Article 28 C (2) (h) ACJHPR Statute.

¹²⁴ Article 8(2) (e) ICC Statute and Article 28 D (e) of the Protocol; Ambos K (2017) 45-47.

¹²⁵ Article 28D (e) (xvi) ACJHPR Statute.

¹²⁶ Article 28 D (e) (xvii) ACJHPR Statute.

damage¹²⁷; making non-defended localities and demilitarised zones the object of attack¹²⁸; slavery, collective punishments' despoliation of the wounded, sick, shipwrecked or dead.¹²⁹ These offences are already provided for in relation to conflicts of international character and extending them to conflicts of non-international character makes sense considering that the diminishing importance of the distinction as to the nature of conflict with regard to the crimes.

In conclusion, the wording of provisions on war crimes follow the formulation of the ICC Statute. Some areas of divergence such as putting 18 years as the minimum age conscripting or enlisting child soldiers, apartheid and the use of nuclear weapons and weapons most as war crimes. There are also additional war crimes in both non-international and international armed conflict. In the absence of travaux documents it is difficult to ascertain the justification behind the inclusion of the additional crimes.

6.3.4 The Crime of Unconstitutional Change of Government

6.3.4.1 A Brief History

The concept of Unconstitutional Change of Government(UCG) is reflected in various AU Declarations and Conventions.¹³⁰ Statistics show that between 1956 and 2001, Africa has experienced more than 80 coup d'états and about 180 attempted coup d'états.¹³¹ It is therefore a concern for Africa to find a way of dealing with unconstitutional changes of government.¹³²

¹²⁷ Article 28 D (e) (xviii) ACJHPR Statute.

¹²⁸ Article 28 D (e) (xix) ACJHPR Statute.

¹²⁹ Article 28 D (e) (xx), (xxi) and (xxii) ACJHPR Statute respectively.

¹³⁰ Article 4(p) of the Constitutive Act of the African Union; AU Declaration on Unconstitutional Changes of Government (2000); African Charter on Democracy, Elections and Governance (2012).

¹³¹ McGowan PJ 'African military coups d'état,1956-2001: frequency, trends and distribution' (2003)41(3) *Journal of Modern African Studies* 339-370.

¹³² Kemp G & Kinyunyu S 'The Crime of Unconstitutional Change of Government (Article 28 E)' in Werle G & Vormbaum M (eds.) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 58-59

The OAU, taking note of the problems of Unconstitutional Change in Governments in Africa made two declarations on the same, The Algiers Declaration and The Lome Declaration.¹³³

Under the declarations, the OAU Heads of States among other things recognised coup d'état as a threat to peace and security and acknowledged that principles of good governance, transparency and human rights were essential for the building of representative governments. The Lome Declaration sets out the elements of what would constitute the OAU's response to UCGs as: (i) a set of common values and principles for democratic governance; (ii) a definition of what constitute an unconstitutional change of government; (iii) measures and actions that the OAU would progressively take to respond to an unconstitutional change of government and (iv) an implementation mechanism.

The Lome Declaration enumerate situations that can be considered as UCGs to include: (i) military coup d'état against a democratically elected government; (ii) intervention by mercenaries to replace democratically elected government; (iii) replacement of democratically elected government by armed dissidents' groups and rebel movements and (iv) the refusal by an incumbent to relinquish power to a winning party after a free, fair and regular elections. The principles under the Declaration were subsequently incorporated into a treaty in the African Charter on Democracy, Elections and Governance (ACDEG).¹³⁴ Article 23 of the ACDEG enumerates five acts amounting to unconstitutional change of Government. Four of the acts are the principles under the Lome Declaration and the fifth one prohibits 'any amendment or revision of the constitution or legal instruments, which is an infringement on

(hereinafter Kemp G & Kinyunyu S (2017) provide an example of the AU response against a coup d'état in Burkina Faso in September 2015.

¹³³ The Algiers Declaration on Unconstitutional Changes of Governments Algiers Decision AHG/142 (XXXV) (1999); The Lome Declaration for an OAU Response to Unconstitutional Changes of Governments AHG/Decl.5 (XXXVI) (2000).

¹³⁴ Adopted on 30 January 2007 and came in force on 15 February 2012.

the principles of democratic change of government.¹³⁵ The Charter's objective, among other things, is to entrench a political culture of change of power based on the holding of regular, free, fair and transparent elections.¹³⁶ It also considers UCGs as one of the causes of insecurity, instability and violent conflict in Africa.¹³⁷

Article 25 of the ACDEG provides for responses that the AU Peace and Security Council can take in a situation of UCG.¹³⁸ The responses are both political and legal. Under the political measures, the AU Peace and Security Council can suspend the concerned state party from exercising its rights in participating in the activities of the AU.¹³⁹ The Charter also provides that the perpetrators of the UCG shall not be allowed to participate in elections to restore order or hold any positions of responsibility in political institutions of their state.¹⁴⁰ It is also provided that perpetrators shall be tried before a competent court of the AU.¹⁴¹ This provision could not be implemented in the absence of a court with jurisdiction to try perpetrators of the crime. In that regard, it is argued in support of the ACJHPR Statute that the criminalisation of Unconstitutional Change of Governments under the Statute is a way of making the implementation of Article 25(5) of the African Charter on Democracy, Elections and Governance possible.¹⁴²

¹³⁵ Article 23 ACDEG; Kemp G & Kinyunyu S (2017) 62.

¹³⁶ Para 7 preamble ACDEG.

¹³⁷ Para 8 preamble ACDEG.

¹³⁸ Established under the Protocol relating to the establishment of the Peace and Security Council of the African Union (2003).

¹³⁹ Article 25(1) ACDEG.

¹⁴⁰ Article 25(4) ACDEG.

¹⁴¹ Article 25(5) ACDEG.

¹⁴² Deya D (2012) 24.

6.3.4.2 The Definition of the Crime of UCG under the ACJHPR Statute

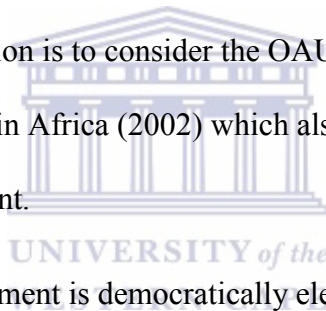
The crime is defined in Article 28E of the Statute. It mirrors Article 23 of the African Charter on Democracy Elections and Governance on what constitutes an Unconstitutional Change of Government. It thus provides as follows:

1. For the purposes of this Statute, Unconstitutional Change of Government means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:
 - (a) A putsch or coup d'état against a democratically elected government;
 - (b) An intervention by mercenaries to replace a democratically elected government;
 - (c) Any replacement of democratically elected government by the use of armed dissidents or rebels through political assassination;
 - (d) Any refusal by the incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
 - (e) Any amendment or revision of the Constitution or legal instruments which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
Any substantial modification to the electoral laws in the last six months before the elections without the consent of the majority of the political actors.

Several aspects can be highlighted in the formulation of the crime of UCG. Firstly, liability lies with the direct perpetrator that is the one who commits either of the acts in Articles 28(1) (a)-(f) or an indirect perpetrator, the one who orders the commission of the proscribed acts. Secondly, the offence can only be committed against a “democratically elected government”. A democratically elected government is defined in Article 28 E (2) as follows:

‘For the purposes of this Statute, democratically elected government has the same meaning as contained in the AU Instruments.’

This manner of defining democratically elected government is problematic in the sense that no specific AU instrument is mentioned in which the concept has been defined. The main instrument on unconstitutional change of government, the African Charter on Democracy Elections and Governance, does not provide for a definition of democratically elected government. However, what constitutes democratically elected government can be implied from Article 17 of the African Charter on Democracy Elections and Governance, providing for democratic elections, whereby one can state that democratically elected government is that which came into power following the procedures for conducting democratic elections under that provision. Another option is to consider the OAU/AU Declaration on Principles Governing Democratic Elections in Africa (2002) which also does not provide a definition of democratically elected Government.



The question of whether a government is democratically elected can be considered obvious but where a penal statute requires a definition of a specific concept, it must be clear where the definition should be derived. During one of the validation workshops on the draft Protocol, it was suggested that ‘democratically elected government’ be deleted altogether.¹⁴³ The justification is different from that proffered in this thesis in that the experts were of the view that ‘democratically elected government’ is not only defined under the AU instruments but

¹⁴³ Report of the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implications of an International Crimes Section within the African Court of Justice and Human Rights, 19-20 December 2012, Arusha, Tanzania AFCHPR/LEGAL/Doc.3 Page 4 (hereinafter Report on the Definition of Crimes of UCG).

also other international instruments although the instruments in question were not mentioned.¹⁴⁴

It is not clear whether other forms of governments are covered under the phrase democratically elected government for instance, transitional government or interim governments. It was also suggested during the validation workshop that ‘democratically elected government’ be replaced with just ‘government’ in order not to legitimise any overthrow of any government regardless of how they came to power.¹⁴⁵ As the final Draft of the Statute would show, these suggestions were not incorporated.

Another area that must be considered was whether the concept of popular uprisings can be included as part of the offence of unconstitutional change of government. The earlier draft of the amended Statute provided for the same. However, during the Ministerial Meeting of the Specialized Technical Committee on Justice and Legal Affairs that was held preceding the adoption of the ACJHPR Statute, it was agreed that popular uprisings should be excluded from the text until the AU Peace and Security Council had defined the concept.¹⁴⁶ The collectivity of popular uprisings make it difficult to attach individual liability and makes it difficult to define it as a crime.

Unconstitutional change of government as a crime is one strategy of complementing the African Charter on Democracy Elections and Governance as it fosters the ideals of peace and democratic governance in Africa.¹⁴⁷ However, the definitions of the crime under Article 28E

¹⁴⁴ Para 11(vii) Report on the Workshop on the Definition of Crimes of UCG.

¹⁴⁵ Para. 11 (iv) Report on the Workshop on the Definition of Crimes of UCG.

¹⁴⁶ First Ministerial Meeting of the Specialized Technical Committee on Justice and Legal Affairs, 15-16 May 2014, Addis Ababa, Ethiopia, STC/Legal/Min/Rpt. para. 23 available at <https://www.justsecurity.org/wp-content/uploads/2014/07/Legal-Instruments-Adopted-in-Malabo-July-2014.pdf> (accessed on 12 April 2017).

¹⁴⁷ Kemp G & Kinyunyu S (2017) 68.

Statute fall short in meeting the principle of legality for criminal offences.¹⁴⁸ For example it is not clear what democratically elected government mean and this defeats the requirement of precision in definition of crimes. The definition of the crime can further be improved by referring to government instead of democratically elected government to make unlawful usurpation of power against any form of government illegal.

6.3.5 Piracy

6.3.5.1 A Brief History

The crime of piracy has been recognised as a customary international law crime since 1600s.¹⁴⁹ There is no international convention on piracy but its prohibition is included in international law instruments on the law of the sea. The crime is defined in the same way as under Article 15 of the Convention on the High Seas, 1958 and Article 101 of the United Nations Convention on the Law of the Sea (UNCLOS). For many years, piracy has been a problem in Asian sea routes, in particular Strait of Malaca and South China Sea.¹⁵⁰ However, in Africa, piracy has become an endemic problem in the waters of the Horn of Africa and the high seas, with acts of piracy occurring as far as south Kenya and the Gulf of Aden in the east.¹⁵¹ Piracy in Africa is not limited to Somalia or East Africa alone, there has been an increase in piracy in the West African Coast as well particularly the Gulf of Guinea.¹⁵² Factors that are creating a conducive environment for piracy include the failed state of Somalia that is unable to counter piracy in its territorial waters and the lucrateness of piracy

¹⁴⁸ Kemp G & Kinyunyu S (2017) 64-67.

¹⁴⁹ Bassiouni MC (2012) 208.

¹⁵⁰ Dugard J *International Law: A South African Perspective* (2013) 381.

¹⁵¹ Dugard J (2013) 381; Geiß R & Petrig *A Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (2011) 6-13 (hereafter Geiß & Petrig (2011)).

¹⁵² Walker T 'African Coastal Piracy in 2013-The Beginning of the end or the end of the beginning?' (2013) available at <http://www.issafrica.org/iss-today/african-coastal-piracy-in-2013-the-beginning-of-the-end-or-the-end-of-the-beginning> (accessed on 30 November 2014).

through ransom payments.¹⁵³ The UN Security Council has made resolutions with regard to piracy in Somalia and the high seas.¹⁵⁴ Therefore, piracy is a reality in Africa and not just some archaic offence and measures have to be put in place in order to prosecute the crime when committed.

It is interesting to note that the Report of the UN Secretary General for the possible options to further the aim of prosecuting persons responsible for the crime of piracy and armed robbery at the sea of Somalia recommended the creation of special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements.¹⁵⁵ The ACJHPR Statute may provide such an avenue for prosecution of piracy as an offence.

6.3.5.2 The Definition of the Crime of Piracy under the ACJHPR Statute

The crime is provided for in Article 28F of the ACJHPR Statute. It takes substantially, the formulation under Article 101 of UNCLOS, the only slight difference is that it includes boat in the list of places where the crime can be committed, thus it defines piracy as consisting of any of the following acts:

¹⁵³ Geiß & Petrig (2011) 6-13.

¹⁵⁴ United Nations, Security Council, S. C Res 1816, U.N Doc. S/Res/ 1816 (June 2, 2008); S.C. Res. 1846 (December 2, 2008); S.C. Res. 1851 (December 16, 2008); S.C. Res. 1897 (November 30, 2009); S.C. Res. 1918 (April 27, 2010); UNSC S/2012/177 among others.

¹⁵⁵ Report of the Secretary-General on the Possible Options to further the aim of Prosecuting and Imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, including in particular, options for creating special domestic chambers possibly with international components, a regional tribunal or an international tribunal and corresponding imprisonment arrangements, taking into account the work of the Contact Group on Piracy off the Coast of Somalia, the existing practice in establishing international and mixed tribunals and the time and resources necessary to achieve and sustain substantive results UNSC S/2010/394 (26 July 2010).

- a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private boat, ship or a private aircraft, and directed:
- i. on the high seas, against another boat, ship or aircraft, or against persons or property on board such boat, ship or aircraft;
 - ii. against a boat, ship, aircraft, persons or property in a place outside the jurisdiction of any State.
- b) any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft;
- c) any act of inciting or intentionally facilitating an act described in paragraph (a) or (b).

The crime is characterised by illegal acts of violence or detention or any act of depredation. The illegal acts must be committed for private ends. This is to distinguish piracy from privateering which is sanctioned by a maritime state.¹⁵⁶ The crime is committed either on the high seas or outside the jurisdiction of any state. Where the crime is committed within the jurisdiction of a State it is dealt with by the municipal law of that State. It is also important to highlight that under customary international law, any State can exercise jurisdiction over the crime.¹⁵⁷

The current challenge of dealing with piracy committed on the territorial waters, such as in the example of Somalia makes some jurisdictions exclude the limiting of the offence to the

¹⁵⁶ Ambos K Vol II (2014) 238-41; Geiß & Petrig (2011) 145.

¹⁵⁷ Jessberger F 'Piracy (Article 28F), Terrorism (Article 28G) and Mercenarism (Article 28H)' in Werle G & Vormbaum M *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 78 (hereinafter Jessberger F (2017)).

high seas, an example is section 369(1) of the Kenyan Merchant Shipping Act.¹⁵⁸ States have leeway as to how they can define the crime to suit their peculiar circumstances.¹⁵⁹

The adoption of a definition of piracy that is almost a copy and paste of Article 101 of UNCLOS entails that all the controversies applying to it will arise. The main controversy being that Article 101 of UNCLOS does not create a crime of piracy but rather just defines it and that the UNCLOS provision never expressly provided for a prohibition of piracy nor does it threaten commission of the same with sanctions and to that extent it is not a penal provision.¹⁶⁰ The provision is therefore considered as merely jurisdictional and that States have to provide in their domestic legislations how the crime is formulated.¹⁶¹ However, States practice show that definition of the crime at the domestic level varies and in certain cases follow the exact wording of Convention and adds to it by providing for penalties.¹⁶² The definition of the crime of piracy under the ACJHPR is therefore not peculiar.

What the Statute has done is reformulating the prohibitions into crimes and in addition it also has a penalty provision for the crimes as such the criticisms under UNCLOS cannot be simply be extended to the Statute. Since not all piracy occurs at the high seas as some occur in the territorial waters of States, the solution to piracy does not only lie in having a regional

¹⁵⁸ Kenya Merchant Shipping Act, 2009; also s.341 Tanzania Merchant Shipping Act (2003) is drafted in similar terms, the provisions omit 'on the high seas' from the definition of the crime.

¹⁵⁹ Dutton YM 'Maritime Piracy and Impunity Gap: Insufficient National Laws or a Lack of Political Will?' (2012) 86 *Tulane Law Review* 1114 an empirical research on the domestic laws on piracy for 50 States shows that some States defines piracy per the law of the nations, some in accordance to UNCLOS whilst others apply ordinary criminal law to deal with piracy.

¹⁶⁰ Geiß & Petrig (2011) 141.

¹⁶¹ Geiß & Petrig (2011) 142.

¹⁶² Examples of countries that follow the UNCLOS definition verbatim are Bulgaria, Poland. France among others for full list see Dutton Y.M (2012) 1141.

framework, but African States should have legislative framework that will enable them to prosecute piracy at the domestic level.¹⁶³

6.3.6 Terrorism

6.3.6.1 A Brief History

An early attempt at defining Terrorism at the international level was by the League of Nations during the drafting of the Convention for the Prevention and Punishment of Terrorism.¹⁶⁴ The League of Nations Convention was not ratified, it however defined terrorism as:

‘All criminal acts directed against a State and intended and calculated to create a state of terror in the minds of particular persons or group of persons or the general public.’¹⁶⁵

Subsequent attempts by the United Nations at defining terrorism were precipitated by series of aircraft hijacking incidents. As such since 1963, the United Nations has focused on individual and small group violence directed against civilians, diplomats, civilian aircrafts, commercial maritime navigation and sea bed platforms and attacks involving use of explosives and weapons of mass destruction.¹⁶⁶ In 1999, the UN adopted the Terrorist Financing Convention which defines terrorism as:

¹⁶³ Gardner M ‘Piracy Prosecutions in National Courts’ (2012)10 (4) *JICJ* 797-821; Guilfoyle D ‘Prosecuting Somali Pirates: A Critical Evaluation of the Options’ (2012)10 (4) *JICJ* 767-96.

¹⁶⁴ Convention for the Prevention and Punishment of Terrorism, League of Nations Doc. C. 547M.384 (1937). For the drafting history of the Convention see Saul B ‘The Legal Response of the League of Nations to Terrorism’ (2006) 4(1) *JICJ* 78-102.

¹⁶⁵ Art 1(2) Convention for the Prevention and Punishment of Terrorism.

¹⁶⁶ Ambos K Vol II (2014) 228 refers to various treaties as patchwork of multilateral treaties aimed at suppressing certain terrorist activities; Bassiouni MC ‘International Terrorism’ in Bassiouni MC *International Criminal Law: Vol I Crimes* 2ed (1999) 765; Cassese A ‘Terrorism as an International Crime’ in Bianchi A *Enforcing International Law Norms against Terrorism* (2004) 213-14 (hereinafter Cassese A (2004)).

‘Any act intended to cause death or serious bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.’¹⁶⁷

Security Council resolution 1373 of September 28 2001, required all members of the UN to ratify the Convention. One of the issues regarding the definition that was insisted upon by the developing world was whether acts of freedom fighters should fall within the exception of the definition.¹⁶⁸ For Africa, the OAU insisted on maintaining the exception and this position is reflected in the OAU Convention on the Prevention and Combating of Terrorism.¹⁶⁹ In Article 1 (3) (a) of the OAU Terrorism Convention, terrorist act is defined as:

‘Any act which is a violation of criminal laws of a State Party and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is intended to:

- (i) Intimidate, put in fear, force, coerce, or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act or to adopt or abandon a particular standpoint, or act according to certain principles.’

¹⁶⁷ Art 2 (b) Terrorist Financing Convention.

¹⁶⁸ Cassese A (2004) 214.

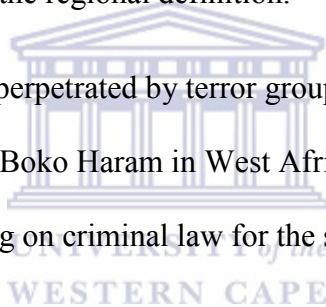
¹⁶⁹ Adopted in Algiers in 1999 and came into force in 2002.

As an exception to what can be considered as a terrorist act, Article 3(1) of the OAU Terrorism Convention provides as follows:

‘Notwithstanding provisions of Article 1, the struggle waged by people in accordance with the principles of international law for their liberation or self-determination, including the struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as a terrorist act.’

The exception is important to Africa as it reflects Africa’s understanding of the crime. During the colonial times, most African freedom fighter were included in terrorist lists regardless of the nobility of their cause.¹⁷⁰ This background informs the insistence on the exception and this is adequately incorporated in the regional definition.

Africa has experienced terrorism perpetrated by terror groups operating in the continent such as Al-Shabaab in East Africa and Boko Haram in West Africa.¹⁷¹ Criminalising terrorism follows the global trend for relying on criminal law for the suppression of terrorist acts.¹⁷²



6.3.6.2 The Definition of Terrorism under the ACJHPR Statute

From a synthesis of the definitions above, terrorism has three elements: (a) the acts must constitute a criminal offence under most national legal systems, (b) they must be aimed at spreading terror by means of violent actions, (c) they must be politically, religiously, or otherwise ideologically motivated.¹⁷³ Under the ACJHPR Statute, the criteria for

¹⁷⁰ For example, ANC freedom fighters such as Nelson Mandela, Thabo Mbeki were on US terrorism watch list for fighting apartheid regime in South Africa see Golpira H ‘Another Man’s Freedom Fighter’ Tehran Times 24 June 2008 available at <http://www.countercurrents.org/golpira240608.htm> (accessed on 28 March 2016); see also Jessberger F (2017) 79.

¹⁷¹ A list of terrorist groups in Africa and beyond is available at <http://www.state.gov/j/ct/rls/other/des/123085.htm> (accessed on 3 April 2016).

¹⁷² Jessberger F (2017) 79.

¹⁷³ Cassese A (2004) 219.

unlawfulness is not restricted to criminal law of national legal systems but can also extend to African Union Laws, Regional Economic Communities laws and International Law.¹⁷⁴ The mens rea is not limited to inducing force or fear to the public or government but also extends to disruption of public services or creation of some insurrection in a State.¹⁷⁵ Under the ACJHPR Statute, those who among other things sponsor or promote terrorism can also be liable as such, Article 28 G (b) provides that:

‘Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to (3).’

The position that liberation or freedom fighters should not be regarded as terrorists has been maintained and is reflected in Article 28 G (c) where it is provided that:

‘Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.’

Other exceptions include acts covered by International Humanitarian Law (IHL) committed in the course international or non-international armed conflict by government forces or members of organised armed groups.¹⁷⁶ This exception entails that all acts of terrorism committed in the context of an armed conflict fall under war crimes.¹⁷⁷ The ACJHPR Statute also excludes political, philosophical, ideological, racial, ethnic, religious or any other

¹⁷⁴ Article 28 G (a) ACJHPR Statute; Jessberger F (2017) 80.

¹⁷⁵ Article 28 G (a) (1), (2) ACJHPR Statute; Jessberger F (2017) 80.

¹⁷⁶ Article 28 G (d) ACJHPR Statute.

¹⁷⁷ Jessberger F (2017) 80.

motives as justifiable defences for the crime of terrorism.¹⁷⁸ This exclusion makes sense as these are some of the underlying motivations for committing the crime, in fact they form part of the elements of the crime of terrorism.

Criminalising terrorism at the regional level is one way of dealing with the problem.

However, a most comprehensive approach would require that individual African States to have comprehensive anti-terrorism legislation as a way of complementing the regional framework. Africa has a model Anti-Terrorism Legislation, which States can use as a blue print for developing domestic anti-terrorism law.¹⁷⁹ Prevention of terrorism is as important as its prosecution, as such States need to have mechanisms for sharing intelligence to prevent terrorist attacks in Africa and even beyond.

6.3.7 Mercenarism

6.3.7.1 A Brief History

At the international level, the instrument on mercenarism is the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (ICAM), 1989. In Africa, the relevant instrument is the OAU/AU Convention for the Elimination of Mercenarism in Africa, 1977. Mercenarism is considered a threat to peace and security and according to Bassiouni it is , ‘an extension to the crime of aggression’.¹⁸⁰ The OAU/AU Convention provides in its preamble that mercenarism presents a grave threat to the independence, sovereignty, territorial integrity and harmonious development of members of

¹⁷⁸ Article 28 G (e).

¹⁷⁹ The African Model Anti-Terrorism Law endorsed by the 17th Ordinary Session of the AU , Malabo 30 June-1 July 2011 available at <http://www.peaceau.org/uploads/african-model-law-en.pdf> (accessed on 3 April 2016); Boinett W ‘ Detection and Prevention of Terrorist Threats’ in Okumu W & Botha A (eds) *Understanding Terrorism in Africa: In Search of an African Voice* (2006) 103-106 (hereinafter Okumu & Botha (2006)); Okello E ‘Arrest and Prosecution of Terrorist Suspects’ in Okumu & Botha (2006) 107-110.

¹⁸⁰ Bassiouni MC (2012) 207.

the OAU/AU.¹⁸¹ The Convention also considers mercenarism as a threat to the legitimate exercises of the right of African people to their independence and solidarity¹⁸² The Convention in Article 1 defines a mercenary as any person who:-

- a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does in fact take a direct part in the hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
- d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- e) is not a member of the armed forces of a party to the conflict; and
- f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

The defining criteria from (a) to (f) is cumulative, as such a person has to fit all the requirements in order to be considered as a mercenary. This can prove difficult in certain scenarios or cases for instance under (c) the motivation for taking part in hostilities is exclusive private gain in form of material compensation. This therefore excludes those that may take part in hostilities not necessarily for material gain but to further a particular

¹⁸¹ Para 1 preamble of the OAU/AU Convention on Mercenarism.

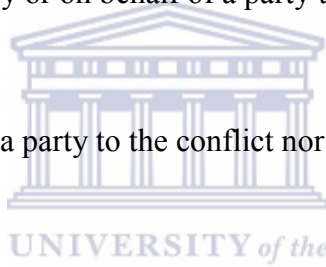
¹⁸² Para 2 preamble OAU/AU Convention on Mercenarism.

ideology. The early drafts of the ICC Statute included the crime of mercenarism but the same was not included in the ICC Statute.¹⁸³

6.3.7.2 The Crime of Mercenarism under the ACJHPR Statute

The crime of mercenarism is defined in Article 28H of the ACJHPR Statute. It adopts a two-way approach of defining a mercenary. The first approach mirrors the OAU/AU Convention as reflected in Article 28H (1)(a) of the ACJHPR Statute, which defines a mercenary as a person who:

- i. Is specially recruited locally or abroad in order to fight in an armed conflict;
- ii. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;
- iii. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- iv. Is not a member of the armed forces of a party to the conflict; and
- v. Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

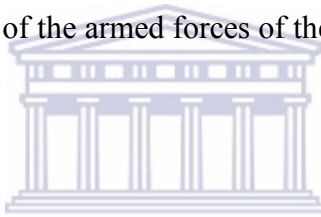


The criteria are cumulative. The second definition or alternative definition of a mercenary is in Article 28 H (1) (b) which defines a mercenary as a person who in any other situation:

- i. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

¹⁸³ Article 23 of the 1991 International Law Commission Draft Code of Crimes against Peace and Security of Mankind provides for the prohibition of recruitment, use, financing and training of mercenaries; see also De Freitas SA & Ellis WF 'Mercenarism and Customary International Law' (2006) *African Yearbook of International Humanitarian Law* 31(hereinafter De Freitas & Ellis (2006)).

1. Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;
2. Assisting a government to maintain power;
3. Assisting a group of persons to obtain power; or
 - i. Undermining the territorial integrity of a State;
 - ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;
 - iii. Is neither a national nor a resident of the State against which such an act is directed;
 - iv. Has not been sent by a State on official duty; and
 - v. Is not a member of the armed forces of the State on whose territory the act is undertaken.



The distinction in Articles 28(H)(a) and (b) is that in (a) the mercenary is recruited for purposes of fighting in an armed conflict whereas in (b) the mercenary is recruited for concerted acts of violence that is aimed at overthrowing legitimate government, undermining the constitutional order of a State, assist the government to maintain power, or a group to obtain power, or undermine the territorial integrity of a State.

At first glance it may appear that the ACJHPR Statute does not require the mercenary to actually participate in armed conflict or concerted acts of violence as the case may be.

However, Article 28(H)(3) provides that the mercenary commits the offence when they actually participate in hostilities or the concerted acts of violence as such being recruited as a mercenary is not an offence per se, but the participating in what the mercenary is recruited for. However, those who recruit would be liable whether the mercenary acts on what they

have been recruited for or not as Article 28(H)(2) provides that a person commits an offence if they recruit, uses, finances or trains mercenaries as defined under paragraphs 1(a) or (b).

The current debate in Africa is on finding a continental approach to dealing with new forms of mercenarism involving Private Military Companies and Private Security Companies .¹⁸⁴

The Private Military and Security Companies comprise of former military personnel or ex-policemen who are employed by states or multinational corporations to provide among other things security detail or combat troops in conflict zones. There is no formal regulation of these security companies and because they are a modern phenomenon the definition of mercenary does not cover them yet they are a threat to peace and security. Although dealing with PMCs and PSCs is such a crucial issue, the African Statute does not attempt to include this aspect in the definition of mercenarism. Thus, the Statute has adequately covered mercenarism in its traditional form but is insufficient in dealing with its modern form. It was therefore necessary for the Statute to cover this modern form of mercenarism through Private Military and Security Companies in its definition of the crime.

6.3.8 Corruption

6.3.8.1 A Brief History

At the international level, the main instrument on corruption is the United Nations Convention against Corruption (UNCAC).¹⁸⁵ The Convention does not define corruption but mandates member states to criminalise acts of corruption which includes bribery among other offences.¹⁸⁶ In Africa, the main instrument on corruption is the AU Convention on Preventing

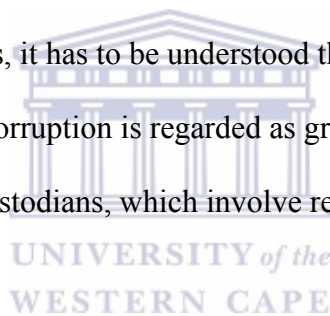
¹⁸⁴ Gumedze S (ed.) *Elimination of Mercenarism in Africa: A Need for a New Continental Approach* (2008) (hereinafter Gumedze S (2008); Gumedze S 'The Elimination of Mercenarism and Regulation of Private Security Industry' in Gumedze S (2008).

¹⁸⁵ 2349 UNTS 41.

¹⁸⁶ Chapter III UNCAC on Criminalisation and Law Enforcement.

and Combating Corruption.¹⁸⁷ In Article 4, the AU Convention on corruption enumerates acts of corruption as: (a) active bribery, (b) passive bribery, (c) abuse of office, (d) diversion of public property, (e) active and passive bribery for persons employed in the private sector, (f) trading in influence, (g) illicit enrichment, (h) use or concealment of proceeds from acts of corruption. Corruption is one of the major causes for underdevelopment in Africa as resources targeted for development are diverted for personal gain.¹⁸⁸ The preamble to the AU Convention acknowledges the negative effects of corruption on Africa's political economy and its devastating effects on the economic and social development of African people.¹⁸⁹

Considering the devastating nature of corruption on economies and ultimately the livelihoods of people, there are calls that corruption be considered an international crime.¹⁹⁰ In order to understand the scope of such calls, it has to be understood that corruption can be categorised as grand or petty corruption.¹⁹¹ Corruption is regarded as grand when it refers to corrupt activities of high ranking State custodians, which involve relatively large amounts of money,



¹⁸⁷ Adopted in 2003 and came into force in 2006.

¹⁸⁸ Awojobi O.N 'Corruption and Underdevelopment in Africa, A Discourse Approach (2014) Vol. II Issue 10 International Journal of Economics, Commerce and Management 1-14 available at <http://ijecm.co.uk/wp-content/uploads/2014/10/21023.pdf> (accessed on 23 April 2017); Gray, Cheryl, Kaufman & Daniel *Corruption and Development* (1998) PREM Notes; No. 4. World Bank, available at <https://openknowledge.worldbank.org/handle/10986/11545> (accessed on 23 April 2017).

¹⁸⁹ Par 6 preamble AU Convention on Prevention and Combating Corruption.

¹⁹⁰ Bantekas I 'Corruption as an International Crime and as a Crime against Humanity: An Outline of Supplementary Criminal Justice Policies' (2006) *JICJ* 4(3) 466-84; Boersma M *Corruption: A Violation of Human Rights and a Crime under International Law* (2012); Ocheje P 'Refocusing International Law on the Quest for Accountability in Africa: The Case against the "Other" Impunity (2002) 15 *Leiden Journal of International Law* 749-779 (hereinafter Bantekas I (2006); Boersma M (2012); and Ocheje P (2002) respectively.

¹⁹¹ Fernandez LD 'Corruption (Article 28I) and Money Laundering (Article 28I bis)' in Werle G & Vormbaum M (eds) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 92 (hereinafter Fernandez LD (2017)); Mbaku JM *Corruption in Africa: Causes, Consequences and Clean Ups* (2007) 23 (hereinafter Mbaku JM (2007)).

whereas petty corruption refers to corrupt activities of lower civil servants, involving smaller amounts of money.¹⁹² The calls are that grand corruption should be an international crime in its own right or as a crime against humanity.¹⁹³ The justification is that the consequences of corruption can be so grave that it can fall under Article 7k of the ICC Statute which provides for ‘other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’¹⁹⁴ The argument in support of such a proposition is that grand corruption has in many cases resulted in great suffering or serious injury to mental and physical health, for example famine directly linked to diversion of funds or failure to purchase food supplies due to corruption.¹⁹⁵ The ACJHPR Statute has criminalised the offence at the regional level.

6.3.8.2 The Definition of Corruption under the ACJHPR Statute

The crime is provided in Article 28L of the ACJHPR Statute. The chapeau highlights that the regional international criminal law section will have jurisdiction over acts of corruption “if they are of serious nature affecting the stability of a state, region or the union”. There is no corresponding provision on how to measure the serious nature of the crime committed. It can be a question of the amount involved probably if it is so huge that it is almost impossible for a state to function or the consequences are so grave in their impact on the affected population. In the absence of some interpretative guideline it becomes speculative as to what exactly the threshold is. However, the provision indicates the gravity of corruption offences that will fall

¹⁹² Mbaku JM (2007) 24.

¹⁹³ Bantekas I (2006) 466-84 (on corruption as a crimes against humanity); Boersma M (2012) 340-344 (on corruption as a separate international crime).

¹⁹⁴ Palmer R ‘Combating Grand Corruption in Africa: Should it be an International Crime?’
Open Space (2012) 34 (hereinafter Palmer R (2012)).

¹⁹⁵ Palmer R (2012) 34.

in the jurisdiction of the court and grand corruption will be prosecutable under the regional court.

The acts of corruption provided for under the ACJHPR Statute are similar to those under Article 4 of the AU Convention on Corruption. The acts criminalised are: active and passive bribery by public officials,¹⁹⁶ acts or omission in the discharging of duties by public officials for purposes of getting direct or indirect benefits, diversion, both active and passive bribery in the private sector, trading in influence, and illicit enrichment.¹⁹⁷

Under the ACJHPR Statute, the concept of illicit enrichment covers both the public and persons outside the public sector as such it is defined as ‘a significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income’. Whilst in most jurisdictions, the implementation of illicit enrichment has been difficult, due to challenges of constitutionality of such provisions, particularly with regard to the fact that it is regarded as violating the reverse onus provisions.¹⁹⁸ There are no such restrictions under the ACJHPR Statute.

One of the offences falling as practices of corruption is ‘the use or concealment of proceeds derived from any acts [of corruption].’¹⁹⁹ It was not necessary to include this provision as it is a duplication of the offence of money laundering which will be considered in detail in the next section.

¹⁹⁶ Article 28 I (1) (a), (b) ACJHPR Statute.

¹⁹⁷ Article 28 I (1) (c)-(g) ACJHPR Statute.

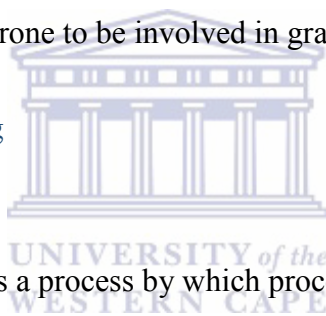
¹⁹⁸ see Kofele-Kale N *Combating Economic Crimes: Balancing Competing Rights and Interests in Prosecuting the Crime of Illicit Enrichment* (2012) (hereinafter Kofele-Kale N (2012)); Muzila, Morales, Mathias & Berger *On the Take: Criminalizing Illicit Enrichment to Fight Corruption Stolen Asset Recovery Initiative*, World Bank, UNODC (2012).

¹⁹⁹ Article 28 I (1) (h) ACJHPR Statute.

The inclusion of grand corruption as an offence under the Statute is a progressive move considering the calls to incorporate it as an international crime. The effectiveness of having such an offence in reducing corruption in Africa can only be assessed through implementation. Eliminating corruption at the continental level requires a multifaceted approach, regional framework is one avenue, there is however a need to have comprehensive legislative framework on corruption at the domestic levels to achieve complementarity. It is essential to highlight that the provision for immunity for Heads of State and Government and Senior State Officials in Article 46A *bis* of the ACJHPR Statute will likely limit the capacity of the Court to deal with grand corruption committed by the officials covered by the immunity provision. This puts into question, the credibility of the Court as such persons subjected to immunity are those prone to be involved in grand corruption.²⁰⁰

6.3.9 Money Laundering

6.3.9.1 A Brief History



As a concept, money laundering is a process by which proceeds from a criminal activity are disguised to conceal their illicit origin.²⁰¹ Internationally, the legal definition of the crime is found in the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (Vienna Convention)²⁰², and United Nations Convention against Transnational Organized Crime, 2000 (Palermo Convention).²⁰³ Under the Vienna Convention the crime was limited to drug trafficking but it has since expanded to other

²⁰⁰ Examples of leaders who were involved in grand corruption are Sani Abacha Nigeria (between \$2 and \$5 billion), Hosni Mubarak of Egypt (between \$40 billion and \$70 billion, Alberto Fujimori, of Peru (about \$2 billion), Zine al-Abidine Ben Ali of Tunisia (about \$13 billion) among others; see Kofele-Kale N (2012) 3-5; Fernandez LD (2017) 92-3.

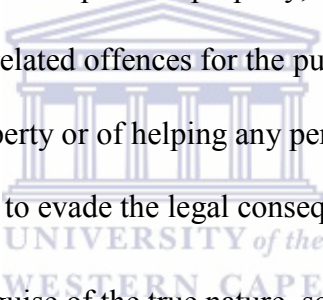
²⁰¹ Schott PA *Reference Guide to Anti-Money Laundering and Combating the Financing of Terrorism* 2 ed (2006) I-1 (hereafter Schott PA (2006)).

²⁰² Article 3 (b)-(c) (i) Vienna Convention 1988.

²⁰³ Article 6 (1) (a)-(b) Palermo Convention 2000.

crimes. At the helm of combating money laundering is the Financial Action Taskforce on Money Laundering (FATF). An international body established by the G-7 in 1989 as an intergovernmental body whose purpose is to develop and promote an international response to combat money laundering and terrorist financing.²⁰⁴ In line with its mandate, FATF has developed 40 recommendations on Money Laundering which are supposed to be implemented by countries.²⁰⁵ The recommendations among other things require States to criminalise money laundering.²⁰⁶

In Africa, Article 6 of the AU Convention on Preventing and Combating of Corruption which defines laundering of proceeds of corruption as:

- 
- a) The conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action.
 - b) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences;
 - c) The acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences.

²⁰⁴ About FATF, <http://www.fatf-gafi.org/pages/aboutus/> (accessed on 2 December 2014).

²⁰⁵ FATF Recommendations, International Standards on Combating Money Laundering and The Financing of Terrorism & Proliferation (2012) available at http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf (accessed on 2 December 2014).

²⁰⁶ FATF Recommendation 3.

This definition of money laundering under the AU Convention limits the scope of the offence to corruption only as it was only for the purposes of covering offences under the AU Corruption Convention.

6.3.9.2 The Definition of Money Laundering under the ACJHPR Statute

The offence is defined under Article 28 L Bis. The offence is committed through conversion, transfer or disposal of proceeds of corruption,²⁰⁷ concealment or disguising the true nature, source, location, disposition or ownership of or rights with respect to property which is the proceeds of corruption or related offences,²⁰⁸ acquisition, possession or use of property with knowledge at the time that the property is proceeds of corruption.²⁰⁹ The ACJHPR Statute also criminalises participation in, association with, conspiracy to commit, attempts, aiding, abetting, facilitation and counselling the commission of any corruption related offences.²¹⁰ The determination of the seriousness of any act offence lies in the discretion of the court as Article 28 I(2) provides that nothing in the article shall be interpreted as prejudicing the power of the court to make a determination as to the seriousness of the offence.

It is interesting to note that although the ACJHPR Statute provides for other offences out of which proceeds of crime can be derived such as illicit exploitation of natural resources, drug trafficking, human trafficking, piracy among others it restricts the offence of money laundering to corruption related offences only. In fact, FATF recommendations encourage States to make money laundering an offence, for the widest range of predicate offences, the idea is to remove the profit from the crime. The regional body is not expected to comply with FATF recommendations, however, it makes sense to have money laundering covering the

²⁰⁷ Article 28 I Bis (1) (i) of the Protocol.

²⁰⁸ Article 28 I Bis (1) (ii) ACJHPR Statute.

²⁰⁹ Article 28 I Bis (1) (iii) ACJHPR Statute.

²¹⁰ Article 28I Bis (1) (iv) ACJHPR Statute.

widest range of offences, at the least those already falling under the ACJHPR Statute and not just corruption related offences.²¹¹ For instance, research showed that piracy in Africa is spurred by the huge amounts of ransom payments that are paid to pirates.²¹² Equally, trafficking in persons and trafficking in drugs are lucrative businesses to the traffickers.²¹³ The underlying principle in money laundering is to remove profit from the crime, thus the offence of money laundering, in as far as it only applies to corruption, is inadequate. Thus, the recommendation is that to be effective, money laundering should be applicable to all offences under the Statute.

6.3.10 Trafficking in Persons

6.3.10.1 A Brief History

Trafficking in persons or as interchangeably referred to as human trafficking was first defined in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children.²¹⁴ The Protocol recognises the need for comprehensive international approach to human trafficking in countries of origin, transit and destination²¹⁵ The Protocol has three goals and purposes and these are (i) to prevent and combating trafficking in persons, in

²¹¹ Fernandez LD (2017) 102-103.

²¹² See London School of Economics and Political Science ‘The Price of Piracy in Somalia’ (2015) available at <http://www.lse.ac.uk/researchAndExpertise/researchHighlights/socialPolicy/The-price-of-piracy.aspx> (accessed on 23 April 2017) reveal that in 2011 Somali pirates accrued more than US\$163 million in ransom payments alone.

²¹³ UNODC Factsheet on Human Trafficking estimates the total market value of human trafficking is \$32 billion available at https://www.unodc.org/documents/human-trafficking/UNVTF_fs_HT_EN.pdf (accessed on 23 April 2017).

²¹⁴ 2237 UNTS 319 (entered into force in 2003). (hereinafter Trafficking in Persons Protocol)

²¹⁵ Para 1 Preamble to the Trafficking in Persons Protocol. For history of offence see Gallagher A.T *The International Law of Human Trafficking* (2010) 12-54 (hereinafter Gallagher A (2010); Mnde-Silungwe F ‘Trafficking in Persons (Article 28J) and Trafficking in Drugs (Article 28K)’ in Werle G & Vormbaum M *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 113-115(hereinafter Mnde-Silungwe F (2017).

particular women and children, (ii) protecting and assisting victims of such trafficking with full respect of their human rights and (iii) promote cooperation among states parties in order to achieve the objectives of curbing human trafficking.²¹⁶ The Protocol defines Trafficking is person as:

‘the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’²¹⁷

Trafficking in persons per the definition above has three elements namely: action, means and purpose.²¹⁸ The action element refers to recruitment, transportation, transfer, harbouring or receipt of persons; the means refers to the use of threats, force, abduction, fraud, deception, or abuse of power as a means of carrying out the action element. The purpose is exploitation and can be in form of sexual exploitation, forced labour, slavery or similar practices. The Trafficking in Persons Protocol does not criminalise trafficking in persons at the international level, but obligate States Parties to have legislative framework that creates the offence at the domestic level. The ACJHPR Statute has gone a step further by criminalising the offence at the regional level.

²¹⁶ Article 2 Trafficking in Persons Protocol.

²¹⁷ Article 3(a) of the Protocol on Trafficking in Persons.

²¹⁸ Gallagher A (2010) 31.

Africa as a region, does not have a single regional Convention on the suppression of trafficking in persons. However, related forms of the offence are prohibited under different continental treaties such as the African Charter on Human and Peoples' Rights which prohibits slavery²¹⁹, Protocol on the Rights of Women in Africa and African Charter on the Rights and Welfare of a Child which obligates State Parties to take appropriate measures to prevent trafficking of women and children respectively.²²⁰

There are some regional policies such as the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children and the Khartoum Declaration on the African Union-Horn of Africa Initiative on Human Trafficking and Migrant Smuggling.²²¹ A key recommendation from both policies is a call for States to ratify and fully implement the UNTOC and Trafficking in Persons Protocol and domesticate their provisions.²²² There is no call for regional criminalisation as done under the ACJHPR Statute.

6.3.10.2 The Definition of Trafficking in Persons under the ACJHPR Statute

Trafficking in persons is defined in Article 28 J (1) of the ACJHPR Statute in the same manner as under the Trafficking in Persons Protocol. The definition under the ACJHPR Statute has elements of acts, means and purpose just like the Trafficking in Persons Protocol. The action and means element are the *actus reus* of the offence and the purpose is the *mens rea* of the offence.²²³ In the definition of the crime the action is the recruitment,

²¹⁹ Article 5 African Charter on Human and Peoples Rights (1981) 1520 U.N.T.S 363; Mninde-Silungwe F (2017) 115-116.

²²⁰ Article 2(g) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003); Article 29 (a) African Charter on the Rights and Welfare of the Child (1990); Mninde-Silungwe F (2017) 116.

²²¹ Ouagadougou Action Plan to Combat Trafficking I Human Beings Especially Women and Children (2006); Khartoum Declaration on the African Union-Horn of Africa Initiative (2014); Mninde-Silungwe F (2017) 116.

²²² Mninde-Silungwe F (2017) 116.

²²³ Gallagher A (2010) 31; Mninde-Silungwe F (2017) 115.

transportation, transferring, harbouring or receipt of persons.²²⁴ The means is the manner in which the action is undertaken and that is the use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability among others.²²⁵ The purpose is that the trafficking must occur for the purpose of exploitation. The ACJHPR Statute defines exploitation as including prostitution and other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.²²⁶ For child trafficking, the Statute excludes the means set down in the definition, thus as long as a child is recruited, transported, transferred, harboured or received for purposes of exploitation, that suffices as trafficking.²²⁷

Of interest, however, regarding trafficking in persons is the absence of a gravity threshold as to which matters would fall in the jurisdiction of the court and which ones would be dealt with at the domestic level.²²⁸ Trafficking in persons can be at the domestic level when it involves trafficking of persons from one area to another area within the same jurisdiction. This form of trafficking can be prosecuted at the domestic level. On the other hand, trafficking in persons can be of transnational nature whereby several jurisdictions can be involved and can take a form of a chain, whereby some jurisdictions are source jurisdictions, whereas others are transit or destination jurisdiction.²²⁹ In such cases, dealing with trafficking would require cooperation between different States. The regional court should not be handling both domestic and transnational trafficking. It is essential that trafficking across

²²⁴ Gallagher A (2010) 31; Mninde-Silungwe F (2017) 115.

²²⁵ Gallagher A (2010) 31; Mninde-Silungwe F (2017) 115.

²²⁶ Article 28 J (2) ACJHPR Statute.

²²⁷ Article 28 J (4) ACJHPR Statute.

²²⁸ Mninde-Silungwe F (2017) 120.

²²⁹ Gallagher A (2010)

different jurisdictions are handled at the regional level, whereas domestic level is empowered to prosecute trafficking within States.

6.3.11 Trafficking in Drugs

6.3.11.1 A Brief History

At the international level, the main instruments regulating illicit cultivation, manufacturing, trade and use in narcotics drugs are the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1961); the 1972 Protocol Amending the 1961 Single Convention on Narcotic Drugs and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention, 1988). The instruments use what is regarded as a control approach by listing potentially harmful products and distinguishing their licit and illicit use.²³⁰ Under these treaties, States are obliged to criminalise the illicit use, cultivation, distribution of drugs among other conduct.²³¹

It is interesting to note that although drug trafficking is not part of the crimes under the ICC Statute, the establishment of the ICC was precipitated by the request of Trinidad and Tobago to establish an international court with jurisdiction over drug related offences.²³² The 1991 ILC Draft Code contained a drug trafficking offence but it was dropped in the subsequent drafts and in the ICC Statute.²³³ Research shows that drug trafficking is a threat to African development and as an example it is said to have exacerbated instability in Guinea Bissau and Mali as such if left unattended will undermine stability and governance and impair economic growth and public health.²³⁴

²³⁰ Ambos K Vol II (2014) 235.

²³¹ Article 36(1)(a) Single Convention on Drug Trafficking, 1961; Article 3(1) Vienna Convention, 1988.

²³² Ambos K Vol II (2014) 234-5.

²³³ Article 25 Draft Code of Crimes against Peace and Security of Mankind (1991).

²³⁴ USAID The Development Response to Drug Trafficking in Africa: A Programming Guide, USAID (2013) 35.

Africa does not have a regional Convention on drug trafficking but is guided by different policy frameworks such as the Declaration and Plan of Action on Drug Abuse and Illicit Drug Trafficking in Africa.²³⁵ However, considering that drug trafficking is a threat to peace and stability of African States, different measures such as criminalisation at the domestic and in the case of the ACJHPR Statute at the regional level are adopted in dealing with the crime.

Africa is mostly used as a transit for drugs that end up in Europe, this is so because of weak institutions and high level of corruption in the States used as transit route.²³⁶ Trafficking in drugs in Africa is regarded as a threat to peace and security in the continent. Reference is made to the nexus between drug trafficking cartels, corrupt government officials and terrorists elements in the Sahel region of the horn of Africa.²³⁷ Trafficking in drugs is quite lucrative for traffickers as it is estimated at \$ 800 million/ per year for West Africa alone.²³⁸ Thus for Africa dealing with drug trafficking requires a multi-pronged approach involving dealing with corruption, money laundering, terrorism, among others.

6.3.11.2 The Definition of Trafficking in Drugs under the ACJHPR Statute

Trafficking in drugs is defined in Article 28K of the ACJHPR Statute as follows:

1. For the purposes of this Statute, trafficking in drugs means:
 - a) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
 - b) The cultivation of opium poppy, coca bush or cannabis plant;

²³⁵ (1996) AHG/Decl.2 (XXXII).

²³⁶ Par 12 AU Plan of Action for Drug Control (2013-2017) available at <http://sa.au.int/en/sites/default/files/AUPA%20on%20DC%20%282013-2017%29%20-%20English.pdf> (accessed on 10 April 2016).

²³⁷ Par 23 AU Plan of Action for Drug Control (2013-2017).

²³⁸ Par 23 AU Plan of Action for Drug Control (2013-2017).

- c) The possession or purchase of drugs with a view to conducting one of the activities listed in (a);
- d) The manufacture, transport or distribution of precursors knowing that they are to be used in or for the illicit production or manufacture of drugs.

The acts constituting drug trafficking in Article 28 K (1) will not fall under the jurisdiction of the Court if it is for personal consumption.²³⁹ The ACJHPR Statute relies on the international instruments on drug trafficking for defining what should be considered as drugs, in that regard, reference has to be made to the 1961 Single Convention on Drugs, 1972 Protocol amending the Single Convention, the 1971 Vienna Convention on Psychotropic Substances and the 1988 Illicit Traffic in Narcotic Drugs.²⁴⁰

There is no gravity threshold to the level of drug related offences that may fall within the jurisdiction of the regional court as opposed to the domestic level.²⁴¹ A gravity threshold will enable the regional court to deal with drug related matters that have an impact on the region and leave the rest to the domestic level. It is essential to highlight that criminalisation at the regional level is not an end in itself it requires more effort to be undertaken at the domestic level such as dealing with corruption and strengthening the weak judicial institutions in African countries which creates a conducive environment for drug trafficking²⁴².

6.3.12 Trafficking in Hazardous Wastes

6.3.12.1 A Brief History

The issue of trafficking of hazardous wastes became part of the international environmental agenda in the 1980s following the adoption by the United Nations Environment Programme

²³⁹ Article 28 K (2) ACJHPR Statute.

²⁴⁰ Article 28 K (3), (4) ACJHPR Statute.

²⁴¹ Mninde-Silungwe F (2017) 120.

²⁴² Mninde-Silungwe F (2017) 121.

as part of its agenda.²⁴³ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was adopted on 22 March 1989 by the Conference of Plenipotentiaries in Basel Switzerland. This was in response to the public outcry following the discovery in the 1980s, in Africa and other parts of the developing world of deposits of toxic wastes imported from abroad.²⁴⁴ This transportation of hazardous wastes is usually from the developed world to the developing world. The Basel Convention on the Control of Transboundary movements of Hazardous Wastes came in force in 1992. The Convention among other things defines illegal traffic as

‘any transboundary movement of hazardous wastes or other wastes: without notification; without consent; with consent obtained from the State concerned through falsification, misrepresentation or fraud; does not conform in a material way with the documents; or that results in deliberate disposal or dumping of hazardous wastes or wastes in contravention of the Convention and general principles of international law.’²⁴⁵

The Convention mandates States Parties to introduce domestic legislation to prevent and punish illegal trafficking.²⁴⁶ In Africa, the Bamako Convention on the Ban of Import into Africa and Control of Transboundary Movement and Management of Hazardous Wastes within Africa was adopted in 1991 but came into force in 1998. The Bamako Convention was adopted by the OAU following the realisation that developing States had become a ‘trash

²⁴³ Introduction to the Basel Convention 1673 UNTS 126.

²⁴⁴ Introduction to the Basel Convention; Heger M ‘Trafficking in Hazardous Wastes (Article 28L) and Illicit Exploitation of Natural Resources (Article 28 L *bis*) in Werle G & Vormbaum M(eds.) *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 127 (hereinafter Heger M (2017)).

²⁴⁵ Article 9 (1) (a)-(e) Basel Convention.

²⁴⁶ Article 9 (5) Basel Convention.

bin' for the rich industrialised nations in the northern hemisphere.²⁴⁷ The provisions of the Bamako Convention and the Basel Convention have areas of similarities and differences. Some similar provisions include provision on the national definition of hazardous wastes,²⁴⁸ and provision on transboundary movement of hazardous wastes from a Party through States which are not parties to the Convention.²⁴⁹ One area of divergence include the categorisation of hazardous wastes whereby under the Bamako Convention radioactive wastes are defined as hazardous whilst the Basel Convention does not categorize them as such.²⁵⁰

6.3.12.2 The Definition of Trafficking in Hazardous Wastes under the ACJHPR Statute

The ACJHPR Statute defines trafficking in hazardous wastes in Article 28 L as follows:

1. For the purposes of this Statute, any import or failure to re-import, transboundary movement, or export of hazardous wastes proscribed by the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted in Bamako, Mali, in January 1991 shall constitute the offence of trafficking in hazardous waste.

In order to determine what hazardous wastes are reference has to be made to the Bamako Convention.²⁵¹ Just like the Bamako Convention the ACJHPR Statute also extends to wastes

²⁴⁷ Heger M (2017) 127.

²⁴⁸ Article 3 Basel Convention and Article 3 Bamako Convention.

²⁴⁹ Article 7 Basel Convention and Article 7 Bamako Convention.

²⁵⁰ Annex I of the Bamako Convention enlists the prohibited waste; For a comprehensive analysis of similarities and differences in the provisions of the Basel and Bamako Conventions see UNEP *Potential Links and Relationships between the Basel Convention and the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* UNEP/CHW.8/INF/32 (1 November 2006).

²⁵¹ Article 28 L (2) ACJHPR Statute provides that:

The following substances shall be "hazardous wastes" for the purpose of this statute:

- a) Wastes that belong to any category contained in Annex I of the Bamako Convention;

as a result of being radioactive regardless of any international instruments applying to the same.²⁵² The ACJHPR Statute does not cover wastes from normal operations of a ship the discharge of which are covered by another international instruments.²⁵³ The ACJHPR Statute also excludes hazardous wastes exported into a member State for purposes of rendering that State safe.²⁵⁴

Africa is a victim of trafficking of hazardous wastes and there are documented cases of trafficking of hazardous wastes into some African States.²⁵⁵ The Bamako Convention obligates States Parties to criminalise trafficking in hazardous wastes at the domestic level and include stiff penalties as a deterrent measure.²⁵⁶ The criminalisation at the regional level should thus be supported by comprehensive domestic legislation in African States. It is essential to highlight that the definition of the crime in Article 28 L of the ACJHPR Statute breaches the principle of legality by not providing for an exhaustive list of hazardous wastes. For example, Article 28 L (2)(b) provides that ‘wastes that are not covered under paragraph (a) above [not contained in Annex I of Bamako Convention] but are defined as, or are

b) Wastes that are not covered under paragraph (a) above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the State of export, import or transit;

c) Wastes which possess any of the characteristics contained in Annex II of the Bamako Convention;

d) Hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the State of manufacture, for human health or environmental reasons.

²⁵² Article 28 L (3) ACJHPR Statute.

²⁵³ Article 28 L (4) ACJHPR Statute.

²⁵⁴ Article 28 L (6) ACJHPR Statute.

²⁵⁵ Examples are five ships that transported 18,000 barrels of hazardous waste (including polychlorinated biphenyls) from Italy to the small town of Koko, in Nigeria, in exchange for \$100 monthly rent, paid to a Nigerian farmer for the use of his land. In August 2006, toxic wastes were transported to port of Abidjan Côte d’Ivoire by a ship registered in Panama, the Probo Koala, chartered by the Swiss oil and commodity shipping company. There are also reports of illegal dumping of toxic wastes in Somalia, see Report of the Secretary General on the Protection of Somali Natural Resources and Waters S/2011/661.

²⁵⁶ Article 9 (2) Bamako Convention.

considered to be, hazardous wastes by the domestic legislation of the State of export, import or transit' entails that there is no exhaustive list of hazardous wastes as they may differ from country to country.²⁵⁷

6.3.13 Illicit Exploitation of Natural Resources

6.3.13.1 A Brief History

Illicit exploitation of natural resources has been of concern to Africa. It is considered as the motivation and one of the factors fuelling conflict in Africa, in particular examples of the African countries in question are: Angola, the Democratic Republic of the Congo, Sierra Leone and Liberia where natural resources provided the major source of funding for the conflicts.²⁵⁸ A UN Secretary General Report draws a link between conflict and illegal exploitation of natural resources.²⁵⁹ The report made recommendations on addressing the problem including: targeted sanctions against persons, products or regimes, certification schemes and the creation of expert panels to investigate illicit commercial activities in the conflict zones.²⁶⁰ It further underscored the need to address the negative implications of illegal exploitation of natural resources in all aspects of peace and security in Africa.²⁶¹

At the regional level, the International Conference on the Great Lakes Region (ICGLR) adopted a Protocol against the Illegal Exploitation of Natural Resources on 30 November

²⁵⁷ Heger M (2017) 132.

²⁵⁸ UN Secretary-General's progress report to the 61st session of the United Nations General Assembly on "Implementation of the recommendations contained in the report of the Secretary-General on the causes of Conflict and the promotion of durable peace and sustainable development in Africa" (A/61/213).

²⁵⁹ Causes of Conflict and the promotion of durable peace and sustainable development in Africa, Report of the Secretary-General, A/52/871-S/1998/318 (13 April 1998)

²⁶⁰ Part III of the Report of the Secretary General.

²⁶¹ Part III of the Report of the Secretary General.

2006.²⁶² The ICGLR was established in 2004 by eleven Member States from the Great Lakes Region as a forum for resolving armed conflict, maintaining peace, security, stability, and laying the foundation for post-conflict reconstruction in the region.²⁶³

The Protocol against Illegal Exploitation acknowledges that the illegal exploitation of natural resources in the Great Lakes Region is one of the factors causing or aggravating endemic conflicts and persistent insecurity in the region.²⁶⁴ It expressed the members' commitment to put in place a legal framework to curb the illegal exploitation of natural resources in the region.²⁶⁵ The Protocol provides for the principle of permanent sovereignty over natural resources and for preventive measures against illegal exploitation.²⁶⁶ It also provides for the criminalization of illicit exploitation of natural resources as well as laundering of proceeds of the illegal exploitation.²⁶⁷ The Protocol enumerates acts constituting offences of illicit exploitation of natural resources as: (i) concluding an agreement to exploit resources in violation of the principle of the people's sovereignty over their natural resources; (ii) concluding with state authorities an agreement to exploit natural resources in contravention to the legal requirements of the state; (iii) concluding an agreement to exploit natural resources through corrupt practices; (iv) concluding a one-sided agreement to exploit

²⁶² The initiative had the support of the AU and the United Nations. In paragraph 2 of the Protocol the ICGLR members reaffirm "the need to respect the fundamental principles enshrined in the United Nations Charter and the Constitutive Act of the African Union, notably territorial integrity, non-interference, non-aggression, and the prohibition of any State from allowing the use of its territory by armed groups as a base for aggression and subversion against another State."

²⁶³ There are now 12 Member States and these are: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda, Zambia and Republic of South Sudan, see ICGLR Background at <http://www.icglr.org/index.php/en/background> (accessed on 2 December 2014).

²⁶⁴ Paragraph 6 of the Protocol against Illicit Exploration of Natural Resources (2006).

²⁶⁵ Para 12 of the Protocol against Illicit Exploration of Natural Resources (2006).

²⁶⁶ Article 3 and 4 of the Protocol against Illicit Exploration of Natural Resources (2006).

²⁶⁷ Article 12 and 13 of the Protocol respectively.

natural resources; (v) exploiting natural resources without the consent of the State concerned; (vi) exploiting natural resources without complying with the norms relating to the protection of the environment and the security of the people and staff; and (vii) violating the norms and standards established by the relevant natural resource certification mechanism.²⁶⁸

This Protocol is the first instruments that defines the crime of illicit exploitation of natural resources. The problem is of regional concern hence the definition of the crime was influenced by the regional concerns on illegal exploitation of resources.

6.3.13.2 The Definition of Illicit Exploitation of Natural Resources under the ACJHPR Statute

The offence of illicit exploitation of natural resources is found in Article 28L Bis of the ACJHPR Statute. The provision is defined in the same manner as under the Great Lakes ACJHPR Statute on Illegal Exploration of Natural Resources. Thus the elements of the offence of illicit exploitation of natural resources are the same as those under the Great Lakes Protocol. However, in order for the African Court to exercise jurisdiction over the offence, there is a gravity threshold whereby illicit exploitation must be of ‘serious nature affecting the stability of a state, region or the Union’ whereas under the Great Lakes Protocol there is no such threshold.²⁶⁹ Another distinction lies in that the Great Lakes Protocol requires member States to criminalise in their domestic jurisdiction which is not the case under the ACJHPR Statute. A gravity provision is therefore necessary to limit the jurisdiction of the Court to only some serious matters that States are not able to deal with themselves.

An analysis of the provision shows some challenging aspects that many require clarification. For instance, under 28 L *Bis* (a) the provision mentions the concept of ‘people’s sovereignty

²⁶⁸ Articles 12 (a)-(g) of the Protocol.

²⁶⁹ Chapeau of Article 28 L Bis.

over their natural resources'. There is a need to provide a definition of what this concept means or refer to an international instrument that defines the concept. This precision is important in a penal statute to comply with the principle of legality. Historically, the principle of people's sovereignty over natural resources can be traced to the early 1950s, when the newly independent States sought the control of their natural resources and understood it as a basic constituent to self-determination.²⁷⁰ The elements underlying the principle of people's sovereignty over natural resources can be found in the General Assembly Resolution on Permanent Sovereignty over Natural Resources 1803(XVII) of 14 December 1962 and these are: (1) the right of people and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and well-being of the people; (2) exploration, development and disposition of resources should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to authorisation, restriction or prohibition of such activities;(3) capital imported and earnings on that capital shall be governed by the terms thereof, national legislation in force and by international law. Profits derived must be shared in accordance to agreed proportions; (4) nationalisation, expropriation or requisition shall be based on grounds or reasons of public utility, security or national interest; (5) free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality; (6) international cooperation for economic development of developing countries shall be based upon respect for their sovereignty over their natural wealth and resources; (7) violation of the rights of people and nations to sovereignty over their natural wealth and resources is contrary to the principles of

²⁷⁰ Schrijver N *Sovereignty Over Natural Resources: Balancing Rights and Duties* (1997) 3 (hereinafter Schrijver N (1997); Ng'ambi SP 'Permanent Sovereignty over Natural Resources and the Sanctity of Contracts from the Angle of *Lucrum Cessans*' (2015) 12(2) *Loyola University Chicago International Law Review* 155.

the UN Charter; and (8) foreign investment agreements freely entered into by or between States shall be observed in good faith. In the absence of express reference, it can only be assumed that the principle encompasses the eight highlighted elements. Thus, in interpreting what constitutes peoples' sovereignty over natural resources, the eight elements can be applied.

Another imprecise provision is 28L *bis*(d) which makes it an offence to conclude an agreement that is clearly 'one-sided'.²⁷¹ This provision needs an elaboration of what one-sided entails, it would have been reasonable to include some criminal intention such as the intention to deprive a State of the benefits of their natural resources. Article 28 L Bis (g) refers to violation of 'norms and standards' on resource certification. Norms and standards do not usually have penal consequences and the organisations involved in the certification process have their own sanction mechanisms. In addition, to be specific, it was important that the provision enumerates the natural resources certification mechanisms that currently exists and in order to cater for other mechanisms that may exist in the future, to put a catch all phrase such as 'and any mechanisms of a similar nature' at the end. Article 28 L *Bis* will present challenges to both the prosecution and the court on drafting of charges and the interpretation of its provisions.

6.3.14 The Crime of Aggression

6.3.14.1 A Brief History

The crime of aggression has a long history.²⁷² The early attempts for individual criminal liability for the crime of aggression can be traced to the Versailles Treaty, 1919 which

²⁷¹ Article 28 L Bis (d) ACJHPR Statute.

²⁷² For the history of the crime of aggression see Bassiouni M.C & Ferencz B 'The Crime against Peace and Aggression: From Its Origins to the ICC' in Bassiouni M.C (ed) *International Criminal Law Vol I: Sources, Subjects, and Contents* 3 ed (2008) 207–242; Kemp G *Individual Criminal Liability for the International Crime of Aggression* (2010) (hereinafter Kemp G (2010)); Sayapin S *The Crime of Aggression in International*

provided for the creation of a special tribunal to try the German Kaiser Wilhelm II for ‘a supreme offence against international morality and sanctity of treaties.’²⁷³ The Kaiser was never tried for the offence as he found refuge in Netherlands, which refused to extradite him to Germany on the grounds that the extradition request was not in compliance with the principle of double criminality.²⁷⁴

Subsequent attempts include The Draft Treaty of Mutual Legal Assistance (1923) which provided in Article 1 that “aggressive war is an international crime and severally undertake that no one of them [the member states] will be guilty of its commission.”²⁷⁵ In addition, the League of Nations Draft Protocol for the Pacific Settlement of Disputes (1924) provided that “war of aggression constitutes a violation of this solidarity and constitute an international crime.”²⁷⁶ There was agreement to the fact that aggressive war was a crime but not as to the acts which constitute aggression.²⁷⁷ The Draft Treaty of Mutual Legal Assistance and the Draft Protocol for Pacific Settlements of disputes were not ratified. However, in the Nuremberg judgment, it was stated ‘[a]lthough the Protocol was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilized states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as an international crime.’²⁷⁸ Other efforts in the history of the crime of aggression are: The

Criminal Law, Historical Development, Comparative Analysis and Present State (2014) (hereinafter Sayapin S (2014)); and Solera O *Defining the Crime of Aggression* (2007) (hereinafter Solera O (2007)).

²⁷³ Article 227 Treaty of Versailles 1919 available at <http://net.lib.byu.edu/~rdh7/wwi/versailles.html> (accessed on 20 October 2014).

²⁷⁴ Sayapin S (2014) 30; Werle G & Jessberger F (2014) 2-3, 536.

²⁷⁵ Article 1 League of Nations Draft Treaty of Mutual Assistance (1923) available at <http://www.jstor.org/stable/20660685> (accessed on 9 April 2017).

²⁷⁶ Para.3 preamble League of Nations, *Protocol for the Pacific Settlement of International Disputes*, 2 October 1924, available at: <http://www.refworld.org/docid/40421a204.html> [accessed 20 October 2014]

²⁷⁷ Sayapin S (2014) 32.

²⁷⁸ International Military Tribunal (Nuremberg), Judgment of 1 October 1946 p. 446.

Locarno Treaties (1925), The General Treaty for the renunciation of war as an Instrument of National Policy (The Kellogg-Briand Pact) (1928) and the Soviet Union Draft Definition of Aggression (1933).²⁷⁹

The Nuremberg Charter and the Tribunal made a significant contribution to individual criminal responsibility for the crime of aggression. Under the charter aggression fell under crimes against peace which prohibited planning, preparation or waging war of aggression.²⁸⁰

The subsequent judgment of the IMT emphasised the gravity of the crime when it was held that the crime of aggression ‘[...] is a supreme international crime differing only from other war crimes in that it contains within itself accumulated evil of the whole.’²⁸¹

Post Nuremberg efforts in relation to aggression include the UN Charter which provides in Article 2(4) for the prohibition of the threat or use of force against the territorial integrity and political independence of any state. The exception being firstly, individual or collective self-defence under Article 51 of the UN Charter and secondly, following the authorisation of use of force by the United Nations Security Council under Article 42 of the UN Charter. As far as the definition of aggression was concerned, it was still not clear as to what its elements were.

Some first steps towards the definition of the crime is in the UN General Assembly Resolution on the Definition of Aggression.²⁸² The resolution was state-centric in nature and therefore did not focus on individual criminal accountability for aggression but defined

²⁷⁹ Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy, October 16, 1925 (The Locarno Pact) available at http://avalon.law.yale.edu/20th_century/locarno_001.asp (accessed on 9 April 2017); Kellogg-Briand Pact 1928 available at http://avalon.law.yale.edu/20th_century/kbpact.asp (accessed on 9 April 2017) and Soviet Union Draft Definition of Aggression of 1933 available at http://www.letton.ch/lvx_33sdn.htm (accessed on 9 April 2017).

²⁸⁰ Article 6 (a) Nuremberg Charter.

²⁸¹ International Military Tribunal (Nuremberg), Judgment of 1 October 1946 p. 186.

²⁸² UN General Assembly, *Definition of Aggression*, 14 December 1974, A/RES/3314.

aggression and provided a list of acts that would constitute aggression. It defined aggression as:

‘...the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.’²⁸³

The resolution also in its Article 3, sets out seven acts that constitute acts of aggression as:

- the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- the blockade of the ports or coasts of a State by the armed forces of another State;
- an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- the use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- the action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State; and

²⁸³ Article 1 of the Resolution on the Definition of Aggression.

- the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

The resolution provides that the list is not exhaustive as the Security Council has power to determine further acts that constitute aggression under the provision of the Charter.²⁸⁴ This provision makes sense as the General Assembly resolution could not bind the Security Council, it could only guide the Security Council on acts of aggression. In addition, with changes in modern methods of conflict, an act of aggression that has not been listed, can still be considered as such if the Security Council holds the view that they constitute aggression.

In Africa, the Constitutive Act of the African Union provides as its objectives the defending of the sovereignty, territorial integrity and independence of its member states.²⁸⁵ It also prohibits the use of force or threat of use of force among member states.²⁸⁶ In 2004, the AU agreed on the Solemn Declaration on a Common African Defense and Security Policy which subsequently led to the adoption of the African Union Non-Aggression Common Defence Pact of 2009.²⁸⁷ The AU Non-Aggression Pact expands the definition of aggression under the Resolution to include non-state actors as follows:

‘... the use, intentionally and knowingly of armed force or any other hostile act by a State, a group of States, an Organization of States or non-State Actor(s) or by any foreign or external entity, against the sovereignty, political independence, territorial

²⁸⁴ Article 4 of the Resolution on the Definition of Aggression.

²⁸⁵ Article 3(b) of the Constitutive Act of the African Union.

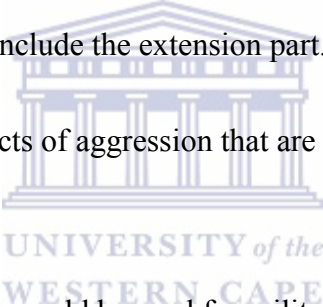
²⁸⁶ Article 4(f) of the Constitutive Act of the African Union.

²⁸⁷ Solemn Declaration on a Common African Defence and Security Policy (2004) available at <http://www.peaceau.org/uploads/declaration-cadsp-en.pdf> (accessed on 21 October 2014) and African Union Non-Aggression Common Defence Pact (2009) available at <http://en.african-court.org/images/Basic%20Documents/AU%20Non%20Agression%20and%20Common%20Defence%20Pact.pdf> (accessed on 21 October 2014).

integrity and human security of the population of a State Party to this Pact, which are incompatible with the Charter of the United Nations or the Constitutive Act of the African Union.²⁸⁸

Under the Pact, Aggression is not only limited to aggressive acts by States but also by Non-State Actors, Organization of States and foreign entities. It also provides a list of eleven acts of aggression which in most parts resemble the UN General Assembly Resolution 3314. The difference lies in that while the UN Resolution refer to blockade of ports and coasts of the Member State, the AU Pact adds airspace. In addition, whereas the UN Resolution refer to the use of armed forces of a Member State within the territory of another Member State and include the extension of the presence of armed forces in the territory beyond the term of the agreement, the AU Pact does not include the extension part.

The AU Pact also includes other acts of aggression that are not part of the UN Resolution and these are:

- 
- the acts of espionage which could be used for military aggression;
 - technological assistance of any kind, intelligence and training to another State for use in committing acts of aggression against another member state; and
 - the encouragement support, harboring or provision of any assistance for the commission of terrorist acts and other violent trans-national organized crimes against a Member State.²⁸⁹

The Pact apart from defining aggression, it does not provide for individual criminal responsibility for the crime of aggression.

²⁸⁸ Article 1(c) of the AU Non-Aggression and Common Defence Pact.

²⁸⁹ Article 1 (c) ix-xi of the AU Non-Aggression Pact.

The ICC Statute in Article 5(d) gives the ICC jurisdiction over the crime of aggression. Initially the ICC Statute did not have a definition of aggression. However, in 2010, at the Kampala Review Conference, the States Parties agreed on the definition of the crime of aggression which is in Article 8 Bis of the ICC Statute. The provision makes aggression a leadership crime and in Article 8Bis (1) it defines the crime of aggression as ‘the planning, preparation, initiation or execution by a person in a position effectively to exercise control over or to direct the political or the military action of a State, or an act of aggression, which by its gravity and scale, constitute a manifest violation of the Charter of the United Nations.’ It also adopts the definition of an act of aggression, under Resolution 3314 (XXIX) of 1974 and reiterates the 7 acts of aggression provided thereunder. The provision is still not yet in force, as the required number of States are yet to ratify the amendments.

6.3.14.2 The Definition of the Crime of Aggression under the ACJHPR Statute

The crime of aggression is provided for in Article 28M of the ACJHPR Statute. Just as under the ICC Statute, the crime is a leadership crime, the ACJHPR Statute also maintains that in order to qualify as a crime under the jurisdiction of the court, it must be by its character, gravity and scale, constitute a manifest violation of the UN Charter and AU instruments.²⁹⁰

Unlike the ICC Statute and similar to the AU Non-Aggression Pact, it provides that aggression can be committed by both States and Non-State Actors.²⁹¹ Ambos defines Non-State Actors to include ‘any armed group able to wage an act of aggression, i.e organised armed groups within the meaning of international humanitarian law possessing a unified military command, a hierarchical structure and accompanying military capacity.’²⁹²

²⁹⁰ Clark R. S ‘The Crime of Aggression’ in Stahn C (ed) *The Law and the Practice of the International Criminal Court* (2015) 783 on threshold requirements for the crime; Heller K ‘Retreat from Nuremberg: The Leadership Requirement for the Crime of Aggression’ (2007) 18 *EJIL* 477.

²⁹¹ Ambos K (2017) 50.

²⁹² Ambos K (2017) 50.

The definition of the crime of aggression in Article 28M (A) of the ACJHPR Statute is as follows:

‘For the purpose of this Statute, “Crime of Aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state or organization, whether connected to the state or not of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party.’

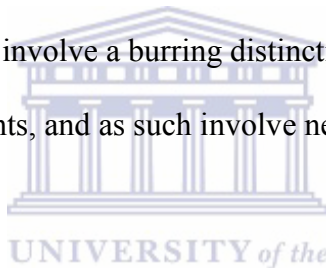
The ACJHPR Statute adopts the acts of aggression under GA Resolution 3314(XXIX) of 1974 although there is no explicit reference to the GA Resolution.²⁹³ It does not include the novel acts of aggression under the AU Non-Aggression Pact as highlighted above.

An analysis on the acts of aggression under the ACJHPR Statute shows that although the idea was not to limit the acts of aggression merely to States by including Non-State Actors, the acts of aggression have substantially maintained the inter-state approach under the UN Resolution and the ICC Statute. For instance under Article 28 M(B) (c) the ACJHPR Statute refers to ‘the bombardment by the armed forces of a State against the territory of another State’ ; Article 28 M(B)(d) where it makes reference to the ‘the blockade of the ports, coasts or airspace of a State by armed forces of another State’; Article 28 (M)(B) (e) where it refers to ‘attack by armed forces of one State on the land...of another State’; or Article 28 (M)(B)(f) which refers to ‘the use of armed forces of one State within the territory of another State...’ and in Article 28(M)(B)(g) which provides that ‘action of a State in allowing its territory which is place on the disposal of another State...’ All these highlighted acts of aggression are

²⁹³ Ambos K (2017) 49-50.

defined in a manner that excludes the Non-State Actors and other organisations as provided in Article 28(M) (A) of the ACJHPR Statute. Even Article 28 M (B) (h) which is the only provision in the acts of aggression which mentions armed groups, irregulars or mercenaries is focused on States in that it relates to sending or on behalf of a State of armed bands, groups, irregulars or mercenaries. This does not envisage Non-State Actors providing material support to armed groups amongst others to commit aggression in another State.

The idea of Non-State Actors being liable for the crime of aggression, resonates with modern thinking on armed conflict. It is argued that State-centred approach does not reflect the modern approaches and the present reality of conflict.²⁹⁴ It therefore argued that there is a decline in what is regarded as ‘old wars’ of wars between States and twentieth century is embattled with ‘new wars’ which involve a blurring distinction between war, organised crime, and large violations of human rights, and as such involve networks of both State and Non-State Actors.²⁹⁵



In order to capture this theory or modern thinking in the provisions on the crime of aggression, the underlying acts should therefore not just mirror the provisions of the UNGA Resolution 3314 and the ICC Statute Article 8 Bis, since these provisions are strictly applicable to inter-state conflict. Based on this understanding, it can be concluded that there is a disconnect between the intention and the provisions under the ACJHPR Statute in that in as far as acts of aggression are formulated to cater for inter-state aggression, they do not reflect the idea of including acts of aggression by Non-State Actors. Another aspect is that the

²⁹⁴ Boas AT ‘The Definition of the Crime of Aggression and its Relevance for Contemporary Armed Conflict’ International Crimes Database Brief 1 (June 2013) 3; Cassese, Gaeta et al (2013) 144; Kaldor M *New and Old Wars Organised Violence in a Global Era* 3ed (2012) vi.

²⁹⁵ Boas AT (2013) 3; Kaldor M (2012) 1.

list of acts of aggression is outdated in that it does not cover new methods of warfare such as the use of technologies such as combat drones among others.

6.4 Conclusion

The Chapter has analysed in-depth the definition of the crimes under the ACJHPR Statute. It has been established from the analysis that regionalisation of international criminal law has enabled some progressive aspects in the definition of crimes to be incorporated in the definition of genocide, war crimes, crimes against humanity and aggression. In certain cases, there has been a disjunction between the intention for progressive provisions and the actual language of the provisions. For example, although the crime of aggression under the ACJHPR Statute was supposed to have incorporate non-state actors, the underlying acts under the provision relates to inter-states aggression.

The ACJHPR Statute has been progressive in including crimes such as corruption, illicit exploitation of resources, trafficking in hazardous wastes among others which are of concern to the continent. The main shortfall in relation to these other crimes is the restriction of the money laundering offence to the crime of corruption, yet most of the other crimes under the ACJHPR Statute have the capacity to produce proceeds of crime that can be laundered. It is therefore essential to expand the scope of the money laundering offence.

The challenges highlighted in this chapter can be worked on to perfect the text of the ACJHPR Statute at any stage when proposals for amendment are being made even after the ratification of the Protocol.

CHAPTER 7

AN OVERVIEW AND ANALYSIS OF GENERAL PRINCIPLES UNDER THE ACJHPR STATUTE

7.1 Introduction

This chapter provides an overview and analysis of some general principles of criminal law provided for under the ACJHPR Statute. Unlike the ICC Statute, the ACJHPR Statute does not have a specific section on general principles of criminal law although they can be extrapolated from different Articles of the Statute. As a background, it is essential to highlight that prior to the entry into force of the ICC Statute, general principles were not of primary importance in the codification of International Criminal Law.¹ This is evident in that Statutes in International Criminal Law prior to the ICC Statute did not have comprehensive and separate provisions covering general principles, for instance the Nuremberg Charter, both the ICTY and ICTR Statutes did not have comprehensive provisions on general principles. Where necessary the Tribunals had to have recourse to the domestic legal systems.²

The principles under the ACJHPR Statute that are a subject of discussion in this chapter are: modes of responsibility, individual criminal responsibility, corporate criminal liability, and immunity. The chapter will analyse the elements of each of the principle as provided

¹ Werle G & Jessberger F (2014) 165.

² Werle G & Jessberger F (2014) 165.

for under the Statute and where applicable offer comparatives on how the principle is applied under the ICC Statute or has been interpreted by the ICTR or ICTY. The comparisons will provide guidance on how general principles of criminal law are applicable in practice. The chapter will also discuss the impact of excluding under the ACJHPR Statute some general principles in particular mens rea and defences.

7.2 Modes of Responsibility³

International crimes are inherently collective in nature, similarly, other crimes such as corruption, money laundering, and terrorism among others may require a chain of individuals participating in different ways in the commission of the crime. The modes of liability can clarify the role of each individual in the commission of the crime in order to attach liability that is specific to the role played in the commission of the crime. The previous statement is not meant to suggest that liability only attaches to when a crime is committed since liability can also attach where a crime is not completed for instance in the case of an attempt, conspiracy or incitement. In most jurisdictions attribution of criminal liability is distinguished between principals/perpetrators and accessories/accomplice.⁴ The

³ They are also referred to as modes of liability. Article 28 N ACJHPR Statute refers to modes of responsibility, however modes of liability is more preferred and will be used in this chapter. It is essential to highlight that there are some proponents for distinguishing between criminal responsibility and criminal liability see Duff RA *Answering for Crime: Responsibility and Liability in Criminal Law* (2007) 19-30 and in distinguishing between responsibility and liability he states that:

‘The relationship between liability and responsibility can be simply stated: responsibility is a necessary but not a sufficient condition of liability. I am liable to conviction or blame for *X* only if I am responsible for *X*; but I can be responsible for *X* without being thus liable.’

⁴ Fletcher G *Basic Concepts of Criminal Law* (1998) 188-201 on perpetration versus complicity (hereinafter Fletcher G (1998); Noto F *Secondary Liability in International Criminal Law: A Study on Aiding and Abetting or Otherwise Assisting the Commission of International Crimes* (2013) 9 (hereinafter Noto F (2013)).

distinction can be aimed at just achieving some fair labelling on the charge or can be of fundamental significance such as influencing the gravity of the punishment to be meted.⁵

In order to determine the practical significance of the modes of liability under the ACJHPR Statute, it is essential to determine whether the Statute reflects a unitary perpetration model or a differentiating participation model. In a unitary system, the distinction between principals and accessories is not relevant, such that any kind of participation or support to criminal acts amounts to participation.⁶ In a differentiated model, there is a distinction between principals and accessories and this distinction is relevant for sentencing.⁷ It is based on the theory that participation in a crime implies plurality of people who each perform a distinct role in the commission of that single crime.⁸ Under the differentiated model, a distinction is made between the perpetrator (the one who commits the crime) and the secondary party who assisted and the liability of the latter is dependent on the responsibility of the former.⁹ It is debatable as to whether the distinction between civil law and common law has an influence on the significance of modes of liability as in practice some common law jurisdictions, which ideally are supposed to apply unitary model apply

⁵ Fletcher G (1998) 188-190; Noto F (2013) 9.

⁶ Ambos K (2013) 102-8; Noto F (2013) 9; van Sliedregt E *Individual Criminal Responsibility in International Law* (2012) 65-6 (hereinafter van Sliedregt E (2012)); Werle G & Jessberger F (2014) 195. An example of the unitary model is in Article 6 of the IMT Charter and Article 5 of the IMTFE Charter which provided that: "leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all the acts performed by any person in the execution of the crime." There was no distinction on the form of participation.

⁷ Fletcher G (1998) 189-90; Noto F (2013) 9; Werle G & Jessberger F (2014) 195.

⁸ Van Sliedregt E (2012) 66.

⁹ Van Sliedregt E (2012) 66.

differentiated model and vice versa.¹⁰ An example of a differentiating model is under Article 25 (3) of the ICC Statute.¹¹

The ACJHPR Statute has modes of liability specific to individual crimes and a general provision for modes of responsibility in Article 28 N. Examples of the former is reflected in the following offences under the Statute: piracy, where it criminalises ‘voluntary participation’¹², ‘inciting or intentionally facilitating’¹³; terrorism where it criminalises ‘promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organising or procurement’¹⁴; or mercenarism where liability attaches to a person who ‘recruits, uses, finances, or trains mercenaries.’¹⁵

¹⁰ Novo F (2013) 9-10 gives example of national jurisdictions applying the two models for instance Germany and Switzerland apply the differentiating model, whilst UK, Denmark, Italy and Austria apply the unitary model. As seen from the examples the distinction is not a clean cut between civil and common law jurisdictions, since some civil law jurisdictions also apply the unitary model. In Africa Ethiopia, a civil law jurisdiction failed to distinguish between different modes of liability in its mass trials against members of the Derg see Tiba F.K ‘Mass Trials and Modes of Criminal Responsibility for International Crimes: The Case of Ethiopia’ in Heller KJ & Simpson G(eds)*The Hidden Histories of War Crimes Trials* (2013) 306-26.

¹¹ Article 25 (3) (a)-(d) ICC Statute contains differentiated modes of participation in (a) commission (individually, jointly or through another), (b) ordering, soliciting or inducing a crime, (c) aiding, abetting or otherwise assisting and (d) contributing to a group crime. On the differentiated model in Article 25 (3) see Ambos K (2013) 102-79; Ambos K ‘Article 25: Individual Criminal Responsibility’ in Triffterer O *Commentary on the Rome Statute of the International Criminal Court* 2 ed. (2008) 743-70 (hereinafter Ambos K (2008); Burghardt B ‘Modes of Participation and their Role in a General Concept of Crimes under International Law’ in Buchard, Triffterer & Vogel *The Review Conference and the Future of the International Criminal Court* (2010) 81-94; Werle G & Burghardt B ‘Establishing Degrees of Responsibility: Modes of Participation in Article 25 of the ICC Statute’ in van Sliedregt E & Vasiliev S (eds) *Pluralism in International Criminal Law* (2014) 301-19 (hereinafter Werle G & Burghardt B (2014)).

¹² Article 28 F (b) ACJHPR Statute.

¹³ Article 28F(c) ACJHPR Statute.

¹⁴ Article 28 G (B) ACJHPR Statute.

¹⁵ Article 28 H (2) ACJHPR Statute.

Article 28N (i)-(iv) of the ACJHPR Statute provides that an offence is committed by any person who, in relation to any of the crimes or offences provided for in the Statute:

(i) incites, instigates, organises, directs, facilitates, finances, counsels or participates as a principal or co-principal, agent or accomplice in any of the offences set forth under the Statute.

(ii) aids and abets the commission of any offence under the Statute.

(iii) is an accessory before or after the fact or in any other manner participates in collaboration or conspiracy to commit an offence under the Statute

(iv) attempts to commit the offence under the Statute

The provision does not categorise the modes of liability in a systematic pattern as there is no clear distinction between principals and accessories at least in their enumeration. For instance, under Article 28 N (i) the modes of liability reflected thereunder are a mixture of both principals and accessories, example of principals being participation as a principal and co-principal and an example of accessories are instigation, facilitation, counselling. In addition, the Chapeau of Article 28N by stating that ‘an offence is committed’ may literally be interpreted to mean that the modes of liability that follow are forms of commission.¹⁶ However, as far as the principles on sentencing are concerned, there is a requirement that the gravity of the offence be considered.¹⁷ The gravity of the offence can be determined

¹⁶ Meloni C ‘Modes of Responsibility (Article 28N), Individual Criminal Responsibility (Article 46B) and Corporate Criminal Liability (Article 46 C) in Werle G & Vormbaum M *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 145 (hereinafter Meloni C (2017)).

¹⁷ Article 43 A (4) ACJHPR Statute provides that:

“In imposing the sentences and/or penalties, the Court should take into account such actors as the gravity of the offence and the individual circumstances of the convicted person.”

through the specific mode of liability attached.¹⁸ In this case, a principal cannot be given the same punishment as an accessory and as such, for purposes of sentencing, the ACJHPR Statute envisages some differentiation. In international statutes, a clear example of the distinction between the two models in practice is Article 7 ICTY Statute (unitary model) and Article 25(3) of the ICC Statute (differentiated model).¹⁹

The Statute enumerates a wide range of modes of responsibility or liability envisageable although as already stated not in such a systematic manner. As such, the prosecution, in formulating charges, will have to identify from the available options a mode of liability that fits the facts of the case. For example, whether an offender committed the offence as a principal, co-principal, instigator among others.

Considering that the scope of modes of liability envisaged is wide, it is essential to analyse whether the enumerated modes of liability are sufficient to cater the complex nature of criminality and modes of perpetration in international crimes such as that the fact that a person that is far removed from the scene of the crime might be the worst perpetrator.²⁰ In other words, not just considering the quantity but the qualitative value as well. This thesis will analyse the modes of liability provided under the Statute in Article 28 N (i) – (iv) under the following categories: participation; accessorial liability and inchoate crimes.

¹⁸ Cassese, Gaeta, Baig et al (2013) 162-63.

¹⁹ Article 7(1) of the ICTY Statute provides that:

‘A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.’

On the discussion on the differentiated model under Article 25(3) of the ICC Statute see Ambos K (2013) 144-160.

²⁰ Werle G & Jessberger F (2014) 195.

7.2.1 Participation

7.2.1.1 Principal or Co-Principal

Article 28 N (i) attaches liability to a person who participates in the commission of a crime as a principal or co-principal. Ashworth defines a principal as a person whose acts fall within the legal definition of the crime.²¹ Where the offence is committed by more than one person, they are referred to as co-principals.²² An example is where P1 and P2 both meet all the elements of the offence or are joint principals in that both have the requisite mens rea for the offence and their combined acts fulfil the actus reus of the offence.²³

In international criminal law, the distinction between principals and accessories is not as clear cut or straightforward in certain cases. This becomes apparent when a person remote to the scene of the crime is actually the worst offender in that they are the mastermind of the crime (the perpetrator behind a perpetrator).²⁴ In dealing with the complexities of collective criminality the adhoc tribunals and the ICC have developed different rules. Under the ICC, the control theory has been applied to attach liability as a principal to an accused who is far removed from the scene of the crime whereas the JCE doctrine was applied in the ICTY and ICTR.²⁵ The tenets of both doctrines have not been considered in-depth in this thesis, nonetheless, it is essential to highlight that JCE is defined as ‘a theory of common purpose liability which permits the imposition of individual criminal responsibility of an accused for his knowing and voluntary participation in a group acting

²¹ Ashworth A (2003) 413.

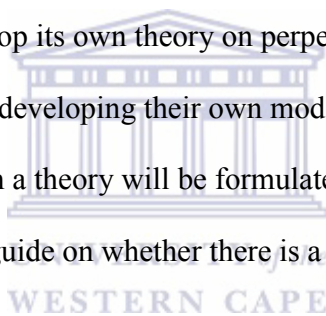
²² Ashworth A (2003) 413.

²³ Jain N *Perpetrators and Accessories in International Criminal Law* (2014) 103(hereinafter Jain N (2014)).

²⁴ Jain N (2014) 139.

²⁵ Ohlin JD ‘Searching for the Hinterman. In Praise of Subjective Theories of Imputation’ (2014) 12 *JICJ* 325-43; Werle G & Burghardt B (2014) 301-19.

with a common criminal purpose or plan'.²⁶ On the other hand, control theory entails that a person who is able to use another person to commit a crime making the later a tool is considered to have committed the crime him or herself.²⁷ Interpreting who a principal or co-principal is, the African Court should not be restricted to the definition of a principal as the one fulfilling the actus reus and the mens rea of the offence, but should consider the doctrine of control theory under the ICC Statute as opposed to JCE in order to attach appropriate liability to the worst perpetrators who may be far removed from the actus reus of the crime. The control theory over the crime is more progressive as it deals away with the unitary model of perpetration that JCE represents. In addition, the African Court through jurisprudence can develop its own theory on perpetration as it is stated that 'there is nothing to exclude a court from developing their own modes of liability.'²⁸ There is no method of anticipating how such a theory will be formulated but the nature of cases that will be presented before it will guide on whether there is a need for other theories.



7.2.1.2 Participation as an Agent

The ACJHPR Statute provides that a person commits an offence in relation to the crimes provided under it if he or she participates as an agent.²⁹ The provision covers the liability of the agent and not the agent's principal as it refers to commission of a crime as an agent and not through an agent. If the formulation was through an agent, the mode of liability would

²⁶ Boas, Bischoff & Reid *Forms of Responsibility in International Criminal Law: International Criminal Law Practitioner Library Series* Vol 1 (2007) 8-9 (hereinafter Boas, Bischoff & Reid (2007)).

²⁷ Werle G & Burghardt B 'Indirect Perpetration: A Perfect Fit for International Prosecution of Armchair Killers?' (2011) 9 JICJ 85-89, see also Jain N 'The Control Theory of Perpetration in International Criminal Law' (2011) 12(1) *Chicago Journal of International Law* 159-200.

²⁸ Boas, Bischoff & Reid (2007) 8.

²⁹ Article 28 N (i) ACJHPR Statute.

have applied in situations where an indirect perpetrator commits a crime through an instrument of another, an agent.³⁰ An agent is defined as a person who is authorized to act for another (the agent's principal) through employment, by contract or apparent authority.³¹ The agent may be innocent by virtue of being a minor or a person with mental illness and ordinarily a person who commits a crime through an innocent agent is liable as a principal perpetrator.³² The liability of an agent is regarded as one form of dealing with corporate liability.³³ The underlying principle is that the agent can bind the principal by contract or create liability if he/she causes injury while in the scope of the agency which arise from a contractual relationship in which the principal engages an agent to perform some services or duties on his or her behalf.³⁴ However, the scope of liability as formulated in Article 28 N (i) ACJHPR Statute is insufficient as it does not cover the liability of the principal who is the mastermind of the offence. Thus, the provision should be extended to attach liability to a person who commits an offence under the Statute through an agent as such person is an indirect perpetrator and should be considered a principal.

7.2.1.3 Organising and Directing

The Statute attaches responsibility for one who organises and directs the commission of a crime.³⁵ These two modes of liability are discussed together because they share a common background. Organising and directing are not commonly found as modes of liability in

³⁰ Snyman CR (2008) 261.

³¹ Moore J.W *Black's Law Dictionary* 6 ed. (1990) 63.

³² Fletcher G (1998) 198.

³³ Macey JR 'Agency Theory and the Criminal Liability of Organisations' 71 (1991) *Boston University Law Review* 315 (hereinafter Macey JR (1991)).

³⁴ Macey JR (1991) 320.

³⁵ Article 28 N (i) ACHPR Statute.

national jurisdictions.³⁶ However, they were incorporated in the UNTOC in order to extend the modes of liability that attach to organised crime.³⁷ The extension of liability to those who direct or organise a crime was intended ‘to ensure the liability of criminal organizations who give orders but do not engage in the commission of the actual crimes themselves.’³⁸ The dictionary meaning of the word organise is to arrange something to happen or to be provided whereas directing can signify control or be in charge of something or it can also mean ordering, that is to give an official order to someone to do something.³⁹ The UNDOC guidance on drafting legislation advises States ‘to make a separate provision for “organizing and directing” as distinct from “aiding and abetting”, as these may have different levels of culpability.’⁴⁰ In international criminal law, particularly in the jurisprudence of the ICC, on the basis of the control over the crime theory, the organizer or director of the crime is treated as principal perpetrator or co-perpetrator depending on the facts of the case.⁴¹ Thus including directing and organizing as falling under principal liability as opposed to accessories signifies that regardless of how far removed one may be

³⁶ Boister N & Currie RJ (eds.) *Routledge Handbook of Transnational Criminal Law* (2015) 429 (hereinafter Boister N & Currie RJ (2015)).

³⁷ Article 5(1) (b) UNTOC.

³⁸ UNDOC Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto (2004) 25; UNDOC Model Legislative Provisions against Organized Crime (2012) 39; see also Boister N & Currie RJ (2015) 429; McClean D *Transnational Organized Crime: A Commentary on the United Nations Conventions and its Protocols* (2007) 64.

³⁹ Oxford Dictionary (2010) 410.

⁴⁰ UNDOC Model Legislative Provisions against Organized Crime (2012) 40.

⁴¹ Schabas W *International Criminal Court: A Commentary on the Rome Statute* (2010) 424; see also *The Prosecutor v Jean-Pierre Bemba Gombo*, Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute, ICC-01/05-01/08 (15 June 2009) par.348-50; *The Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Confirmation of Charges, ICC-01/04-01/07 (30 September 2008) par. 480-84.

from the scene of the crime, as long as they have control over the commission of the crime, they will be liable as a principal.

7.2.2 Accessorial Liability

Article 28 N enumerates different modes of accessorial liability. An accessory does not participate in the actus reus of a crime but does acts that furthers or promotes the commission of a crime by the principal.⁴² Accessory liability is derivative as it presupposes someone else committing the actual offence.⁴³ The forms of accessory liability considered in this section are: instigating, facilitating, counselling, aiding and abetting and accessory before or after the fact.

7.2.2.1 Instigating

The Statute provides that a person commits a crime if they instigate an offence under the Statute.⁴⁴ An instigator is defined as one who prompts another to commit a crime.⁴⁵ The jurisprudence of the ICTR established as a principle that there must be a causal link between the instigation and the execution of the crime.⁴⁶ It is also considered that instigation must be a conduct substantially contributing to the commission of the crime.⁴⁷ Unlike incitement, where it is not necessary for the crime intended to be committed,

⁴² Snyman CR *Criminal Law* 5 ed. (2008) 274 (hereinafter Snyman CR (2008)).

⁴³ Fletcher G (1998) 194; Snyman CR (2008) 273-4.

⁴⁴ Article 28 N (i) ACJHPR Statute.

⁴⁵ Jean Paul Akayesu Judgment para. 482.

⁴⁶ *Prosecutor v. Akayesu* para. 482; *Sylvestre Gacumbitsi v. The Prosecutor* Case No. ICTR-2001-64-A ICTR Appeal Judgment (7 July 2006) para 129 (hereinafter *Gacumbitsi v The Prosecutor*); Boas, Bischoff & Reid (2007) 346.

⁴⁷ *Gacumbitsi v. The Prosecutor* para 129, *Feidinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v The Prosecutor* (The Media Case) Case No. ICTR-2007-99-52-A ICTR Appeal Judgment (28 November 2007) para 480.

instigation requires that the crime actually intended by the instigator be committed.⁴⁸ It has also been decided that it is not necessary that the person instigated be specifically identified by name.⁴⁹ The accused does not have to be present when the instigated crime was committed.⁵⁰ In addition, it is not a requirement that instigation should be public and direct.⁵¹ The principles from the adhoc Tribunals as highlighted in this section can be used by the Court to understand the elements of instigation..

7.2.2.2 Facilitation

To facilitate is to make an action or process possible or easier.⁵² Under the ICC Statute facilitation is found under Article 25(3) (c) as to refer to conduct that can generically be regarded as assistance such as aiding and abetting. The ICTY in the case of *Naser Oric* puts facilitation to be lower than instigation when it held that instigation “has to be more than merely facilitating the commission of the principal offence, as it may suffice for aiding and abetting.”⁵³ According to the interpretation of the Tribunal, the one who facilitates does not

⁴⁸ Jean Paul Akayesu Judgment para 482.

⁴⁹ *The Prosecutor v. François Karera*, Case No. ICTR-2007-01-74-A ICTR Appeal Judgment (27 November 2007) para. 480.

⁵⁰ The Media Case Appeal Judgment para 660.

⁵¹ Akayesu Appeals Judgment para 483.

⁵² Oxford Dictionary (2010) 525.

⁵³ *Naser Oric* Case, ICTY Case No. IT-03-68-T, Trial Judgement, (30 June 2006) para 271-2. Some judgements define aiding to mean “giving assistance to someone” and abetting to involve “facilitating the commission of an act by being sympathetic thereto”: see Jean Paul Akayesu judgment para. 484; *The Prosecutor v. Clement Kayishema & Obed Ruzindana* ICTR Case No. ICTR-95-1-T Trial Chamber Judgment (21 May 1999) para 196; *Prosecutor v. Elizaphan Ntakirutimana and Gérard Ntakirutimana*, Case No. ICTR-96-10-T&ICTR-96-17-T, Trial Chamber Judgement, (21 February 2003) para. 787. Concerning abetting in particular, the Trial Chamber in the *Semanza* case refers to it as “encouraging, advising or instigating the commission of a crime” *The Prosecutor v. Laurent Semanza* ICTR Case No. ICTR-97-20-T Trial Chamber Judgement (15 May 2003) para. 384.

have to make a substantial contribution to the commission of the crime as in the case with instigation where the conduct of the instigator must substantially contribute to the crime.

7.2.2.3 Counsels

The one who counsels is the one who incites, instigates or advises on the commission of the offence by the principal.⁵⁴ The definition highlighted shows a link between counselling and other forms of liability such as incitement and instigation. It is therefore stated that in the ordinary meaning of counselling may as well fall short of inciting or instigating an offence and may cover such conduct as advising on an offence or giving information required for an offence.⁵⁵ Due to some continuities and similarities between different modes of liabilities, some domestic jurisdictions such as the United Kingdom have made cogent proposals that there should be two modes of liability on complicity that is encouraging and assisting as they are broader terms to encompass aiding, abetting, procure and counsel.⁵⁶ However, this approach is yet to be adopted and the ACJHPR has opted to enumerate the modes of liability individually. As already noted, the significance of including counselling alongside related forms of liability such as incitement, instigation will be appreciated in practice, otherwise, it is a mere redundancy.

⁵⁴ Ashworth A (2003) 422.

⁵⁵ Ashworth A (2003) 422-3.

⁵⁶ Ashworth A (2003) 424 in this case assisting would include any act that a person knows or believes will assist the principal and encouragement will apply to anyone who solicits, commands or encourages another to commit a crime; see also UK Law Commission Participating in a Crime Report (2007) available at http://lawcommission.justice.gov.uk/docs/lc305_Participating_in_Crime_report.pdf (accessed on 18 February 2015).

7.2.2.5 Aiding or Abetting

The Statute provides that a person commits an offence if he or she aids or abets the commission of a crime under the Statute.⁵⁷ Aiding applies to one who gives support in the commission of a crime and examples of such are supplying instruments to the principal, keeping a look out, doing preparatory acts and other forms of assistance given before or at the time of committing the offence.⁵⁸ The natural meaning of abet is to incite, instigate or encourage. Abetting refers to some form of encouragement for the principal to commit an offence, whether through words or conduct.⁵⁹ Abetting usually accompanies or is implicit in the act of aiding.⁶⁰ The distinction between aiding and abetting is often neglected in practice thus some case law from the Tribunals treat them cumulatively as opposed to separately.⁶¹ An attempt at distinguishing the two was made in the Akayesu judgment whereby aiding was defined as “giving assistance to someone and abetting as would involve facilitating the commission of an act by being sympathetic thereto.”⁶² The use of the disjunctive ‘or’ instead of a conjunctive ‘and’ can lead to the literal interpretation that the approach adopted under the ACJHPR Statute is to treat them separately.⁶³ The practical

⁵⁷ Article 28 N (ii) ACJHPR Statute. This can be distinguished with the ICC Statute Article 25 (3) (c) which also refer not only to aiding or abetting commission but also attempted commission of a crime.

⁵⁸ Ashworth A (2003) 416; Jean Paul Akayesu Judgment para 484.

⁵⁹ Ashworth A (2003) 416; Jain N (2014) 160; Jean Paul Akayesu Judgment para. 484.

⁶⁰ Ashworth A (2003) 416.

⁶¹ *Prosecutor v. Tadic* Case No. IT-94-1-A Appeal Judgment (15 July 1999) para. 229

The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime.

⁶² Jean Paul Akayesu Judgment para.484.

⁶³ Article 6(1) ICTR Statute and Article 7(1) ICTY Statute provide for ‘aided and abetted’ whilst Article 28 N(ii) provides for ‘aids or abets’.

consequence of this is that the prosecution in determining a charge, will have to look at whether it amounts to aiding or abetting and charge accordingly. Nonetheless, as already stated the two can be used together without any issue.

There are other interpretations that the African Court may be guided with in interpreting aiding and abetting. Two of which are: firstly, whether or not aiding and abetting requires substantial contribution and secondly, whether or not providing specific direction is a requisite component to aiding and abetting liability. The Tribunals decisions are to the effect that aiding and abetting under international customary law requires making substantial contribution to the commission of a crime or having a substantial effect on its perpetration.⁶⁴ Thus not every assistance would suffice, it should be such that has a substantial effect to the commission of crime. The second issue is the requirement of a specific direction. The ICTY Trial Chamber in the Perišić case decided that in the case of a remote aider and abetter, the substantial contribution must be specifically directed to the commission of the crimes charged.⁶⁵ This was a controversial interpretation to aiding and abetting as subsequent cases have not maintained the position and have held that specific direction was not an element of aiding and abetting.⁶⁶ It is essential that such recent

⁶⁴ *Prosecutor v Tadic* Trial Judgment Case No. ICTY-94-1-A (7 May 1997) para 688; *Prosecutor v Krstic*, Trial Judgment Case No. ICTY-98-33-T (2 August 2001) para. 601: “‘Aiding and abetting’ means rendering a substantial contribution to the commission of a crime.” *Prosecutor v Furundzija* Trial Judgment Case No. ICTY-95-17/1 (10 December 1998) paras. 235, 249: “[T]he *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.”

⁶⁵ *Prosecutor v Perišić* (Appeal Judgment) Case No. ICTY-04-81-A (28 February 2013) paras 25-44.

⁶⁶ *Prosecutor v Šainović et al.* (Appeal Judgment) Case No. ICTYT-05-87 (23 January 2014) paras 1617-1651; a similar position was adopted by the Special Court of Sierra Leone in the case of *Prosecutor v Charles Ghankay Taylor* (Appeal Judgment) Case No. SCSL-03-01-A (26 September 2013) paras. 471-480. See also

developments be considered by the African Court in interpreting what constitutes aiding and/or abetting and as such a specific direction should not be a requirement .

7.2.2.6 Accessory Before and After the Fact

An accessory before the fact is the person who counsels, encourages or assists in the preparation of the crime but is not present during the commission or at the scene of the crime.⁶⁷ The definition of an accessory before the fact covers accessorial liability already discussed above such as instigation, facilitation, aiding and abetting among others. It is a form of umbrella accessorial liability that covers all conduct that enables the commission of a crime. On the other hand, an accessory after the fact applies to someone who assists a person who has committed an offence, with knowledge that the person has committed an offence in order to help the offender avoid punishment.⁶⁸ The punishment for the offence of accessory after the fact is ordinarily lesser than that of accessories before and perpetrators.⁶⁹ The conduct referred to as accessory after the fact is similar to what is considered obstruction of justice.⁷⁰ Accessory before the fact and after the fact do not form part of the modes of liability under the ICC Statute or the ICTY and ICTR Statutes though they are often found in domestic legislation. Inclusion of accessory before the fact is duplicating what is already provided for under the different modes of accessorial liability such as

Coco A & Gal T 'Losing Direction: The ICTY Appeals Chamber's Controversial Approach to Aiding and Abetting in Perišić' (2014) 12 (2) *JICJ* 345-366.

⁶⁷ Hall DE *Criminal Law and Procedure* 6 ed (2012) 235.

⁶⁸ Snyman CR *Criminal Law* 5 ed (2008) 278 (hereinafter Snyman CR (2008)).

⁶⁹ Ohlin J.D 'Organizational Criminality' in van Sliedregt E & Vasiliev S (eds) *Pluralism in International Criminal Law* (2014) 110.

⁷⁰ Article 70 ICC Statute provides for offences against administration of justice and conduct such as tampering with evidence can fall into that category.

instigation, facilitation, aiding or abetting. On the other hand, accessory after the fact is one way of dealing with matters of obstruction of justice whereby the court will exercise jurisdiction over those who intentionally assist perpetrators of crimes to escape justice. However, the scope of obstruction of justice can be expanded to cover other areas such those covered under Article 70 of the ICC Statute such as giving false testimony, intimidation of witnesses among others.

7.2.2.7 Financing

The ordinary meaning of financing is to provide money or funds for a project.⁷¹ This is relevant since some perpetrators whether individual or corporate may fund the commission of crimes which enable the direct perpetrators to purchase instruments for committing crimes. There must be intention or knowledge that finances would be used to further a criminal activity however the intention and knowledge may not be easily determined. For instance, in the post Nuremberg trials in Flick et al case, one of the charges against the defendants (Flick and Steinbrinck) was that as members of the Keppler Circle of friends of Himmler, with knowledge of its criminal activities contributed large sums to the financing of the SS.⁷² Members of the Circle represented Germany's industrialists in iron, steel and munitions production, banking, chemicals and shipping.⁷³ Each year from 1933 to 1945 the Circle contributed about 1,000,000 Reichmarks to Himmler.⁷⁴ The defendants argued that

⁷¹ Oxford Dictionary (2010) 554.

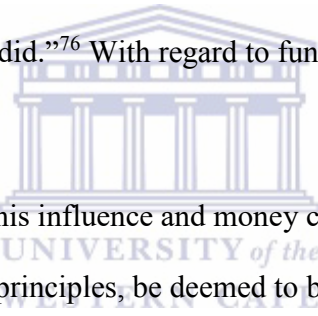
⁷² Count 4 of the Indictment in *The Trial of Friedrich Flick and Five Others* or 'The Flick Trial' Trials of War Law Reports of Trials of War Criminals Vol. IX (1947)5.

⁷³ The Flick Trial Judgment (1947)5 Count 4 of the indictment explains that the Circle was formed early in 1932 at Hitler's suggestion by his economic adviser Wilhelm Keppler

⁷⁴ The Flick Trial Judgment (1947) 15.

they had no knowledge that their contributions were used to aid financially the activities of the SS they thought that the funds were used for Himmler's cultural activities.⁷⁵

It was further submitted by the defendants that they did not believe in the Nazi ideologies nor approved or condoned the SS activities. Although the tribunal had established that there was no evidence to suggest that the accused had acted with actual knowledge of the activities of the SS, the court made a finding to the effect that they had constructive knowledge stating that "at a certain point, the criminal character of the SS must have been known and that it was a strain upon credulity to believe that Himmler needed to spend annually a million Reichmarks solely for cultural purposes or that members of the Circle could reasonably believe that he did."⁷⁶ With regard to funding commission of crimes, the court stated that:


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‘One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly and accessory to such crimes.’⁷⁷

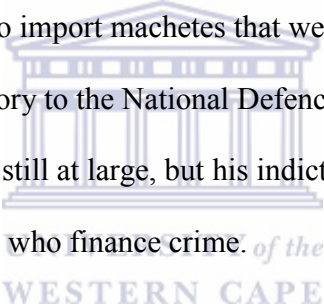
It is essential to highlight that financing was not a separate mode of responsibility as is the case under the ACJHPR Statute, but was used to signify that through their financing, the defendants had acted as accessories, or abetted the commission of war crimes and crimes against humanity by the SS.

⁷⁵ The Flick Trial Judgment (1947) 16.

⁷⁶ The Flick Trial Judgment (1947) 29.

⁷⁷ The Flick Trial Judgment (1947) 29.

The ICTR in the case of *Prosecutor v Felicien Kabuga*⁷⁸ indicted a Rwandan business man for charges of conspiracy to commit genocide, genocide and as alternative charges complicity in genocide, direct and public incitement to commit genocide, and extermination as a crime against humanity.⁷⁹ The indictment describes Kabuga as being wealthy and influential businessman. He was part of President Juvenal Habyarimana tight circle, locally called the “Akazu” which had political and financial power in Rwanda.⁸⁰ The ICTR indictment specifies how he funded the Intarahamwe which was the Hutu militia. He conducted meetings raising and soliciting funds to provide financial and logistical support and arms for the Intarahamwe.⁸¹ The indictment alleges that through his company, Kabuga ETS, he ordered his employees to import machetes that were used as weapons during genocide.⁸² He was also a signatory to the National Defence Fund (FDN) which he used to fund the Hutu militia. Kabuga is still at large, but his indictment is an example on how liability can be attached on those who finance crime. *of the*



Financing of crime is also an offence under international treaty law such as the International Convention for the Suppression of the Financing of Terrorism (1999) also referred to as the Terrorist Financing Convention, which provides that:

1. Any person commits an offense within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willingly, provides or

⁷⁸ *Prosecutor v Felicien Kabuga* Case No. ICTR-98-44B-I (October, 2004) (hereinafter Felicien Kabuga Indictment).

⁷⁹ Para. 1 Felicien Kabuga Indictment.

⁸⁰ Para 2 Felicien Kabuga Indictment.

⁸¹ Paras 11-15 Felicien Kabuga Indictment.

⁸² Paras 25-29 Felicien Kabuga Indictment.

collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex...

2....

3. For an act to constitute an offense set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offense referred to in paragraph 1, subparagraph (a) or (b).

Under the ACJHPR Statute, one would be liable for financing any of the fourteen crimes provided thereunder. The inclusion of financing as a mode of liability is progressive considering that finances play a crucial part in the commission of international crimes. For example, Felicien Kabuga used his funds to purchase machetes for the Hutu militia which were used as instruments of killing thousands of Tutsis. Thus, the inclusion of financing will cover a unique category of offenders whose sole role is to provide the financial support for the commission of crimes.

7.2.3 Inchoate Crimes

7.2.3.1 Incitement

As already discussed in the previous chapter on definition of crimes, a distinct form of incitement under international law is incitement to commit genocide. The requirement of public and direct incitement with regard to genocide are not necessary in the general incitement provision. The distinction between incitement in common law systems and civil law systems was elaborately considered in the Akayesu judgment in the following manner:

‘Incitement is defined in Common law systems as encouraging or persuading another to commit an offence. One line of authority in Common law would also view threats or other forms of pressure as a form of incitement. As stated above, Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended to directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication.’⁸³

It is an offence regardless of whether the incited person proceeded to commit the offence or not.⁸⁴ Where the incited goes on to commit the offence, the inciter becomes an accomplice to the offence and may be charged with counselling the offence.⁸⁵ The fault element in the offence is that the one inciting must intend that the substantive crime be committed.⁸⁶ Two reasons have been put forward in justifying the criminalisation of incitement: first is that those that engage in the preparatory acts portray the culpable mental state even if they do not participate in the commission of the offence; secondly, it has a preventive element in that authorities can intervene before a crime is completed.⁸⁷ In as much as it is commendable that there is a general provision on incitement. It is also necessary that the ACJHPR Statute include as an offence incitement to commit genocide as it is distinct in that it requires public and direct incitement to commit genocide.

⁸³ Jean Paul Akayesu Judgment para. 555; see also Ambos K (2013) 132; Ashworth A (2003) 465.

⁸⁴ Ashworth A (2003) 465.

⁸⁵ Ashworth A (2003) 465.

⁸⁶ Ashworth A (2003) 466.

⁸⁷ Ohlin JD ‘Incitement and Conspiracy to Commit Genocide’ in Gaeta P ed. *The UN Genocide Convention: A Commentary* (2009) 208; Robinson PH *Criminal Law* (1997) 644-5.

7.2.3.2 Conspiracy

Conspiracy is an inchoate crime that is used to punish a plurality of persons who agree to carry out a crime.⁸⁸ The crime is a common feature in common law jurisdictions whereas in civil law jurisdictions it is considered broad and vague.⁸⁹ Under common law the offence is characterised by two or more persons agreeing with one another to carry out a criminal offence.⁹⁰ The offence was first considered in international criminal law in the IMT Charter when the Americans influenced its inclusion in order to deal with collective criminality.⁹¹ The IMT Charter provided that there shall be individual criminal liability for crime against peace in particular among others the participation in a common plan or conspiracy.⁹² The Tribunal enunciated some principles with regard to the crime of conspiracy. For instance, the prosecution had submitted that any significant participation in the Nazi Government was evidence of participation in a conspiracy and temporally they had stretched the conspiracy to 25 years before from the time of the formation of the Nazi Party. However, the Tribunal held that conspiracy must not be too far removed from the time of a decision and action and as such limited the time span of the conspiracy to those committed between 1937 and 1939.⁹³

⁸⁸ Okoth J.R *The Crime of Conspiracy in International Criminal Law* (2014) 2 (hereinafter Okoth JR (2014)).

⁸⁹ Okoth JR (2014) 2, 10-45 (for conspiracy in common law systems) and 46-72 (for conspiracy in civil law systems); Van Sliedregt E *Individual Criminal Responsibility in International Law* (2012) 23 (hereinafter Van Sliedregt (2012)).

⁹⁰ Section 1(1) Criminal Law Act, UK (1977); Okoth JR (2014)15.

⁹¹ Okoth JR (2014) 80; Van Sliedregt (2012) 23-6.

⁹² Article 6 (a) IMT Charter; Article 6 IMT Charter also had a general provision on modes of liability which stated that: "Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in the execution of the plan."

⁹³ IMT Opinion and Judgment p54

Conspiracy is not included in the ICC Statute. Previous drafts to the ICC Statute had provided for the crime.⁹⁴ The differences between civil law and common law jurisdictions led to a compromise of including Article 25(3) (d) which is regarded as some ‘surrogate’ of the crime of conspiracy.⁹⁵ The provision criminalises the intentional contribution to the commission of a crime by a group acting with a common purpose. The contribution shall either be made with an aim of furthering the criminal activity or criminal purpose or made with knowledge of the intention of the group to commit a crime.⁹⁶ Okoth calls for the amendment of the ICC Statute in order to include the crime of conspiracy.⁹⁷

The African Statute, provides for the crime of conspiracy. The travaux preparatoires to the Statute do not show the underlying thinking to the inclusion of the crime. Under the ACJHPR Statute a person commits a crime if he or she ‘participates in a collaboration or conspiracy to commit any of the offences set forth in the Statute.’⁹⁸ There are no other requirements such as intent as in the committing of a crime by a group in Article 25(3) (d) of the ICC Statute. The crime of conspiracy will be relevant in the prosecution of collective criminality. Conspiracy is a useful tool to the prosecutor as it is often referred to as a ‘darling of the modern prosecutors’ nursery.⁹⁹ Admittedly, recourse to conspiracy remains controversial as it may run contra to the principle of personal culpability.¹⁰⁰

⁹⁴ Okoth JR (2014) 159.

⁹⁵ Meloni C (2017) 148; Okoth JR (2014) 172.

⁹⁶ Article 25 (3) (d) (i), (ii).

⁹⁷ Okoth JR (2014) 193-4.

⁹⁸ Article 28 N (iii) ACJHPR Statute.

⁹⁹ Okoth JR (2014) 2; *Harrison v. United States* 7 F.2d 259. (2d Cir.1925)

¹⁰⁰ Meloni C (2017) 148.

7.2.3.3 Attempt

The ACJHPR Statute provides for liability for an attempt to commit any of the crimes under the Statute.¹⁰¹ Unlike the ICC Statute the specific elements of an attempt have not been defined. The general principle is that an accused is liable for attempt where he or she takes some overt acts towards the commission of crime, not merely preparatory but at least the commencement of the execution of the intended crime.¹⁰² Article 23 (3)(f) of the ICC Statute provides that an attempt requires taking action that commences the execution of the crime by means of a “substantial step” but the crime does not occur because of circumstances independent of the accused intentions. The ICC Statute also provides that where a person abandons the effort to commit a crime or prevents the completion of the crime, he or she will not be liable for attempt. As already stated the ACJHPR Statute does not define the confines of attempt as such the jurisprudence of the Court will have to provide guidance on the scope of its application. The general principle however that will apply is that there should be an overt act towards the commission of the crime to suffice as an attempt.

7.3 Individual Criminal Responsibility

7.3.1 Individual Responsibility

Historically the concept of individual criminal responsibility was reflected in the Nuremberg Charter. In the Nuremberg judgment, it was highlighted that crimes under international law are committed by individuals and not by abstract entities. Today, the principle is reflected in Article 25(2) of the ICC Statute. Under the ACJHPR Statute, the

¹⁰¹ Article 28 N (iv) ACJHPR Statute.

¹⁰² Snyman CR (2008) 285.

principle is found in Article 46 B. Individual criminal responsibility is described in principles under sub-articles (1) – (4).

In Article 46 B (1) the Statute provides the general principle on individual criminal responsibility that a person who commits a crime under the Statute shall be held individually responsible for the crime. In Article 46 B (2) the Statute provides for the principle of irrelevance of official position of the accused. This provision is distinguishable from a similar provision under the ICC Statute where it is expressly provided that official capacity as a Head of State or Government and other enumerated government officials shall not exempt a person from criminal responsibility.¹⁰³ Under the ACJHPR Statute the provision on irrelevance of official position is made subject to Article 46 A *bis* which provides for immunity to AU Heads of States or Government and other Senior State Officials based on their functions, during the tenure of their office.

7.3.2 Superior Responsibility

Superior responsibility is provided for in Article 46 B (3) of the ACJHPR Statute which states that:

“The fact that any of the acts referred in Article 28A of the present Statute was committed by a subordinate does not relieve his or her superior if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.”

¹⁰³ Article 27 ICC Statute.

The ACJHPR Statute uses the generic term superior responsibility without distinguishing between military and civilian superior responsibility. The approach of distinguishing between military commander and civilian superiors is reflected in Article 28 (a) and (b) of the ICC Statute. However, this does not signify that the approach adopted by the ACJHPR Statute is wrong since the position under the ICC Statute does not necessarily reflect the customary international law position.¹⁰⁴ The ICTR Statute and the ICTY Statute provisions on superior or command responsibility did not distinguish between the military and civilian superiors.¹⁰⁵ In fact the ICTY and the ICTR have interpreted the relevant provision as not just applying to military commanders but also to a wide range of civilian leaders such as local politicians among others.¹⁰⁶ The provision under the ACJHPR Statute would therefore apply in any superior-subordinate relationship, whether military or civilian. The superior will therefore be liable if he or she had knowledge or had reason to know that a subordinate was about to commit or had committed a crime and has failed to take necessary and reasonable measures to prevent or punish such an act.¹⁰⁷ There is no requirement that the

¹⁰⁴ Meloni C *Command Responsibility in International Criminal Law* (2009) 144 (hereinafter Meloni C (2009) who state that the distinction in the ICC Statute followed a proposal by the US Delegate to the Rome Conference “in order to take into account differences between powers of control over subordinates by those having military command and those deprived of it.”

¹⁰⁵ Article 7(3) ICTY Statute and Article 6(3) ICTR Statute.

¹⁰⁶ *The Prosecutor v Zejnil Delalic, Zdravko Mucic (aka “PAVO”), Hazim delic & Esad Landžo (aka Zenga) (Celebici Case)* ICTY Case No. IT-96-21-A Appeals Chamber Judgment (20 February 2001) para 251-56; *The Prosecutor v. Zlatko Aleksovski* ICTY Case No. IT-95-14/1-T Trial Judgment (25 June 1999) para 103; *The Prosecutor v Clement Kayishema & Obed Ruzindana* ICTR Case No. ICTR-95-1-T Trial Chamber Judgment (21 May 1999) para 216; Meloni C (2009) 92-3; Meloni C (2017) 149.

¹⁰⁷ Meloni C (2017) 149-150 (on the mens rea for superior responsibility)

superior exercise effective authority and control on the subordinate as is the case under the ICC Statute hence the standard is not as rigorous.¹⁰⁸

Article 46 B (4) provides that the fact that an accused acted pursuant to an order of a Government or Superior would not relieve him or her from criminal liability, although it may be considered in mitigation of sentence. In comparison to the ICC Statute, the provision is broader since it does not have any exceptions.¹⁰⁹ Although this section presents the customary international law position on dealing with superior orders, it can in practice highlight some ‘discriminatory justice’ in that while the Senior Government Officials may enjoy immunity during the tenure of their office, the one implementing the order (the foot soldier) can still be tried for executing an unlawful order at any point in time. This scenario though hypothetical is an example of the challenges that the immunity provision under the Statute may cause as shall be seen in the next section analysing the immunity provision. Nonetheless, obeying superior orders remain a mitigating factor for sentencing.¹¹⁰

7.3.3 Immunity

7.3.3.1 The Paradox of Immunity under ACJHPR Statute

Article 46 A Bis of the Protocol is probably the most controversial provision in the Protocol. This assertion is based on the number of writings, both academic and non-

¹⁰⁸ Article 28 ICC Statute.

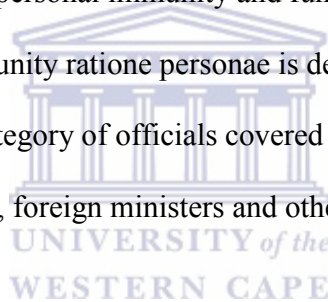
¹⁰⁹ The exceptions under the ICC Statute are provided for in Article 33 (1) (a)-(c) and these are (a) the person was under a legal obligation to obey the orders of the Government or superior (b) the person did not know that the order was unlawful and (c) the order was not manifestly unlawful.

¹¹⁰ Meloni C (2017) 151.

academic that this single provision has managed to generate as compared to any other provision of the Statute.¹¹¹ The relevant Article provides as follows:

‘No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other Senior State Officials based on their functions, during their tenure of office.’¹¹²

The starting point in the analysis of the provision is to establish whether it reflects the international law position on immunities over international crimes. The obvious starting point is distinguishing between personal immunity and functional immunity in international law. Personal immunity or immunity *ratione personae* is derived from the office of the individual concerned and the category of officials covered by personal immunity are Heads of States, Heads of Government, foreign ministers and other high ranking state-



¹¹¹ Examples are: Du Plessis M (2014); Mark M ‘African Leaders vote themselves immunity from new human rights Court’, *The Guardian* 3 July 2014; Saul H ‘Leaders at African Summit vote to have Immunity from War Crimes and Genocide Prosecution’, *The Independent* 2 July 2014; Planz M ‘African Leaders vote to give themselves Immunity from War Crimes Prosecutions’, *The Telegraph* 2 July 2014; Nossiter & Simmons ‘African Leaders Grant Themselves Immunity in the Proposed Court’, *New York Times* 2 July 2014; Morgan S ‘African Leaders Vote to Give Themselves Immunity from Violent Crimes’ *Vanderbilt Journal of Transnational Law* (2014) available at <http://www.vanderbilt.edu/jotl/2014/10/african-leaders-vote-to-give-themselves-immunity-from-violent-crimes/> (accessed on 11 April 2015).

¹¹² Article 46 A bis ACJHPR Statute.

representatives.¹¹³ Whereas, functional immunity or immunity *ratione materiae* covers the official acts of all state officials and is determined by the nature of the act in question.¹¹⁴

There is confusion as to which doctrine of personal immunity is provided for under Article 46A *bis* ACJHPR Statute.¹¹⁵ On one hand the provision can be interpreted to provide personal immunity for ‘Head of State or Government’ and ‘anybody acting or entitled to act in such capacity.’¹¹⁶ On the other hand, it can be interpreted to provide for functional immunity for ‘other senior state officials based on their functions’. Tladi provides an alternative interpretation that establishes personal immunity for Heads of States and Government and for other senior state officials by stating that the phrase does not qualify the extent of the immunity but rather is a description of the senior officials.¹¹⁷ This alternative explanation is supported by the fact the AU in their discussions leading to the adoption of the provision, they never distinguished between personal immunity for Heads of States and Government and other senior officials.¹¹⁸ Thus, Article 46 A *bis* should be interpreted to cover the doctrine of personal immunity as opposed to functional immunity.

¹¹³ Foakes J ‘Immunity for International Crimes: Developments in the Law on Prosecuting Heads of State in Foreign Courts’ Chatham House Briefing Paper (November, 2011) 4 (hereinafter Foakes J (2011)); Watts A & Foakes J ‘Heads of Government and Other Senior Officials’ Max Planck Encyclopaedia of Public International Law (2012) available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1418?prd=EPIL> (accessed on 9 April 2015) (hereinafter Watts A & Foakes J (2012)).

¹¹⁴ Foakes J (2011) 4.

¹¹⁵ Tladi D ‘Immunities (Article 46 A *bis*) in Werle G & Vormbaum M *The African Criminal Court: A Commentary on the Malabo Protocol* (2017) 206 (hereinafter Tladi D (2017)).

¹¹⁶ Tladi D (2017) 206.

¹¹⁷ Tladi D (2017) 207.

¹¹⁸ Para 9 Decision on Africa’s Relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec.1 (October 2013); Tladi D (2017) 207.

It however suffices to state that as far as functional immunity is covered under Article 46B of the Statute, it is provided that subject to Article 46A Bis (the provision being analysed in this section), the official position shall not relieve an accused person of responsibility. The principle is that personal immunities apply to a selected senior state officials on the basis that they have the primary responsibility to conduct international relations of the State and as such they need to do so without fear of arrest or any other related disturbance.¹¹⁹ The provision is not precise as to which senior state officials personal immunities would apply and as such each State will exercise discretion as to which officials apart from the Head of State or Government the immunities will apply.¹²⁰ This will require an assessment as to whether immunities would apply to a particular official.¹²¹

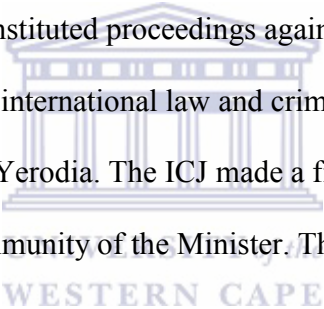
The AU Provision accords absolute personal immunity for Heads of State and other Senior State Officials whilst they are still in office. It also covers a situation whereby proceedings had been instituted against a person who was not a Head of State or Senior State Official and subsequently assumes that position as such it refers to commencement or continuation of charges. In the latter case in the event of assuming the Head of State position the charges must be suspended. It is not clear the procedure to be followed in this case, whether the charges suspended to be resuscitated if the accused loses the subsequent election and hence lose their official status. The ideal situation in that scenario is to suspend the charges in a manner that does not amount to an acquittal so that they can be prosecuted in the future.

¹¹⁹ Tunks MA 'Diplomats or Defendants? Defining the Future of Head of State Immunity' (2002) 52 *Duke Law Journal* 656.

¹²⁰ Watts A & Foakes J (2012) para. 2.

¹²¹ This can be done in the Pre-Trial Chamber under Article 19 Bis (2) which grants the chamber power on the request of the Prosecutor, to issue such orders as may be required for an investigation or prosecution.

At the domestic level, personal immunities are usually respected as courts at that level are reluctant to disregard personal immunities for Head of State and senior state officials. For example although the Pinochet case related to a former Head of State and as such functional immunity, it was alluded in one of the judgments that the reasoning of the House of Lords did not affect the immunity of current Heads of States.¹²² Equally, in 2004 the Bowstreet Magistrate Court in London refused to issue warrants of arrest against Zimbabwean President, Robert Mugabe and Minister of Defence for Israel, Mofaz, on the ground of personal immunity.¹²³ The position of upholding personal immunities at the domestic level was also confirmed in the ICJ decision in the Arrest Warrant Case (*Congo v. Belgium*).¹²⁴ The Congo had instituted proceedings against Belgium in respect of the Arrest Warrant for crimes under international law and crimes against humanity, against its Minister of Foreign Affairs, Mr Yerodia. The ICJ made a finding that the Belgian Arrest Warrant violated the personal immunity of the Minister. The court specifically decided that


‘It had been unable to deduce from [State] practice that there exist under customary international law an exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers of Foreign Affairs, where they are suspected to have committed war crimes or crimes against humanity.’¹²⁵

¹²² *R v Bow Street Metropolitan Stipendiary Magistrate Ex Parte Pinochet Ugarte* (No 3) [1999] 2 All ER 179.

¹²³ Mugabe Case reported at (2004) 53 ICLQ 789; *Re Mofaz* ILDC 97 (UK 2004); see also Warbrick C ‘Immunity and International Crimes in English Law’ 53 *ICLQ* (2004) 769.

¹²⁴ The Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*) (Judgment) ICJ Reports 2002 (hereinafter Arrest Warrant Case).

¹²⁵ Para 58 Arrest Warrant Case.

This position is true between States because of the doctrine of sovereign equality. However, regarding international courts or tribunals the question as to whether personal immunities will be applied is dependent on the provisions of the instrument creating the international court or tribunal in question.¹²⁶ States can consent to waive personal immunities and allow international courts or tribunals to exercise of jurisdiction over their officials without restrictions and an example of this is Article 27(2) of the ICC Statute, which provides that:

‘Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over that person.’

In this case, States Parties to the Statute have consented to the waiver of personal immunities to officials in whom personal immunities would ordinarily apply. This provision has proved controversial in practice following the indictment of President Al Bashir of Sudan and subsequently the Kenyatta trial. This section does not dwell in the debate that ensued in detail. However, it is essential to highlight that from the decision of the AU Assembly of October 2013, the organisation’s position on immunity is that customary international law and under international law personal immunities apply to sitting Heads of States and Senior Officials.¹²⁷ Tladi argues that there is a fundamental problem with the AU’s postulation in that the immunity of state officials, whether personal

¹²⁶ Akande D (2004) 415-16; Tladi D (2017) 211.

¹²⁷ Para 9 Decision on Africa’s Relationship with the International Criminal Court(ICC), Ext/Assembly/AU/Dec.1(October 2013).

or functional, under customary law applies to immunity of state officials from jurisdiction of courts of foreign States and not from international courts or tribunals.¹²⁸

Having established that States can consent to waive their jurisdiction, it is also true that States can protect personal immunities either by entering a reservation on a treaty providing for such waiver on that specific provision; not become a party to such a treaty,¹²⁹ or creating a tribunal entrenching the immunities as in the case of Article 46 A *bis* of the ACJHPR Statute. Whether this position reflect customary international law or not is debatable. However, the AU members can exercise their discretion and entrench immunities under their Statute. The decision to entrench immunity has consequences, hence the paradox aspect of this provision.

First, one can argue that the very nature of international crimes, puts the senior officials at the core of these crimes being committed. This is based on the understanding that international crimes are “system crimes” and the important characteristics as summarised by Van Sliedregt as : (1) they are committed because of existence of a criminal climate in a State System; (2) a typical characteristic is that governments order, encourage, favour and tolerate the commission of the crime and as rightly argued that:

‘The accomplices in international crimes are extremely peculiar in their official position and social composition. They are not some Tom, Dick and Harry of

¹²⁸ Tladi D (2017) 212.

¹²⁹ Although in the Case of the ICC Statute, it has been argued that for referrals by the UNSC in exercise of Chapter VII powers, personal immunities are inapplicable even for non-State Parties to the ICC Statute see Kress C ‘International Criminal Court and Immunities under International Law for States not Party to the Court’s Statute’ in Bergsmo M & Yan L *State Sovereignty and International Criminal Law* (2012) 223-65.

unknown lineage, without hearth or home. These are ‘titled personages’, upper classes, Ministers, generals, leaders...’¹³⁰

These leaders who fall at the helm of commission of these crimes are the ones Article 46 A *bis* seeks to protect. This means that a category of main perpetrators is excluded, at least for the period they are in Government from liability. This protection undermines the deterrent effect of international criminal law since perpetrators are shielded from prosecution. In addition, it may also encourage those in power to cling to power using any possible measures since it is their only shield from criminal liability.

Secondly, it creates inconsistencies with other AU instruments particularly the AU Constitutive Act which provides for the right to intervention in respect of grave circumstances such as war crimes, crimes against humanity and genocide.¹³¹ The right to intervention is one of the progressive principles under the AU as it entails that the AU can intervene to prevent international crimes from being committed. This provision under the AU Constitutive Act is evidence that the AU regarded international crimes as serious, hence the need for prompt intervention. The immunity provision is completely doing the opposite by stating that in as far as accountability for crimes are concerned, the African Court will have to wait or suspend intervention in the sense of prosecution until the perpetrator is out of power. As rightly put by Du Plessis as follows:

‘The first problem with Article 46 A Bis is that it is difficult to square with the AU’s other commitments regarding accountability. It is inappropriate for an international organisation to create uncertainty as regards its own legal

¹³⁰ Van Sliedregt E *Individual Criminal Responsibility in International Law* (2012) 21.

¹³¹ Article 4(h) Constitutive Act of the AU; Du Plessis M (2014) 11.

commitments. Such uncertainty is offensive to victims of international crimes who are entitled to demand that their regional body acts clearly and consistently in an area as important as accountability for international crimes.’¹³²

Another paradox is the internal inconsistencies in the ACJHPR Statute generated by the immunity provision. In particular, the leadership crime of aggression which per the Statute can only be committed by “a person in a position effectively to exercise control over or to direct the political or military action of a state...”¹³³ The category of persons who are envisaged under this provision are those protected by immunity under Article 46 A *bis*. Similarly, it is difficult to ascertain how the immunity provision reconciles with the crime of unconstitutional changes of government particularly, the offence of “refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections” under Article 28 E (1) (d). The question that arises is will the head of that incumbent government be entitled to immunity even when he or she has committed an offence under the Statute?

Lastly, the provision goes counter to the much touted “African Solutions to African Problems” in that African leaders by putting the immunity provision, they are more susceptible for trials at the ICC since they cannot be tried at the domestic level and at the regional level. Therefore, the only Court available is the ICC. In fact, the AU Leaders have rejected their own home grown solutions with the inevitable consequence of being susceptible to the ICC which in their different resolutions they have touted as being biased against them.

¹³² Du Plessis (2014) 11.

¹³³ Article 28 M (A) ACJHPR Statute.

In conclusion, although the AU had the choice to entrench personal immunities as opposed to waiving them, the observations made in this section weigh against the inclusion of such a provision in the Statute. Politically, it can be interpreted that the AU leaders are against being made accountable for international crimes at any level, whether international or regional.

7.4 Corporate Criminal Liability

International criminal law has always been concerned with individual criminal responsibility and liability for international crimes for legal entities is still not developed. It is established that corporations contribute to the commission of international crimes through among other things supplying governments or militia groups with weapons used in committing crimes.¹³⁴ They are also involved in pillaging of natural resources in conflict areas.¹³⁵ In addition, corporations, in the form of shell companies, can also be used in financial crimes such as money laundering.¹³⁶ Regardless of this status quo, the ICC and the Statute establishing the Tribunals had no provision for corporate criminal liability.¹³⁷ It has

¹³⁴International Commission of Jurists (ICJ), *Report of the ICJ Expert Legal Panel on Corporate Complicity in International Crimes: Corporate Complicity & Legal Accountability. Volume 2: Criminal Law and International Crimes*, 2008, Vol. 2, available at: <http://www.refworld.org/docid/4a78423f2.html> (accessed 24 March 2015); Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo UN Doc. S/2002/1146.

¹³⁵ Panel Experts Report on DRC, 2002 paras. 174-178.

¹³⁶ Financial Action Task Force (FATF) ‘The Misuse of Corporate Vehicles, Including Trusts and Company Service Providers (13 October 2006) available at <http://www.fatf-gafi.org/media/fatf/documents/reports/Misuse%20of%20Corporate%20Vehicles%20including%20Trusts%20and%20Company%20Services%20Providers.pdf> (accessed on 24 March 2015).

¹³⁷ Article 25 ICC Statute; Article 6 ICTY Statute and Article 5 ICTR Statute all refer to individual criminal responsibility.

therefore been rightly argued that corporate criminal liability for corporates should apply to offences with an economic dimension.¹³⁸

During the drafting of the ICC Statute, the question of corporate criminal liability was considered.¹³⁹ The French delegation had supported corporate criminal liability since they considered it relevant for purposes of compensation and restitution of victims.¹⁴⁰ The proposals were to link corporate liability to the liability of business leaders of the relevant corporate, who are in the position of control and acted on behalf and with consent from of the corporation in the course of its activities but the proposal was rejected.¹⁴¹ The arguments for rejection included that corporate criminal liability would detract the court from its focus on individuals.¹⁴² In addition, it would overload the ICC with corporate crime cases.¹⁴³

Historically, liability for business activity was attached to the business leaders of the corporates involved.¹⁴⁴ An example of such a case is the Flick Case on of the post

¹³⁸ Nerlich V 'Core Crimes and Transnational Business Corporations' (2010) 8(3) *JICJ* 900 (hereinafter Nerlich V (2010)); Stewart JG 'The Turn to Corporate Criminal Liability for International Crimes: Transcending the Alien Tort Statute' (2014) 47 *New York University Journal of International Law and Politics*. Available at SSRN: <http://ssrn.com/abstract=2354443> or <http://dx.doi.org/10.2139/ssrn.2354443> (accessed on 23 July 2016)

¹³⁹ 1995 Report of the Ad Hoc Committee on the Establishment of an International Criminal Court U.N Doc. A/50/22 Annex II para B (1) p. 58.

¹⁴⁰ Ambos K (2013) 144; Proposals by France, Article 23 Individual Criminal Responsibility, Legal Persons, UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (16 June 1998) UN Doc. A/CONF.183/C.1/L.3 (1998).

¹⁴¹ Ambos K (2013) 144.

¹⁴² Ambos (2013) 144.

¹⁴³ Ambos (2013) 145.

¹⁴⁴ The Trial of Friedrich Flick and Five Others or 'The Flick Trial' Law Reports of Trials of War Criminals Vol. IX (1947); United States v. Carl Krauch, et al., or the 'Farben Case' Law Reports of Trials of War

Nuremberg trials where the defendants were charged with war crimes and crimes against humanity for their participation in the slave labour programme, the spoliation of private and public property, exercise of anti-Semitic economic pressure to obtain property, and financing of the SS.¹⁴⁵ Liability was attached to the business leaders based on the factual relationship between the provision of material, goods or services and the perpetration of an international crime.¹⁴⁶ In addition, the business leaders ought to have acted with knowledge that an international crime will be committed.¹⁴⁷

Under the ACJHPR Statute, corporate criminal liability is provided for in Article 46 C (1) which states that the Court shall have jurisdiction over legal persons with the exception of States. Liability for corporations does not just apply to crimes with an economic dimension such as money laundering and corruption but extends to all the crimes, therefore corporations can also be made liable for war crimes, crimes against humanity, aggression and genocide.

One of the controversial issues regarding corporate criminal liability is determining the mental element for committing international crimes by the corporation. The solution to this problem is in Article 46 C (2) of the Statute which provides that that corporate intention may be established by proof that it was its policy to do acts constituting an offence under the Statute. Article 46 C (3) extends to provide that a policy may be attributed to a

Criminals Vol X (1949); Jessberger F 'On the Origins of Individual Criminal Responsibility under International Law for Business Activity: IG Farben on Trial' (2010) 8 *JICJ* 783-802.

¹⁴⁵ The Flick Trial Judgment (1949) 5; Nerlich V (2010) 901.

¹⁴⁶ Vest H 'Business Leaders and the Modes of Individual Criminal Responsibility under International Law' (2010) 8 *JICJ* 853 (hereinafter Vest H (2010)).

¹⁴⁷ Vest H (2010) 853.

corporation where it provides the most reasonable explanation to its conduct. In this case it is a question of assessment of existing facts or circumstances and determine whether corporate intention to commit international crimes can be attributable to the corporation. This is relevant since it is most unlikely that a corporation committing crimes would have documented policy on the same although in certain cases such a policy can also be documented.

Apart from intention, the Statute also refers to corporate knowledge.¹⁴⁸ The knowledge may be actual or constructive, hence in Article 46 C (3) the Statute provides that ‘corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.’ The relevant information is said to be possessed within a corporation although the information is divided between corporate personnel.¹⁴⁹ Corporate criminal liability does not exclude individual criminal responsibility for natural persons who are perpetrators and accomplices in the same crimes.¹⁵⁰ In this case liability can attach to both individual business leaders and the corporation. Documented evidence show that corporations are often involved in commission of international crime yet there is no international instrument providing for their liability in international criminal law.¹⁵¹ In this regard, the inclusion of corporate criminal liability under the Statute is progressive in that it incorporates a section of perpetrators that are not included under international instruments.

¹⁴⁸ Article 46 C (4) -(5) ACJHPR Statute.

¹⁴⁹ Article 46 C (5) ACJHPR Statute.

¹⁵⁰ Article 46 C (6) ACJHPR Statute.

¹⁵¹ Meloni C (2017) 152.

7.5 General Principles Excluded in the ACJHPR Statute

7.5.1 Mental Element

The ACJHPR Statute does not have a general provision on the mental element. In the definition of a crime the general principle is that a law establishing criminal culpability requires an actus reus and a mens rea, actus reus referring to the physical act necessary for the offence and the mens rea referring to the necessary mental element.¹⁵² Under the ICC Statute, the mental element is found in Article 30. The question to be considered in this case is the significance of the mental element in the definition of the crimes and in the case of the ACJHPR Statute, what are the consequences of the absence of a general provision for mental element?

The ICC Statute is the first instrument to codify the mental element for international crimes. Such a requirement was not explicitly mentioned under the IMT Charter and the ICTR Statute and the ICTY Statute. It is therefore not new that an instrument containing international crimes fail to include the mental element. Besides the mental element can also be derived from the individual definitions of the crimes under the Statute for instance the mental element for the crime of unconstitutional change of Government refers to the various underlying acts under Article 28E committed with the aim of illegally accessing power.¹⁵³ The intention is the illegal accessing of power. As such, intrinsic in the definitions of the crimes will be the applicable mens rea. Just as the adhoc tribunals created their own jurisprudence on the mens rea for various international crimes, the African Court

¹⁵² Werle G & Jessberger F (2014) 175.

¹⁵³ Article 28 E ACJHPR Statute; Kemp G & Kinyunyu S (2017) 67.

must develop its own jurisprudence on the same and can be guided by domestic principles on relevant mental element for offences under the ACJHPR Statute.

7.5.2 Grounds for Excluding Criminal Liability/Defences

In discussing the nature of a crime, it has already been stated that a crime can be either bi-partite or tri-partite and relevant elements are the actus reus, mens rea, and defence. The ICC Statute expressly provides the grounds for excluding responsibility and these are mental illness¹⁵⁴, intoxication¹⁵⁵, self-defence,¹⁵⁶ and duress.¹⁵⁷ Under the ICC Statute, there is also provision for considering other grounds of excluding responsibility provided for under other applicable laws.¹⁵⁸ The ACJHPR Statute has no provision for defence or grounds for excluding criminal responsibility. Certain provisions of the ACJHPR Statute defining the crimes state what does not suffice as a defence, for instance, Article 28 G (E) specifies that: ‘political, philosophical, ideological, racial, ethnic, religious or other motive shall not be justifiable defence for terrorist acts.’ Whereas there is no general provision specifying which defences would be applicable the court can use other sources of law such as customary international law to determine whether a defence will apply to a particular crime.

7.6 Conclusion

The ACJHPR Statute has both progressive and retrogressive aspects in terms of defining some general principles. Among the progressive aspects, is the provision on corporate

¹⁵⁴ Article 31(1) (a) ICC Statute.

¹⁵⁵ Article 31(1) (b) ICC Statute.

¹⁵⁶ Article 31(1)(c) ICC Statute

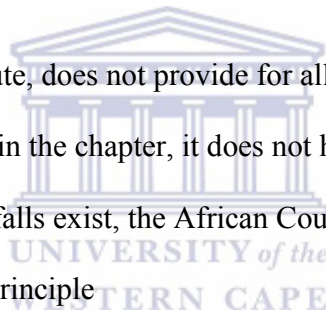
¹⁵⁷ Article 31(1) (d) ICC Statute.

¹⁵⁸ Article 31(3) ICC Statute.

criminal liability. The Statute can be part of the solution to make corporates liable for their role in the commission of international crimes in Africa. In addition, the Statute provides for a wide range of modes of liability, including conspiracy, which can make prosecution's work much easier when faced with group criminality.

On the retrogressive aspect, is the provision on immunity as it violates the principle of equality since it protects senior officials such as Heads of State and Government from prosecution whilst their 'foot soldiers' can be made accountable at any stage. Paradoxically, it makes the Heads of State more susceptible to the jurisdiction of the ICC which does not provide for immunity for sitting Heads of State and Government.

The Statute just as the ICC Statute, does not provide for all the general principles of criminal law and as highlighted in the chapter, it does not have provision on mental element and defences. Where such shortfalls exist, the African Court must be guided by the domestic interpretations of the principle



CHAPTER 8

SUMMARY OF FINDINGS, RECOMMENDATIONS AND CONCLUSION

8.1 Introduction

This thesis starting point was acknowledging that regionalisation of international criminal justice is an underdeveloped and underexplored area and that Africa has become the trailblazer in developing a regional international criminal justice framework. It therefore considered that the appropriate approach to handle the subject was to conduct research in three related levels: (1) conceptualisation of regionalisation of international criminal justice; (2) interrogation of the AU's proposed framework for regional international criminal justice; and (3) making recommendations on how to improve the proposed regional framework. It was considered that the question of whether Africa should or should not regionalise international criminal justice was rather moot or redundant since the region has already adopted the instrument establishing the regional court and as such at this stage, research should contribute towards analysing the proposed framework and make recommendations that will contribute to an effective court.

The three levels are addressed by answering five specific research questions: (1) What is the conceptualisation regionalisation of international criminal justice generally and in Africa specifically? (2) Is there provision for regionalisation of international criminal justice under the ICC Statute? (3) What is the history of regionalisation of international criminal justice in Africa? (4) What is the scope of the AU legal framework providing for

regionalisation of international criminal justice in Africa, particularly the Malabo Protocol and the ACJHPR Statute? and (5) What are the implications of AU's proposed model for regionalisation of international criminal justice in Africa?

This chapter summarises the findings, conclusions and answers to the highlighted research questions. This chapter will also provide recommendations which can be used to improve the provisions of the ACJHPR Statute and the administration of international criminal justice in Africa.

8.2 Summary of Findings on the Research Questions

8.2.1 The Conceptualisation of Regionalisation of International Criminal Justice

Chapter two of this thesis has illustrated how law and politics interact in regionalisation. It has provided the definitions of the relevant concepts touching on regionalisation of international criminal justice and these are: region, regionalisation, and regionalism. In defining the concepts, the chapter highlights the fluidity of the concept regionalisation, which in certain cases it is used interchangeably with regionalism. Having synthesised different definitions, it concludes that regionalisation should be viewed as a process towards regional integration, coordination or convergence in any particular field and this includes international criminal justice whereas regionalism refers to the underlying ideology, set of goals or values that informs regionalisation. In dealing with another relevant concept, region, the chapter synthesised different definitions of the concept and concluded that a region is politically determined and as such some factors such as geographic proximity may not be the main determining factors of what would constitute a region. It is therefore concluded that regionalisation of any area of international law is influenced by political factors.

In order to answer the question why States would regionalise international criminal justice when there is an already functioning international framework, the chapter answers the question through an analysis of international relations theories on regionalism which positions regionalism in two waves, the old and the new or the first and second. The chapter posits regionalisation of international criminal justice in Africa as temporally falling within the new regionalism phase. The chapter also considers that although the new and old regionalism theories can be used to explain regionalism in Africa, despite their European origins, Pan-Africanism or politics of identity can also be considered as a compelling ideology that influence regionalisation in Africa whereby Africa view the international system as being aimed at victimising it in its alleged bias in administering international criminal justice. The chapter has highlighted that regionalisation is a political process and as such where States consider it appropriate to regionalise any area including international criminal justice, they can do so even where in certain cases it can cause conflict with established frameworks at the international level.

8.2.2 The ICC Statute and Regionalism in International Criminal Justice

Chapter three discusses regionalism under the ICC Statute. It is an analysis of the provisions of the ICC Statute to determine if there is room for regionalisation. There is no express provision on regionalism or regionalisation under the ICC Statute. The ICC Statute provides some soft form of regionalism in that for instance in the appointment of judges and members of staff of the ICC, regional considerations are taken into consideration. The ICC Statute provides in Articles 3, 62 that the Court can shift the place of trial. However, in practice, logistical considerations such as security makes it difficult for the court to shift the place of trial.

The principle of complementarity lies at the heart of the ICC Statute, however complementarity under the ICC Statute entails that the Court shall be complementary to national criminal jurisdictions and there is no provision for regional jurisdictions. In line with the recent developments in Africa and a possibility of future regionalisation in other regions, the ICC Statute should be amended to incorporate complementarity with regional mechanisms. There is a proposal by Kenya to amend the preamble of the ICC Statute so that it provides that the ICC shall be complementary to regional mechanisms. This research has argued that the proposal for amendment is incomplete since existing of regional mechanisms with jurisdiction over international crimes also have an implication on the admissibility provisions and cooperation provisions. Therefore, it has been proposed that a comprehensive amendment would be necessary to cater for all the relevant areas.

8.2.3 The History of Regionalisation of International Criminal Justice in Africa

Chapter four has analysed the history of regionalisation of international criminal justice in Africa in two significant periods in the history of the continental organisation, the OAU Period (1963-2001) and the AU Period (2001-Present). The OAU period was characterised by Africa's reluctance to judicial mechanisms which were considered as contrary to African culture. On this basis, the OAU promoted conciliation, mediation and arbitration as means of resolving conflict. Under this period there was a call for Africa to adopt instruments to deal with human rights issues. It is in the development of the African Charter on Human and Peoples Rights that a proposal for the creation of a court to deal with international crimes was considered. This proposal was rejected, and was considered 'untimely'. The OAU was not ready for any Court let alone that dealing with international crimes let alone any court. They were in favour of a Commission as opposed to a Court. A Commission did

not have adjudicative powers and as such more in line with what the OAU's conception of dispute resolution mechanism.

Subsequently, the OAU decided that a court should be established, to complement the Commission's work. The African Court of Human and Peoples Rights was established under the Protocol to the African Charter on Human and Peoples Rights.¹ Its jurisdiction was limited to human rights matters.

The OAU era saw the adopting of various treaties dealing with different areas of crime and security and they currently form the source of definition of crimes under the current ACJHPR Statute. It is also under this period that the negotiation of the ICC Statute was taking place and the OAU supported the establishment of the ICC. In summary, under the OAU although proposals for regionalisation of international criminal justice were raised, they were not implemented.

The AU period represent a different approach in dealing with international crimes. The Constitutive Act of the AU provides for the right to intervene in the case of international crimes such as genocide, war crimes and crimes against humanity. This is different from the OAU's non-interference approach. The AU period saw the initial support of the ICC with African States with the downturn of the relationship for various reasons. The proposals for regionalisation under the AU period were mainly influenced by EU-AU relationship on the administration of international criminal justice and the downturn in the AU-ICC relationship. It is in this period that a decision to give jurisdiction over international crimes to the African Court is made. The legal instrument to that effect named Protocol on

¹ Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights adopted in 1998 and entered into force in 2004.

Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights the was adopted by the Ordinary Session of the AU Assembly held in Malabo, Equatorial Guinea on 27 June 2014.

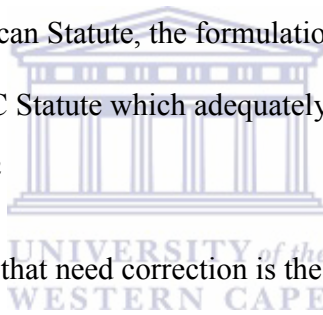
8.3 The Scope of AU's Legal Framework and Recommendations for the Amendment of Specific Provisions of the ACJHPR Statute

The last two research questions are on the scope of the AU legal framework of regionalisation of international criminal justice and its implications. Chapter five provides an overview of the structure of the Court, highlighting the functions of the organs of the Court. Chapters six and seven will highlight some of the findings on the substantive provisions of the Protocol and the ACJHPR Statute annexed to it. It will also make specific recommendations on the amendments to the text of the Statute.

8.3.1 Definitions of Crimes

The Statute provides for fourteen, and the number of crimes is not closed since the Statute provides that the AU Assembly can extend the number of crimes upon the consensus of States Parties to increase the jurisdiction of the court. As chapter six of this thesis shows, the crimes provided in the Statute have both progressive and retrogressive aspects. In that regard, while highlighting the progressive aspects, it is essential to make recommendations on the retrogressive aspects of the same. The approach in this section will be to highlight the positive and make recommendations for amendment for those crimes where amendment would be appropriate.

The crime of genocide as defined under Article 28 B of the Statute adopts the customary international law definition of the crime. Progressively the crime has included acts of rape or any other form of sexual violence as an underlying offence for genocide. However, the areas that need reform is the need to include the offence of incitement to commit genocide. This is important considering the negative impact that incitement have. In fact, criminalising incitement to commit genocide has a preventive element to it and as such the Statute should cater for the same. It is not sufficient that the ACJHPR Statute has incitement as a mode of liability since incitement to commit genocide is unique as it requires public and direct incitement. Thus, in incorporating the crime of incitement to commit genocide under the African Statute, the formulation should follow the wording of the Genocide Convention or ICC Statute which adequately criminalises direct and public incitement to commit genocide.²



Another aspect of the definition that need correction is the underlying act of killing ‘members’ as opposed to a ‘member’ of a protected group. Although, all international instruments providing for the offence of genocide refer to the plural members instead of singular member, it has been established through interpretation that killing a member of a protected group with genocidal intent will suffice therefore it is essential to adopt the singular as opposed to plural to reflect the correct position of the law.

Crimes against humanity are defined in Article 28C of the Statute. The crimes are formulated substantially in the same manner as under the ICC Statute. The crimes have broadened the underlying crimes on torture to include cruel and inhuman and degrading treatment and punishment. However, there is a need to clarify the concept of enterprise

² Article II (II)(2) Genocide Convention; Article 25(3)(c) ICC Statute.

found in the chapeau of the crime where it provided for “widespread or systematic attack or enterprise”. Although a definition of attack in this case is provided for in Article 28C (2) (a) of the Statute, there is no corresponding definition for enterprise. It also need to be clarified whether, widespread or systematic are applicable to enterprise just as they apply to attack. In fact, the concept of enterprise does not form part of the customary international law definition of crimes against humanity, as such the most convenient approach is to have it removed from the definition of the crime. In the alternative, a proposed definition of enterprise that can be included should refer to **multiple commission of underlying acts referred to in paragraph 1 against any civilian population committed through a collective or group.**

War crimes are provided for in Article 28D of the Statute. They are substantially defined in the same manner as under the ICC Statute. The positive aspects are improvements in the definition of certain individual war crimes. These include the increase of the minimum age for child soldiers from fifteen years to eighteen years; criminalisation of use of nuclear weapons and other weapons of mass destruction. These two aspects are a positive development that can be replicated at the ICC Statute. As the thesis has shown, there has been a general concern that the minimum age of 15 for child soldiers was rather too low and by increasing the age to 18, the African Statute has addressed the concern at the regional level. On the criminalisation of use of nuclear weapons, Africa has reached a consensus on an issue that the international level has failed to agree on. Thus, regionalisation enables prioritisation of regional interests which ordinarily would not have been achieved at the international level.

The crime of unconstitutional change of government is provided for in Article 28E of the ACJHPR Statute. The Statute underlines the conduct that constitute UCG where it is done with an aim of illegally accessing or maintaining power. What is common is that it can only be committed against a 'democratically elected government'. However, the Statute does not provide a precise meaning of what a democratically elected government means, it only state in Article 28 C (2) that a democratically elected government has the same meaning as contained in the AU instruments. However, upon analysing the AU instruments, in particular the ACDEG from where the offence has been derived, there is no definition of 'democratically elected government'. This is problematic since a penal provision need to be clear and precise to comply with the principle of legality. In that regard, there was a need to be precise in defining the offence. In addition, the inclusion of 'democratically elected government' itself limits the scope of the crime. Since it is not clear whether the scope of the crime would apply to other form of governments for instance transitional governments or interim government which also need to be protected from UCGs, the best approach is to adopt a neutral term 'government' in the place of 'democratically elected government'. One can argue that the proposal to have 'government' and not 'democratically elected government' would lead to protection of illegitimate power such as dictatorship. The argument is that the mischief that this provision is trying to deal with is accessing power through illegitimate means, thus disposing a dictator through undemocratic means although it might be necessary amounts to unconstitutional change of Government.

Corruption is defined in Article 28 I of the Statute. It is defined in the same manner as under the AU Convention on Corruption. The gravity of the offence that will fall under the jurisdiction of the Court is that if it is of a serious nature affecting the stability of a state,

region or union. It is not clear whether the threat to stability can be determined by the quantity involved, in the case of a bribery or the consequences. Aligning corruption to stability is tricky considering that in certain cases the consequences of corruption may not be immediately felt, as such a country may still be stable even though corruption has caused some economic damage to the country and the region. As such it is suggested that the gravity be limited quantity of the amounts involved and not necessarily the stability of a country or the region.

With regard to the definition of the crime Article 28 I (1)(h) providing for ‘the use or concealment of proceeds derived from any of the acts referred to in this Article’ is a duplication of what the offence of Money Laundering under Article 28 I Bis already provides for, therefore it was not necessary to include it.

The offence of money laundering is provided for under Article 28 I Bis of the Statute. The problem with the formulation of the offence is that it is only limited to laundering proceeds of corruption. This limited approach in defining the offence is retrogressive considering the fact the other crimes under the Statute for instance drug trafficking, illicit exploitation of natural resources, human trafficking among others can also produce proceeds of corruption. Therefore, it is necessary to expand the scope of the crime to cover laundering of proceeds of from crimes under the Statute.

The offence of illicit exploitation of natural resources is provided under Article 28 L Bis. The gravity threshold for the offence to fall under the jurisdiction of the Court is that it should be of a serious nature affection the stability of a state, nation or region. The offence is specially developed in Africa to deal with illicit exploitation. There are however, certain aspects of the definition of the crime that need clarification, for instance the principle of

‘people’s sovereignty over their natural resources’. The principle is used in defining the crime and it is not clear what the concept entails. There is need to clarify the principle by defining it. The starting point is to refer to the UN General Assembly Resolution on Permanent Sovereignty over Natural Resources 1803(XVII) of 14 December 1962 for the underlying principles of peoples’ sovereignty over natural resources. In addition, the offence has some aspects that are clearly vague for instance ‘concluding an agreement to exploit natural resources that is clearly one-sided.’³ In as much as the idea behind the offence is preventing Africa not benefitting from its natural resources it is not clear how the offence cited can be enforced. Another vague offence is ‘violating the norms and standards established by the relevant natural resources mechanisms’⁴ Violating norms is not specific for a penal provision and there was need to specify which standards are being referred to if they are known. In its current formulation, the offence is too broad. There is need for further research on the specific conduct amounting to illicit exploitation of natural resources to have a clear formulation of the crime.

The crime of aggression is provided for in Article 28M of the Statute. The crime of aggression under the Statute can also be committed by organisations not connected to the State, Non-State Actors (NSAs) or foreign entities. The provision reflects the nature of modern conflicts which are not limited to States. However, in the formulation of the underlying acts for aggression, NSAs are not reflected. Therefore, as a recommendation there is a need to reformulate some of the underlying acts of aggression. In particular Article 28 M(c) which provides that:

³ Article 28 L Bis (d) ACJHPR Statute.

⁴ Article 28 L Bis (g) ACJHPR Statute.

“The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against a territory of another State”

Should be amended as follows:

The bombardment or the use of any weapons by the armed forces of a State, group of States, Organisation of States, Non-State Actor(s) or any foreign entity against a territory of a State.

The proposed formulation caters for the categories envisaged under Article 28 M (B) of the Statute. Similarly, Article 28 M (B)(d) of the Statute providing for

“The blockade of ports, coasts or airspace of a State by the armed forces of another State”

Should be amended in the following manner:

The blockade of ports, coasts or airspace of a State by armed forces of a State, group of States, Organisation of States, Non-State Actor(s) or any foreign entity

These two are examples on how the provisions can be amended to include all the categories envisaged under Article 28 M. As such where in Articles 28 M (B) (e)-(h) reference is made to State, there should be amendment to also include group of States, organisation of States, Non-State Actor(s) or any foreign entity.

Apart from clarifying the text of the Statute, there is need for the development of Elements of Crimes that can help the Court in the interpretation of individual provisions. However,

there is no specific provision under the Statute providing the Court with the power to develop the elements.⁵

8.3.2 General Principles

Chapter six of the thesis dealt with other important areas under the Statute. There are various recommendations that can be made on them. The Statute provides for a wide range of mode of liabilities, it is essential to state that under the Statute responsibility and not liability is used. On a positive note, the Statute provides for corporate criminal liability which is significant considering research establishing that corporates play a role in the commission of international crimes. In addition, it also provides for crime of conspiracy which can make prosecuting group criminality much easier. Although the Statute provides a wide range of modes of liabilities that can be used, the thesis has established that there was no systematic approach that was adopted in including them. The best approach, therefore, is to categorise them as (i) liability as principals (ii) accessory liability and (iii) inchoate liability. Another aspect is the need to clarify some novel modes of liabilities that may also be a duplication of other recognised modes of liabilities. The novel modes of liabilities are ‘organises’, ‘directs’. There is paucity of case law to determine the scope of their applicability and their relationship with other modes of liability such as ‘facilitation’. There is a clear duplication in the modes of liability in that it incorporates such modes as accessory before the fact which can refer to other modes of liability such as instigation, facilitation, aiding or abetting among others. In addition, there is no provision that clearly attaches liability as a principal to the perpetrator behind the perpetrator. The suggested

⁵ Article 27 (1) ACJHPR Statute provides that the Court shall adopt rules for carrying out its functions. This does not extend to development of Elements of Crimes as such there is a need to have a specific provision giving power to develop elements of crimes and also to use them in interpretation of provisions.

solution is to incorporate under perpetration liability for one who commits a crime through another.

The immunity provision under the Statute reflects the AU position on immunity of sitting heads of States and Governments and Senior Officials. The challenging aspect of the provision is that the provision is counter to the AUs approach to intervention in the case of war crimes, crimes against humanity and genocide as provided under Article 4(h). It is more of a reflection of the OAU era where the protection of State sovereignty was the order of the day. In addition, it represents some discriminatory justice, in that the foot soldiers can be held liable for crimes while heads of State and governments who may have directed the perpetration of the crimes are enjoying immunity. In addition, the provision is contradictory to some of the crimes under the Statute. For instance, the crime of UCG whereby an incumbent who refuses to step down is liable for the offence. In this case the confusion lies in whether that incumbent, who is committing an offence under the Statute should also benefit from the immunity provision. The other problem is that African leaders are excluding themselves from being subjected to a justice system they have created which makes them more amenable to be tried at the ICC. This goes counter to the often used rhetoric of African solution to African problems. On this basis there is a need to reconsider the immunity provision.

The provision on complementarity is incomplete as there is no provision for working relationship with the ICC. The failure to mention the ICC in the provision entail that's there is no provision on how conflict of jurisdiction between the two courts will be dealt with. It is therefore recommended that it be provided that among other things there should be complementary relationship with the ICC. In this thesis, a similar recommendation has been

made, that the text of the ICC Statute should also be amended to reflect complementarity with regional mechanisms.

8.7 Additional Recommendations

8.7.1 From Regionalisation to Regionalism

In Chapter two of this thesis, it was proposed that an ideal theory for regionalisation of international criminal justice is that in which first, States develop a set of preferences in favour of regional outcomes and secondly, they must implement a strategy of regionalisation that aligns with those goals.⁶ In distinguishing between regionalisation and regionalism, this thesis has highlighted that the former is the process of cooperation or integration, whilst the latter is the ideology. In considering the ideal process of regionalisation as stated above it is clear that the regionalisation of international criminal justice in Africa is taking a top-down approach, whereby international crimes are defined at the regional level, whilst most African States have not entrenched them in their domestic systems.⁷ It is therefore important that African States be encouraged to have domestic legislations covering international crimes that are provided for at the regional level.

Another challenge is that although the ACJHPR Statute although providing for the principle of complementarity, it does not provide for a corresponding obligation for States Parties to implement its provisions. This means that States are not obligated to implement the provisions at the domestic level. Moving from regionalisation to regionalism means that:

⁶ Burke-White W (2003) 729.

⁷ Statistics on States Parties to the ICC Statute shows that on 10 States Parties in Africa has Implementing Legislation, see Status of the Rome Statute in Africa 2013 available at http://www.iccnw.org/documents/RomeStatuteUpdate_2013_web.pdf (accessed on 12 April 2015).

(1) Africa States are obligated to incorporate the crimes provided at the regional level in their domestic legislations; (2) they should actually prosecute the crimes at the domestic level. Complementarity under the Statute will only be meaningful when the Regional Court is not turned into a court of first instance because of lack of capacity at the domestic level.

8.7.2 Benchmarks to an Effective Court

The ICC Statute emphasises that international crimes are of serious concern to the international community as a whole⁸. This entails that at any level that international crimes are being prosecuted whether domestic or regional, they are being done for the whole world community. The ultimate goal having multifarious processes is to close the impunity gap. The African Court should not just be viewed merely as a matter of proliferation of courts dealing with international crimes, but as a tool for dealing with international crimes in Africa. It is against this background that some benchmarks for an effective court are being considered. They are not meant to be exhaustive but can provide a frame of reference when the court starts its work

8.7.2.1 The African Court Should Help Reduce the Impunity Gap

The phrases ‘reducing impunity gap’, ‘narrowing impunity gap’ or ‘closing impunity gap’ are often used in international criminal justice⁹. What all this mean in practice is a question of context. It relates to what to do with the remaining perpetrators after only a few of them

⁸ Par.4, preamble ICC Statute.

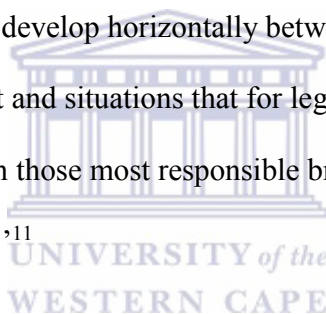
⁹ Human Rights Watch ‘Narrowing the Impunity Gap: Trials before Bosnia’s War Crimes Chamber’ (2007) 19 (1)(D) Human Rights Watch; Assembly of States Parties Report of the Bureau on Stocktaking: Complementarity, Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap (2010) 4 par. 14 available at <http://www.icc-cpi.int/iccdocs/doc/doc1062631.pdf#search=impunity%20gap> (accessed on 24 August 2014).

have been prosecuted at the international level. The Office of the United Nations Commissioner for Human Rights put it as follows:

‘The fact that many people will not be investigated, much less prosecuted, should not mean that they should escape any form of accountability... [i]n order to bridge the impunity gap, prosecutorial initiative will need to build constructive relationships with other transitional justice mechanisms.’¹⁰

The Assembly of States Parties refers to horizontal and vertical impunity gap and this can be explained as follows:

‘[A]n impunity gap may develop horizontally between situations that are investigated by the Court and situations that for legal and jurisdictional reasons are not, or vertically between those most responsible brought before the Court and other perpetrators who are not.’¹¹



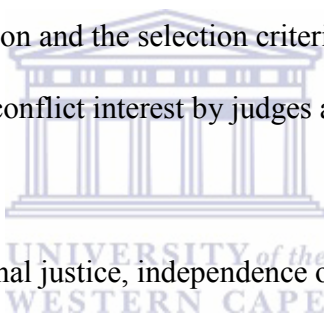
In that regard, the African Court should provide an avenue for reduction of that immunity gap by prosecuting those that the ICC cannot prosecute due to jurisdictional limits such as that of gravity or the lower level perpetrators that the ICC may have left out from prosecution.

¹⁰ Office of The United Nations High Commissioner for Human Rights, Rule of Law Tools for Post-Conflict States: Prosecution Initiative, (2006) 9 available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf> (accessed on 24 August 2014).

¹¹ Assembly of States Parties Report of the Bureau on Stocktaking: Complementarity, Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap (2010) 4 par. 14 available at <http://www.icc-cpi.int/iccdocs/doc/doc1062631.pdf#search=impunity%20gap> (accessed on 24 August 2014).

8.7.2.2 Independence

A regional mechanism dealing with international crimes that takes a judicial form is supposed to be independent. It is rightly argued that the essence of judicial power and function requires independence of the judicial organ in every sense and that it is the guarantee of justice.¹² It is also argued that impartiality is a corollary to the requirement of independence and as such should be considered an important aspect of that independence.¹³ The independence of the judicial organ should be enshrined in its form, and also be evident in its practice. Independence is regarded as a jurisprudentially vacuous or indeterminate principle.¹⁴ However, as far as judicial organs are concerned, some fundamental aspects to independence are: the qualification and the selection criteria for judges; the security of tenure for judges; avoidance of conflict of interest by judges and the legislative powers of the creating authority.¹⁵



In relation to international criminal justice, independence of the prosecutor should also be guaranteed. Highlighting on the legislative powers of the creating authority, the two principal problems that may affect independence are said to be (i) the legislative authority is the international organisation which is also a part of the proceedings before the judicial organs being considered; and (ii) absence of express or implied limitations on the

¹² Amerasighe C.F Principles of the Institutional Law of International Organisations 2ed. (2005) 224 (hereafter Amerasighe C.F (2005)).

¹³ Amerasighe C.F (2005) 224.

¹⁴ Amerasighe C.F (2005) 225.

¹⁵ Amerasighe C.F (2005) 238; see also Heifer L.R & Slaughter A.M, 'Toward a Theory of Effective Supranational Adjudication' (1997) *107 YALE L.J.* 300-14 who argue that effective international tribunals are those that are independent and are composed of senior, respected jurists who make binding international decisions on the basis of principle as opposed to power.

legislative power of the organisation, which relates to the maintenance and the preservation of the independence of the judicial organs.¹⁶ The first feature is unavoidable, it can be paralleled to what happens in the national legal systems whereby a state which legislates may be a part to the proceedings, however, the second factor, presents the adverse effect on the independence on the judicial power.¹⁷ An example of how legislative power can influence the independence of a judicial organ is seen in what has happened with the SADC Tribunal whereby the SADC heads of states decided to disband the Tribunal and amend its legislative framework in order to prevent individual access. This was after the court ruled against Zimbabwe in a case challenging its land reform policy.¹⁸ With regard to the African Court, the AU Assembly should have limited power in the activities of the Court and protect its independence at all cost.

8.7.2.3 Adequate Resources

The question of resources should be considered seriously. The resources in question include financial, human and infrastructural resources. It takes a lot of financial resources to prosecute international crimes, as such African States should have the political will to contribute towards its budget. This area requires further research on how the court can be adequately resourced.

¹⁶ Amerasighe C.F (2005) 257-58.

¹⁷ Amerasighe C. F (2005) 258.

¹⁸ Nathan L 'The Disbanding of the SADC Tribunal: A Cautionary Tale (2013) 35(4) *Human Rights Quarterly* 870-92

8.7.2.4 Dissemination on the Activities of the Court

There is need for an effective communication so that citizens are aware of the existence of the Court and how they can access it. In that regard an effective communication strategy need to be developed. It is also necessary to lobby States to ratify the Protocol.

8.8 General Conclusion

Africa has become trailblazer in adopting a regional instrument for dealing with international crimes. It is not a perfect instrument, as this thesis has highlighted some shortfalls in some of the provisions. However, in most aspects, particularly in defining some international crimes and crimes of regional concern, the ACJHPR Statute reflects some progressive aspects. Currently, only ten States have signed the Protocol with no ratifications. The effectiveness of the Court can only be tested when it begins its operations. The recommendations made in this thesis are to tighten some loose ends in the provisions of Protocol and the ACJHPR Statute.

Word Count: 94 663 Words.

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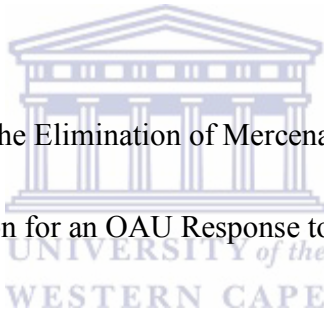
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APPENDICES

1. Protocol on Amendments to the Protocol on the Statute of The African Court of Justice and Human Rights





**PROTOCOL ON AMENDMENTS TO THE PROTOCOL ON THE STATUTE
OF THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS**



UNIVERSITY *of the*
WESTERN CAPE

PREAMBLE

The Member States of the African Union parties to the Constitutive Act of the African Union;

RECALLING the objectives and principles enunciated in the Constitutive Act of the African Union, adopted on 11 July 2000 in Lome, Togo, in particular the commitment to settle their disputes through peaceful means;

FURTHER RECALLING the provisions of the Protocol on the Statute of the African Court of Justice and Human Rights and the Statute annexed to it adopted on 1 July 2008 in Sharm-El-Sheikh, Egypt;

RECOGNIZING that the Protocol on the Statute of the African Court of Justice and Human Rights had merged the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into a single Court;

BEARING IN MIND their commitment to promote peace, security and stability on the continent, and to protect human and people's rights in accordance with the African Charter on Human and Peoples' Rights and other relevant instruments;

FURTHER RECOGNIZING the efforts and contribution of the African Commission on Human and Peoples' Rights in the promotion and protection of human and peoples' rights since its inception in 1987;

NOTING the steady growth of the African Court on Human and Peoples' Rights and the contribution it has made in protecting human and people's rights on the African continent as well as the progress towards the establishment of the African Court of Justice and Human and Peoples' Rights;

FURTHER BEARING IN MIND the complementary relationship between the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, as well as its successor, the African Court of Justice and Human and Peoples' Rights;

FURTHER RECALLING their commitment to 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 as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council;

REITERATING their respect for democratic principles, human and people's rights, the rule of law and good governance;

FURTHER REITERATING their respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, unconstitutional changes of governments and acts of aggression;

FURTHER REITERATING their commitment to fighting impunity in conformity with the provisions of Article 4(o) of the Constitutive Act of the African Union;

ACKNOWLEDGING the pivotal role that the African Court of Justice and Human and Peoples' Rights can play in strengthening the commitment of the African Union to promote sustained peace, security and stability on the Continent and to promote justice and human and peoples' rights as an aspect of their efforts to promote the objectives of the political and socio-economic integration and development of the Continent with a view to realizing the ultimate objective of a United States of Africa;

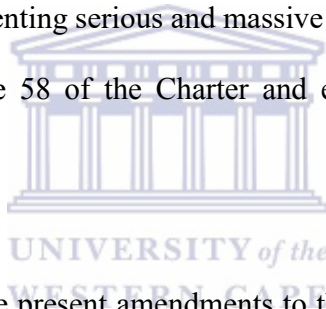
FURTHER RECALLING Assembly Decision Assembly/AU/Dec.213 (XII) adopted by the Twelfth Ordinary Session of the Assembly in Addis Ababa, Federal Democratic Republic of Ethiopia, on 3 February 2009 on the implementation of the Assembly's Decision on the Abuse of the Principle of Universal Jurisdiction;

FURTHER RECALLING Assembly Decision Assembly/AU/Dec.263 (XIII) adopted by the Thirteenth Ordinary Session of the Assembly in Sirte, Libya, on 3

July 2009 on the transformation of the African Union Commission to the African Union Authority;

FURTHER RECOGNIZING the need to take the necessary measures to amend the legal instruments of the principal organs of the African Union in the light of the aforementioned Assembly Decisions;

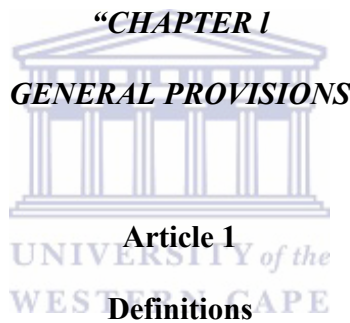
CONVINCED that the present Protocol will complement national, regional and continental bodies and institutions in preventing serious and massive violations of human and peoples' rights in keeping with Article 58 of the Charter and ensuring accountability for them wherever they occur;



HAVE AGREED to adopt the present amendments to the Protocol on the Statute of the African Court of Justice and Human Rights and the Statute annexed thereto as follows: -

CHAPTER 1

In CHAPTER 1 of the Protocol (MERGER OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS AND THE COURT OF JUSTICE OF THE AFRICAN UNION) the deletion of the existing title, Articles and their provisions in their entirety and the insertion in their place of the following:



In this Protocol:

“Assembly” means the Assembly of Heads of State and Government of the African Union;

“Chairperson” means the Chairperson of the Assembly;

“Charter” means the African Charter on Human and Peoples’ Rights;



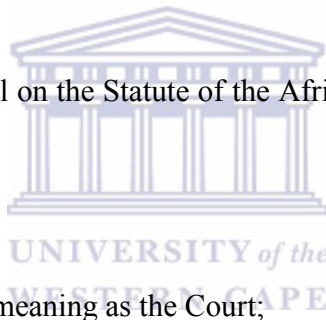
“Commission” means the Commission of the African Union;

“Court” means the African Court of Justice and Human and Peoples’ Rights;

“Member State” means a Member State of the Union;

“President” means the President of the Court;

“Protocol” means the Protocol on the Statute of the African Court of Justice and Human Rights;



“Single Court” has the same meaning as the Court;

“Statute” means the present Statute;

“Union” means the African Union established by the Constitutive Act of the African Union;

“Vice President” means the Vice President of the Court.



Article 2

Organs of the Court

The Court shall be composed of the following organs:

1. The Presidency;
2. The Office of the Prosecutor;
3. The Registry;
4. The Defence Office.



Article 3

Jurisdiction of the Court

1. The Court is vested with an original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the Statute annexed hereto.
2. The Court has jurisdiction to hear such other matters or appeals as may be referred to it in any other agreements that the Member States or the Regional Economic



Communities or other international organizations recognized by the African Union may conclude among themselves, or with the Union.

Article 4

Relationship between the Court and the African Commission on Human and Peoples' Rights

The Court shall, in accordance with the Charter and this Protocol, complement the protective mandate of the African Commission on Human and Peoples' Rights.



CHAPTER II
TRANSITIONAL PROVISIONS

Article 5

**Term of Office of the Judges of the African Court on
Human and Peoples' Rights**

In Article 4 (Term of Office of the Judges of the African Court on Human and Peoples' Rights), replace the existing provision including its title, with:

“Article 4

**Term of Office of the Judges of the African Court on
Human and Peoples' Rights**

1. Upon the coming into force of the Protocol on the Statute of the African Court of Justice and Human Rights, the terms and appointment of the Judges of the African Court on Human and Peoples' Rights shall terminate.

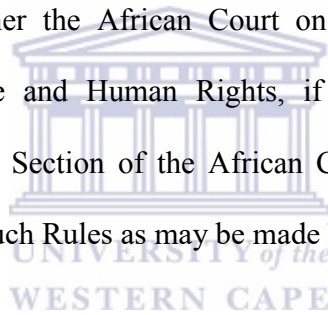


2. Without prejudice to paragraph 1, the Judges of the African Court on Human and Peoples' Rights shall remain in office until the judges of the African Court of Justice and Human and Peoples' Rights are sworn in.

Article 6

Pending Cases

At the entry into force of this Protocol, where any matter affecting any State had already been commenced before either the African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights, if in force, such a matter shall be continued before the relevant Section of the African Court of Justice and Human and Peoples' Rights, pursuant to such Rules as may be made by the Court.



Article 6bis

Temporary Jurisdiction

At the entry into force of this Protocol, until a Member State ratifies it, any jurisdiction which has hitherto been accepted by such Member State with respect to either the African Court on Human and Peoples' Rights or the African Court of Justice and Human Rights shall be exercisable by this Court.



Article 7

Registry of the Court

1. The Registrar of the African Court on Human and Peoples' Rights shall remain in office until the appointment of a new Registrar for the African Court of Justice and Human and Peoples' Rights.
2. The staff of the African Court on Human and Peoples' Rights shall be absorbed into the Registry of the African Court of Justice and Human and Peoples' Rights, for the remainder of their subsisting contracts of employment.

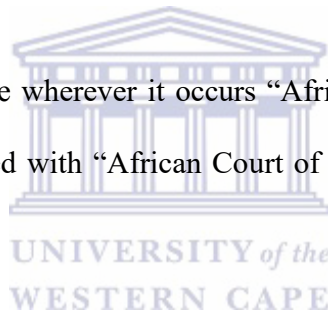


CHAPTER III
FINAL PROVISIONS

Article 8

Nomenclature

In the Protocol and the Statute wherever it occurs “African Court of Justice and Human Rights” is deleted and replaced with “African Court of Justice and Human and Peoples’ Rights.”



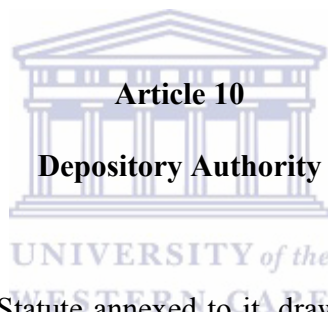
Article 9

Signature, Ratification and Accession

1. This Protocol and the Statute annexed to it shall be open for signature, ratification or accession by Member States, in accordance with their respective constitutional procedures.



2. The instruments of ratification or accession to this Protocol and the Statute annexed to it shall be deposited with the Chairperson of the Commission.
3. Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, make a declaration accepting the competence of the Court to receive cases under Article 30 (f).



1. This Protocol and the Statute annexed to it, drawn up in four (4) original texts in the Arabic, English, French and Portuguese languages, all four (4) texts being equally authentic, shall be deposited with the Chairperson of the Commission, who shall transmit a certified true copy to the Government of each Member State.
2. The Chairperson of the Commission, shall notify all Member States of the dates of deposit of the instruments of ratification or accession, and shall, upon the entry into force of this Protocol, register the same with the Secretariat of the United Nations.



Article 11

Entry into force

1. This Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of instruments of ratification by fifteen (15) Member States.
2. For each Member State which shall accede to it subsequently, this Protocol and Annexed Statute shall enter into force on the date on which the instruments of ratification or accession are deposited.
3. The Chairperson of the Commission shall notify all Member States of the entry into force of this Protocol.

Article 12

Amendments

1. This Protocol and the Statute annexed to it may be amended if a State Party to the Protocol makes a written request to that effect to the Chairperson of the Commission. The Assembly may adopt, by simple majority, the draft amendment after all the States parties to the present Protocol have been duly informed of it and the Court has given its opinion on the amendment.



2. The Court shall also be entitled to propose such amendments to the present Protocol or the Statute annexed to it as it may deem necessary, through the Chairperson of the Commission.

3. The amendments shall come into force for each State Party which has accepted it thirty (30) days after the Chairperson of the Commission has received notice of the acceptance.



**ADOPTED BY THE TWENTY-THIRD ORDINARY SESSION
OF THE ASSEMBLY, HELD IN MALABO, EQUATORIAL
GUINEA**

27TH JUNE 2014



Annex

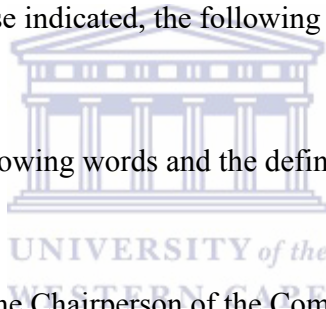
Statute of the African Court of Justice and Human and Peoples' Rights

Article 1

Definitions

1. In Article 1 of the Statute (Definitions), the deletion from the chapeau of the words “except otherwise indicated, the following shall mean”

3. The insertion of the following words and the definitions ascribed to them



“Chairperson” means the Chairperson of the Commission;

“Child” means any person under eighteen years of age;

“Court” means the African Court of Justice and Human and Peoples’ Rights;

“Full Court” means the three Sections of the Court sitting together in plenary;

“Person” means a natural or legal person;

“President” means the President of the Court unless otherwise specified; “Section” means the General Affairs or Human and Peoples’ Rights or International Criminal Law Section of the Court;



“Statute” means the Statute of the African Court of Justice and Human and Peoples’ Rights;

“Vice President” means the Vice President of the Court.

Article 2

Composition

In Article 3 of the Statute (Composition), add the following paragraph 4: “

4. The Assembly shall ensure that there is equitable gender representation in the Court.

”



Article 3

Qualifications of Judges

Article 4 of the Statute (Qualifications of Judges) is replaced with the following: “The

Court shall be composed of impartial and independent Judges elected from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults of recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law.”



*Article 4**List of Candidates*

Article 6 of the Statute (List of Candidates) is replaced with the following: - “

1. For the purpose of election, the Chairperson of the Commission shall establish three (3) alphabetical lists of candidates presented as follows:
 - i. List A containing the names of candidates having recognized competence and experience in International law;
 - ii. List B containing the names of candidates having recognized competence and experience in international human rights law and international humanitarian law; and
 - iii. List C containing the names of candidates having recognized competence and experience in international criminal law.
2. States Parties that nominate candidates possessing the competences required on the three (3) lists shall choose the list on which their candidates may be placed.
3. At the first election, five (5) judges each shall be elected from amongst the candidates on lists A and B, and six (6) judges shall be elected from amongst the candidates of list C respectively.



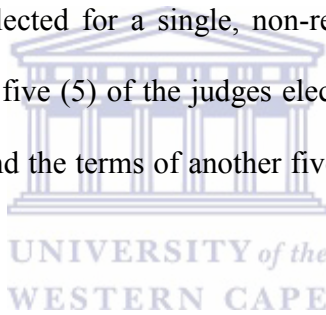
4. The Chairperson of the Commission shall communicate the three lists to Member States, at least thirty (30) days before the Ordinary Session of the Assembly or of the Council during which the elections shall take place.”

Article 5

Term of Office

Article 8 of the Statute (Term of Office) is replaced with the following: - “

1. The Judges shall be elected for a single, non-renewable term of nine (9) years. The terms of office of five (5) of the judges elected at the first election shall end after three (3) years, and the terms of another five (5) of the judges shall end after six (6) years.
2. The Judges whose term of office shall end after the initial periods of three (3) and six (6) years shall be determined by lot drawn by the Chairperson of the Assembly or the Executive Council, immediately after the first election.



3. A Judge elected to replace another whose term of office has not expired shall complete the term of office of his or her predecessor.
4. All the Judges, except the President and the Vice President, shall perform their functions on a part-time basis.
5. The Assembly shall, on the recommendation of the Court, decide the time when all the Judges of the Court shall perform their functions on a full time basis.”



Article 16 of the Statute (Sections of the Court) is replaced with the following: -

“Article 16

Structure of the Court

1. The Court shall have three (3) Sections: a General Affairs Section, a Human and Peoples’ Rights Section and an International Criminal Law Section.

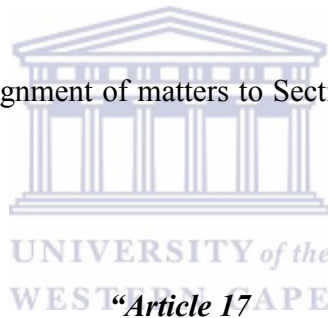


2. The International Criminal Law Section of the Court shall have three (3) Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.
3. The allocation of Judges to the respective Sections and Chambers shall be determined by the Court in its Rules. ”

Article 7

Assignment of matters to Sections of the Court

Article 17 of the Statute (Assignment of matters to Sections) is replaced with the following:



“Article 17

Assignment of matters to Sections of the Court

1. The General Affairs Section shall be competent to hear all cases submitted under Article 28 of the Statute except those assigned to the Human and Peoples’ Rights Section and the International Criminal Law Section as specified in this Article.
2. The Human and Peoples’ Rights Section shall be competent to hear all cases relating to human and peoples’ rights.



3. The International Criminal Law Section shall be competent to hear all cases relating to the crimes specified in this Statute.”

Article 8

Revision and Appeal

Article 18 (Referral of matters to the Full Court) is replaced with the following:



1. In the case of the General Affairs Section and the Human and People’s Rights Section, a revision of a judgement shall be made in terms of the provisions of Article 48.
2. In the case of the International Criminal Law Section, a decision of the Pre-Trial Chamber or the Trial Chamber may be appealed against by the Prosecutor or the accused, on the following grounds:



- (a) A procedural error;
 - (b) An error of law;
 - (c) An error of fact.
3. An appeal may be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction.
 4. The Appellate Chamber may affirm, reverse or revise the decision appealed against. The decision of the Appellate Chamber shall be final.”



Article 19 of the Statute (Chambers) is replaced with the following:

“Chambers of the Court

1. The General Affairs Section, Human and Peoples’ Rights Section or International Criminal Law Section may, at any time, constitute one or more Chambers in accordance with the Rules of Court.



2. A Judgment given by any Chamber shall be considered as rendered by the Court.”



Article 9 Bis

Powers and Functions of the Chambers of the International Criminal

Law Section

After Article 19 of the Statute (Chambers) add the following as Article 19 *Bis*:

“Article 19 Bis

Powers and Functions of the Chambers of the International Criminal

Law Section

1. The Pre-Trial Chamber shall exercise the functions provided for in Article 46F of this Statute.
2. In addition, the Pre-Trial Chamber may also at the request of the Prosecutor issue such orders and warrants as may be required for an investigation or prosecution.
3. The Pre-Trial Chamber may issue such orders as may be required to provide for the protection and privacy of witnesses and victims, the presentation of evidence and the protection of arrested persons.
4. The Trial Chamber shall conduct trials of accused persons in accordance with this Statute and the Rules of Court.



5. The Trial Chamber shall receive and conduct appeals from the Pre-Trial Chamber in accordance with Article 18 of this Statute.
6. The Appeals Chamber shall receive and conduct appeals from the Trial Chamber in accordance with Article 18 of this Statute.”

Article 10

Quorum

Article 21 of the Statute (Quorum) is replaced with the following:

1. The General Affairs Section of the Court shall be duly constituted by three (3) judges.
2. The Human and Peoples’ Rights Section of the Court shall be duly constituted by three (3) judges.
3. The Pre-Trial Chamber of the International Criminal Law Section of the Court shall be duly constituted by one (1) judge.
4. The Trial Chamber of the International Criminal Law Section of the Court shall be duly constituted by three (3) judges.



5. The Appellate Chamber of the International Criminal Law Section of the Court shall be duly constituted by five (5) judges.

Article 11

Presidency and Vice Presidency

Article 22 (Presidency, Vice-Presidency and Registry) is replaced with the following: -



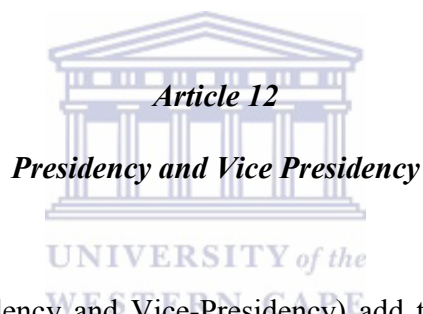
Article 22

Presidency and Vice Presidency

1. At its first ordinary session after the election of the Judges, the Full Court shall elect a President and a Vice President of the Court.
2. The President and Vice President shall serve for a period of two (2) years, and may be re-elected once.



3. The President and Vice President shall, in consultation with the Members of the Court and as provided for in the Rules of Court, assign Judges to the Sections.
4. The President shall preside over all sessions of the Full Court. In the event of the President being unable to sit during a session, the session shall be presided over by the Vice President.
5. The President and Vice President shall reside at the seat of the Court.”



After Article 22 (Presidency and Vice-Presidency) add the following as Articles 22A and 22B:

“Article 22A

The Office of the Prosecutor

1. The Office of the Prosecutor shall comprise a Prosecutor and two Deputy Prosecutors.



2. The Prosecutor and Deputy Prosecutors shall be elected by the Assembly from amongst candidates who shall be nationals of States Parties nominated by States Parties.



3. The Prosecutor shall serve for a single, non-renewable term of seven (7) years.
4. The Deputy Prosecutors shall serve for a term of four (4) years, renewable once.
5. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the conduct of investigations, trial and prosecution of criminal cases.
6. The Office of the Prosecutor shall be responsible for the investigation and prosecution of the crimes specified in this Statute and shall act independently as a separate organ of the Court and shall not seek or receive instructions from any State Party or any other source.
7. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses and collect evidence, including the power to conduct on-site investigations.
8. The Prosecutor shall be assisted by such other staff as may be required to perform the functions of the Office of the Prosecutor effectively and efficiently.



9. The staff of the Office of the Prosecutor shall be appointed by the Prosecutor in accordance with the Staff Rules and Regulations of the African Union.
10. The remuneration and conditions of service of the Prosecutor and Deputy Prosecutors shall be determined by the Assembly on the recommendation of the Court made through the Executive Council.”

Article 22B

The Registry

1. The Registry shall comprise of a Registrar and three Assistant Registrars.
2. The Court shall appoint the Registrar and Assistant Registrars, in accordance with the Staff Rules and Regulations of the African Union.
3. The Registrar shall serve for a single, non-renewable term of seven years.
4. The Assistant Registrars shall serve for a term of four (4) years, renewable once.



5. The Registry shall be headed by a Registrar who, under the direction of the President, shall be responsible for the non-judicial aspects and servicing of the Court. The Registrar shall be the principal administrative and accounting officer of the Court, and shall ensure that proper books of accounts are kept in accordance with the financial rules and regulations of the African Union.
6. The Registrar and Assistant Registrars shall be persons of high moral character, be highly competent in and have extensive practical managerial experience.
7. The Registrar shall be assisted by such other staff as may be necessary for the effective and efficient performance of the functions of the Registry.
8. The staff of the Registry shall be appointed by the Court in accordance with the Staff Rules and Regulations of the African Union.
9. The Registrar shall set up, within the Registry:
 - a) A Victims and Witnesses Unit, which shall provide, in consultation with the Court and the Office of the Prosecutor, as appropriate, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at



risk on account of testimony given by such witnesses. The Unit personnel shall include experts in the management of trauma.

- b) A Detention Management Unit, which shall manage the conditions of detention of suspects and accused persons.
10. The salaries and conditions of service of the Registrar, Assistant Registrars and other staff of the Registry shall be determined by the Assembly on the proposal of the Court, through the Executive Council.



1. The Court shall establish, maintain and develop a Defence Office for the purpose of ensuring the rights of suspects and accused and any other person entitled to legal assistance.
2. The Defence Office, which may also include one or more public defenders, shall act independently as a separate organ of the Court. It shall be responsible for protecting the rights of the defence, providing support and assistance to defence counsel and to the persons entitled to legal assistance, including, where appropriate, legal research, collection of



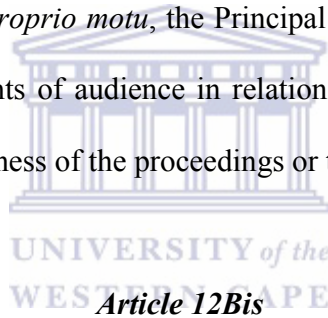
evidence and advice, and appearing before the Chamber in respect of specific issues.

3. The Defence Office shall ensure that there are adequate facilities to defence counsel and persons entitled to legal assistance in the preparation of a case, and shall provide any additional assistance ordered by a Judge or Chamber.
4. The Defence Office shall be headed by a Principal Defender, who shall be appointed by the Assembly, and shall be a person of high moral character and possess the highest level of professional competence and extensive experience in the defence of criminal cases. He shall be admitted to the practice of law in a recognised jurisdiction and shall have practised criminal law before a national or international criminal court for a minimum of ten years.
5. The Principal Defender shall, in order to ensure that the fair trial rights of suspects and accused are protected, adopt such regulations and practice directions as may be necessary to effectively carry out the functions of the Defence Office.
6. The Principal Defender shall be assisted by such other staff as maybe required to perform the functions of the Defence Office effectively and efficiently. The staff



of the Defence Office shall be appointed by the Principal Defender in accordance with the Staff Rules and Regulations of the African Union.

7. The Principal Defender shall, for all purposes connected with pre-trial, trial and appellate proceedings, enjoy equal status with the Prosecutor in respect of rights of audience and negotiations *inter partes*.
8. At the request of a Judge or Chamber, the Registry, Defence or where the interests of justice so require, *proprio motu*, the Principal Defender or a person designated by him shall have rights of audience in relation to matters of general interest to defence teams, the fairness of the proceedings or the rights of a suspect or accused.



Conditions of Service of the Registrar and Members of the Registry

Article 24 of the Statute (Conditions of Service of the Registrar and Members of the Registry) is deleted.



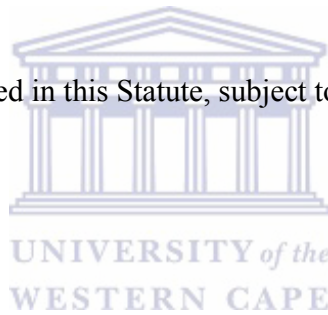
Article 13

Under Chapter III (Competence of the Court) In Article 28 of the Statute (Jurisdiction of the Court), the insertion of a new sub-paragraph (d) as follows, with consequential renumbering of the existing paragraphs (d) to (h).

“...

(d) The crimes contained in this Statute, subject to a right of appeal.

...”



Article 14

International Criminal Jurisdiction of the Court

Immediately after Article 28 (Jurisdiction of the Court), the insertion of new Articles 28A, 28B, 28C, 28D, 28E, 28F, 28G, 28H, 28I, 28I *Bis*, 28J, 28K, 28L, 28L *Bis*, 28M and 28N **as follows:**

“Article 28A

International Criminal Jurisdiction of the Court



1. Subject to the right of appeal, the International Criminal Law Section of the Court shall have power to try persons for the crimes provided hereunder:

- 1) Genocide
- 2) Crimes Against Humanity
- 3) War Crimes
- 4) The Crime of Unconstitutional Change of Government;
- 5) Piracy
- 6) Terrorism
- 7) Mercenarism
- 8) Corruption
- 9) Money Laundering
- 10) Trafficking in Persons
- 11) Trafficking in Drugs
- 12) Trafficking in Hazardous Wastes
- 13) Illicit Exploitation of Natural Resources
- 14) The Crime of Aggression



2. The Assembly may extend upon the consensus of States Parties the jurisdiction of the Court to incorporate additional crimes to reflect developments in international law.

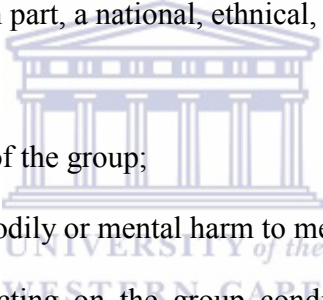


3. The crimes within the Jurisdiction of the Court shall not be subject to any statute of limitations.”

Article 28 B

Genocide

For the purposes of this Statute, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- 
- a) Killing members of the group;
 - b) Causing serious bodily or mental harm to members of the group;
 - c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d) Imposing measures intended to prevent births within the group;
 - e) Forcibly transferring children of the group to another group;
 - f) Acts of rape or any other form of sexual violence.

Article 28 C

Crimes Against Humanity



1. For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack or enterprise directed against any civilian population, with knowledge of the attack or enterprise:
 - a) Murder;
 - b) Extermination;
 - c) Enslavement;
 - d) Deportation or forcible transfer of population;
 - e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - f) Torture, cruel, inhuman and degrading treatment or punishment;
 - g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law;
 - i) Enforced disappearance of persons;
 - j) The crime of apartheid;
 - k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or mental or physical health.



2. For the purpose of paragraph 1:
- a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - b) 'Extermination' includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
 - c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful



sanctions;

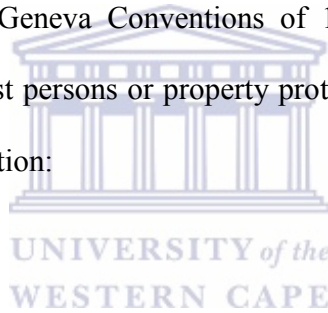
- f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
- g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
- h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
- i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.



Article 28 D***War Crimes***

For the purposes of this Statute, ‘war crimes’ means any of the offences listed , in particular when committed as part of a plan or policy or as part of a large scale commission of such crimes.

- a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:



- i) Wilful killing;
- ii) Torture or inhuman treatment, including biological experiments;
- iii) Wilfully causing great suffering, or serious injury to body or health;
- iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- vii) Unlawful deportation or transfer or unlawful confinement;



- viii) Taking of hostages.
- b) Grave breaches of the First Additional Protocol to the Geneva Conventions of 8 June 1977 and other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
- i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
 - iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
 - iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;



- v) Intentionally launching an attack against works or installations containing dangerous forces in the knowledge that such attack will



cause excessive loss of life, injury to civilians or damage to civilian objects which will be excessive in relation to the concrete and direct overall military advantage anticipated;

- vi) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
- vii) Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;
- viii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
- ix) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
- x) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;



- xi) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
- xii) Killing or wounding treacherously individuals belonging to the hostile nation or army;
- xiii) Declaring that no quarter will be given;
- xiv) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
- xv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
- xvi) Compelling the nationals of the hostile party to take part in the operations of war directed against their own State, even if they were in the belligerent's service before the commencement of the war;
- xvii) Pillaging a town or place, even when taken by assault;
- xviii) Employing poison or poisoned weapons;
- xix) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
- xx) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;



- xxi) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary



suffering or which are inherently indiscriminate in violation of the international law of armed conflict

- xxii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- xxiii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
- xxiv) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
- xxv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
- xxvi) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
- xxvii) Conscripting or enlisting children under the age of eighteen years into the national armed forces or using them to participate actively in hostilities;
- xxviii) Unjustifiably delaying the repatriation of prisoners of war or civilians;
- xxix) Willfully committing practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.



- xxx) Making non-defended localities and demilitarised zones the object of attack;
 - xxxi) Slavery and deportation to slave labour;
 - xxxii) Collective punishments;
 - xxxiii) Despoliation of the wounded, sick, shipwrecked or dead;
- c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
- i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
 - iii) Taking of hostages;
 - iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court,



affording all judicial guarantees which are generally recognized as indispensable.

- d) Paragraph c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
- e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
- i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
 - ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
 - iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed



- conflict;
- iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
 - v) Pillaging a town or place, even when taken by assault;
 - vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
 - vii) Conscripting or enlisting children under the age of eighteen years into armed forces or groups or using them to participate actively in hostilities;
 - viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - ix) Killing or wounding treacherously a combatant adversary;
 - x) Declaring that no quarter will be given;
 - xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her



- interest, and which cause death to or seriously endanger the health of such person or persons;
- xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
 - xiii) Employing poison or poisoned weapons;
 - xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
 - xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
 - xvi) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies;
 - xvii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;
 - xviii) Launching an indiscriminate attack resulting in death or injury to civilians, or an attack in the knowledge that it will cause excessive incidental civilian loss, injury or damage;
 - xix) Making non-defended localities and demilitarised zones the object of attack;



- xx) Slavery;
 - xxi) Collective punishments;
 - xxii) Despoliation of the wounded, sick, shipwrecked or dead.
- f) Paragraph e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.
- g) Using nuclear weapons or other weapons of mass destruction



Article 28E

The Crime of Unconstitutional Change of Government

1. For the purposes of this Statute, ‘unconstitutional change of government’ means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:



- a) A putsch or coup d'état against a democratically elected government;



- b) An intervention by mercenaries to replace a democratically elected government;
 - c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
 - d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
 - e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
 - f) Any substantial modification to the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.
2. For purposes of this Statute, “democratically elected government” has the same meaning as contained in AU instruments.

Article 28F

Piracy

Piracy consists of any of the following acts:



- a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private boat, ship or a private aircraft, and directed:
- i. on the high seas, against another boat, ship or aircraft, or against persons or property on board such boat, ship or aircraft;
 - ii. against a boat, ship, aircraft, persons or property in a place outside the jurisdiction of any State
- b) any act of voluntary participation in the operation of a boat, ship or of an aircraft with knowledge of facts making it a pirate boat, ship or aircraft;
- c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 28 G

Terrorism

For the purposes of this Statute, 'terrorism' means any of the following acts:

- A. Any act which is a violation of the criminal laws of a State Party, the laws of the African Union or a regional economic community recognized by the African Union,



or by international law, and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any



person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

1. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
2. disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
3. create general insurrection in a State.

B. Any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in sub-paragraph (a) (1) to(3).

C. Notwithstanding the provisions of paragraphs A and B, the struggle waged by peoples in accordance with the principles of international law for their liberation or



self-determination, including armed struggle against colonialism, occupation, aggression and domination by foreign forces shall not be considered as terrorist acts.

- D. The acts covered by international Humanitarian Law, committed in the course of an international or non-international armed conflict by government forces or members of organized armed groups, shall not be considered as terrorist acts.
- E. Political, philosophical, ideological, racial, ethnic, religious or other motives shall not be a justifiable defence against a terrorist act.



1. For the purposes of this Statute:
 - a) A mercenary is any person who:
 - i. Is specially recruited locally or abroad in order to fight in an armed conflict;
 - ii. Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation;



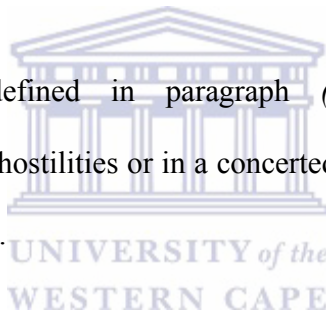
- iii. Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- iv. Is not a member of the armed forces of a party to the conflict;
and
- v. Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

b) A mercenary is also any person who, in any other situation:

- i. Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - 1. Overthrowing a legitimate Government or otherwise undermining the constitutional order of a State;
 - 2. Assisting a government to maintain power;
 - 3. Assisting a group of persons to obtain power; or
 - 4. Undermining the territorial integrity of a State;
- ii. Is motivated to take part therein essentially by the desire for private gain and is prompted by the promise or payment of material compensation;



- iii. Is neither a national nor a resident of the State against which such an act is directed;
 - iv. Has not been sent by a State on official duty; and
 - v. Is not a member of the armed forces of the State on whose territory the act is undertaken.
2. Any person who recruits, uses, finances or trains mercenaries, as defined in paragraph (1) (a) or (b) above commits an offence.
 3. A mercenary, as defined in paragraph (1) (a) or (b) above, who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence.



Article 28I

Corruption

1. For the purposes of this Statute, the following shall be deemed to be acts of corruption if they are of a serious nature affecting the stability of a state, region or the Union:



- a) The solicitation or acceptance, directly or indirectly, by a public official, his/her family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or



- advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
- b) The offering or granting, directly or indirectly, to a public official, his/family member or any other person, of any goods of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions;
- c) Any act or omission in the discharge of his or her duties by a public official. his/her family member or any other person for the purpose of illicitly obtaining benefits for himself or herself or for a third party;
- d) The diversion by a public official, his/her family member or any other person, for purposes unrelated to those for which they were intended, for his or her own benefit or that of a third party, of any property belonging to the State or its agencies, to an independent agency, or to an individual, that such official has received by virtue of his or her position;
- e) The offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works



for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties;

- f) The offering, giving, solicitation or acceptance directly or indirectly, or promising of any undue advantage to or by any person who asserts or confirms that he or she is able to exert any improper influence over the decision making of any person performing functions in the public or private sector in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result;
- g) Illicit enrichment;
- h) The use or concealment of proceeds derived from any of the acts referred to in this Article.

2. For the purposes of this Statute "Illicit enrichment" means the significant increase in the assets of a public official or any other person which he or she cannot reasonably explain in relation to his or her income.



Article 28I Bis

Money Laundering

1. For the purposes of this Statute, 'Money Laundering' means: any act of –
 - i) Conversion, transfer or disposal of property, knowing that such property is the proceeds of corruption or related offences for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the offence to evade the legal consequences of his or her action.
 - ii) Concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property which is the proceeds of corruption or related offences;
 - iii) Acquisition, possession or use of property with the knowledge at the time of receipt, that such property is the proceeds of corruption or related offences
 - iv) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.



2. Nothing in this article shall be interpreted as prejudicing the power of the Court to make a determination as to the seriousness of any act or offence.

***Article 28J Trafficking in
persons***

For the purposes of this Statute:

1. “Trafficking in persons” means the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.
2. Exploitation shall include the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;



3. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (1) of this article shall be irrelevant where any of the means set forth in subparagraph (1) have been used;



4. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (1) of this article;

Article 28K

Trafficking in drugs

1. For the purposes of this Statute, trafficking in drugs means:
 - a) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of drugs;
 - b) The cultivation of opium poppy, coca bush or cannabis plant;
 - c) The possession or purchase of drugs with a view to conducting one of the activities listed in (a);
 - d) The manufacture, transport or distribution of precursors knowing that they are to be used in or for the illicit production or manufacture of drugs.



2. The conduct described in paragraph 1 shall not be included in the scope of this Statute when it is committed by perpetrators for their own personal consumption as defined by national law.

3. For the purposes of this Article:

A) “Drugs” shall mean any of the substances covered by the following United Nations Conventions:

- a) The 1961 Single Convention on Narcotic Drugs, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs of 1961;
- b) The 1971 Vienna Convention on Psychotropic Substances.

B. “Precursors” shall mean any substance scheduled pursuant to Article 12 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 20 December 1988.

Article 28L

Trafficking in Hazardous Wastes



1. For the purposes of this Statute, any import or failure to re-import, transboundary movement, or export of hazardous wastes proscribed by the Bamako Convention on the Ban of the Import into Africa and the



Control of Transboundary Movement and Management of Hazardous Wastes within Africa, adopted in Bamako, Mali, in January 1991 shall constitute the offence of trafficking in hazardous waste.

2. The following substances shall be "hazardous wastes" for the purpose of this statute:
 - a) Wastes that belong to any category contained in Annex I of the Bamako Convention;
 - b) Wastes that are not covered under paragraph (a) above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the State of export, import or transit;
 - c) Wastes which possess any of the characteristics contained in Annex II of the Bamako Convention;
 - d) Hazardous substances which have been banned, cancelled or refused registration by government regulatory action, or voluntarily withdrawn from registration in the State of manufacture, for human health or environmental reasons.



3. Wastes which, as a result of being radioactive, are subject to any international control systems, including international instruments, applying specifically to radioactive materials are included in the scope of this Convention.
4. Wastes which derive from the normal operations of a ship, the discharge of which is covered by another international instrument, shall not fall within the scope of this Convention.
5. For the purposes of this Article, “failure to re-import” shall have the same meaning assigned to it in the Bamako Convention.
6. The export of hazardous waste into a Member State for the purpose of rendering it safe shall not constitute an offence under this Article.

Article 28L Bis

Illicit Exploitation of Natural Resources

For the purpose of this Statute, “Illicit exploitation of natural resources” means any of the following acts if they are of a serious nature affecting the stability of a state, region or the Union:



- a) Concluding an agreement to exploit resources, in violation of the principle of peoples' sovereignty over their natural resources;



- b) Concluding with state authorities an agreement to exploit natural resources, in violation of the legal and regulatory procedures of the State concerned;
- c) Concluding an agreement to exploit natural resources through corrupt practices;
- d) Concluding an agreement to exploit natural resources that is clearly one-sided;
- e) Exploiting natural resources without any agreement with the State concerned;
- f) Exploiting natural resources without complying with norms relating to the protection of the environment and the security of the people and the staff; and
- g) Violating the norms and standards established by the relevant natural resource certification mechanism.

Article 28M Crime of

Aggression

- A. For the purpose of this Statute, “Crime of Aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a state or organization,



whether connected to the state or not of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations or the Constitutive Act of the African Union and with regard to the territorial integrity and human security of the population of a State Party.”

B. The following shall constitute acts of aggression, regardless of a declaration of war by a State, group of States, organizations of States, or non-State actor(s) or by any foreign entity:

- a) The use of armed forces against the sovereignty, territorial integrity and political independence of any state, or any other act inconsistent with the provisions of the Constitutive Act of the African Union and the Charter of the United Nations.
- b) The invasion or attack by armed forces against the territory of a State, or military occupation however temporary, resulting from such an invasion or attack, or any annexation by the use of force of the territory of a State or part thereof.
- c) The bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State.
- d) The blockade of the ports, coasts or airspace of a State by the armed forces of another State.



- e) The attack by the armed forces of a State on the land, sea or air forces, or marine and fleets of another State.
- f) The use of the armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the African Union Non-Aggression and Common Defence Pact or any extension of their presence in such territory beyond the termination of the agreement.
- g) The action of a State in allowing its territory, which it has placed at the disposal of another State to be used by another State for perpetrating an act of aggression against a third State.
- h) The sending or materially supporting by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

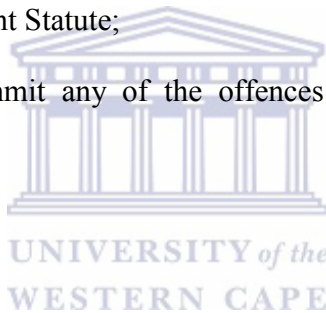
Article 28N

Modes of Responsibility

An offence is committed by any person who, in relation to any of the crimes or offences provided for in this Statute:



- i. Incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the present Statute;
- ii. Aids or abets the commission of any of the offences set forth in the present Statute;
- iii. Is an accessory before or after the fact or in any other manner participates in a collaboration or conspiracy to commit any of the offences set forth in the present Statute;
- iv. Attempts to commit any of the offences set forth in the present Statute.



Article 15

Entities Eligible to Submit Cases to the Court

In paragraph 1(b) of Article 29 of the Statute (Entities Eligible to Submit Cases to the Court), immediately after the words “The Assembly” insert:

“the Peace and Security Council”

Add a new paragraph (d)

(d) “The Office of the Prosecutor”



Article 16***Other Entities Eligible to Submit Cases to the Court***

The deletion of paragraph (f) of Article 30 of the Statute (Other Entities Eligible to Submit Cases to the Court), and the insertion of the following new paragraph:

“(f) African individuals or African Non-Governmental Organizations with Observer Status with the African Union or its organs or institutions, but only with regard to a State that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made a Declaration in accordance with Article 9(3) of this Protocol.”

Article 17***Institution of Proceedings before the International Criminal Law Section***

UNDER CHAPTER FOUR (PROCEDURE), immediately after Article 34 of the Statute (Institution of Proceedings before the Human Rights Section, the insertion of new Articles 34A and 34B as follows:

“Article 34A

Institution of Proceedings before the International Criminal Law Section

1. Subject to the provisions of Articles 22A and 29, cases brought before the International Criminal Law Section of the Court shall be brought by or in the name of the Prosecutor.
2. The Registrar shall forthwith give notice of the case to all parties concerned, as well as the Chairperson of the Commission.

Article 34B

Institution of Proceedings before the Appellate Chamber

The Court shall define the procedures for appeals in its Rules.”



Article 18

Representation of Parties

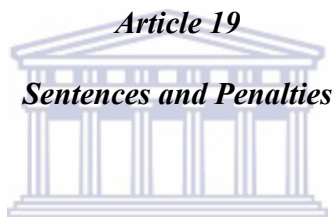
In Article 36 of the Statute (Representation of the Parties), the insertion of a new paragraph (6) as follows, with consequential renumbering of the existing paragraph 6:



“.....

6. A person accused under the international criminal jurisdiction of this Court shall have the right to represent himself or herself in person or through an agent.

.....”



Immediately after Article 43 of the Statute (Judgments and Decisions) the insertion of a new Article 43A as follows:

“Article 43A

***Sentences and Penalties under the International Criminal Jurisdiction of the
Court***



1. Without prejudice to the provisions of Article 43, the Court shall pronounce judgment and impose sentences and/ or penalties, other than the death penalty, for persons convicted of international crimes under this Statute.
2. For the avoidance of doubt, the penalties imposed by the Court shall be limited to prison sentences and/ or pecuniary fines.
3. The sentences and/ or penalties shall be pronounced in public and, wherever possible, in the presence of the accused.
4. In imposing the sentences and/ or penalties, the Court should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
5. In addition to the sentences and/ or penalties, the Court may order the forfeiture of any property, proceeds or any asset acquired unlawfully or by criminal conduct, and their return to their rightful owner or to an appropriate Member State.”

Article 20

Compensation and Reparations to Victims



Article 45 of the Statute (Compensation), including its title, is deleted in its entirety and substituted with the following:



“Article 45

Compensation and Reparations to Victims

1. Without prejudice to the provisions of paragraph (i) of Article 28, the Court shall establish in the Rules of Court principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss or injury to, or in respect of, victims and will state the principles on which it is acting.
2. With respect to its international criminal jurisdiction, the Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.
3. Before making an order the Court may invite and take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.
4. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.”

Article 21



Binding Force and Execution of Judgments

Paragraph 2 of Article 46 of the Statute (Binding Force and Execution of Judgments) is deleted and substituted with the following: -

“.....

2. Subject to the provisions of Article 18 (as amended) and paragraph 3 of Article 41 of the Statute, the judgment of the Court is final.

3.”



Provisions Specific to the International Criminal Jurisdiction of the Court

Under Chapter IV (PROCEDURE), immediately at the end of Article 46 (Binding Force and Execution of Judgments), the insertion of a new CHAPTER IVA and new Articles 46A to 46L as follows:

**“CHAPTER IVA: PROVISIONS SPECIFIC TO THE
INTERNATIONAL CRIMINAL JURISDICTION OF THE COURT**



*Article 46A Rights of
Accused*

1. All accused shall be equal before the Court.
2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Court for the protection of victims and witnesses.
3. The accused shall be presumed innocent until proven guilty according to the provisions of this Statute.
4. In the determination of any charge against the accused pursuant to this Statute, he or she shall be entitled to the following minimum guarantees, in full equality:
 - a) To be informed promptly and in detail in a language that he or she understands of the nature and cause of the charge against him or her;
 - b) To have adequate time and facilities for the preparation of his or her defence and to communicate freely with counsel of his or her own choosing;
 - c) To be tried without undue delay;



- d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;
- e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;
- f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Court;
- g) Not to be compelled to testify against himself or herself or to confess guilt.
- h) To have the judgment pronounced publicly i)
To be informed of his /her right to appeal.

Article 46A bis

Immunities

No charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in



such capacity, or other senior state officials based on their functions, during their tenure of office.

Article 46B

Individual Criminal Responsibility

1. A person who commits an offence under this Statute shall be held individually responsible for the crime.
2. Subject to the provisions of Article 46*Abis* of this Statute, the official position of any accused person shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in article 28A of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.



4. The fact that an accused person acted pursuant to the order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Court determines that justice so requires.

Article 46C Corporate Criminal

Liability

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.



5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.

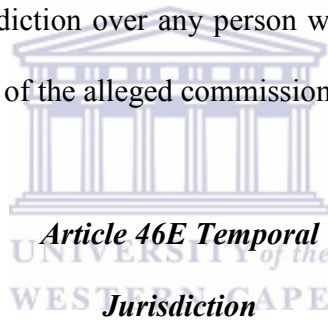


6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

Article 46D

Exclusion of Jurisdiction over Persons under the age of eighteen

The Court shall have no jurisdiction over any person who was under the age of eighteen (18) years at the time of the alleged commission of a crime.



1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Protocol and Statute.
2. If a State becomes a Party to this Protocol and Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Protocol and Statute for that State.

Article 46E bis



Preconditions to the exercise of Jurisdiction

1. A State which becomes a Party to this Protocol and Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 28A.

2. The Court may exercise its jurisdiction if one or more of the following conditions apply:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
 - (b) The State of which the person accused of the crime is a national. (c) When the victim of the crime is a national of that State.
 - (d) Extraterritorial acts by non-nationals which threaten a vital interest of that State.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise



***Article 46F Exercise of
Jurisdiction***

The Court may exercise its jurisdiction with respect to a crime referred to in article 28A in accordance with the provisions of this Statute if: -

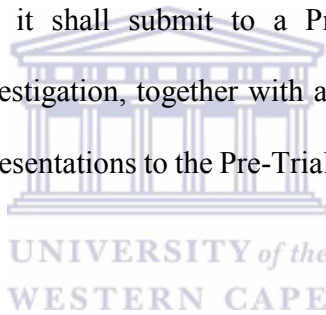
1. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party;
2. A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Assembly of Heads of State and Government of the African Union or the Peace and Security Council of the African Union.
3. The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 46G.

***Article 46G The
Prosecutor***

1. The Office of the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.



2. The Office of the Prosecutor shall analyze the seriousness of information received. For this purpose, he or she may seek additional information from States, organs of the African Union or United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony.
3. If the Office of the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, it shall submit to a Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of the Court.
4. If the Pre-Trial Chamber, upon examination of the request and supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Office of the Prosecutor based on new facts or evidence regarding the same situation.



6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Office of the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, it shall inform those who provided the information. This shall not preclude the Office of the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.



1. The jurisdiction of the Court shall be complementary to that of the National Courts, and to the Courts of the Regional Economic Communities where specifically provided for by the Communities.
2. The Court shall determine that a case is inadmissible where:
 - a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;



- b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute;
- c) The person concerned has already been tried for conduct which is the subject of the complaint;
- d) The case is not of sufficient gravity to justify further action by the Court.

3. In order to determine that a State is unwilling to investigate or prosecute in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

- a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
- b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
- c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner



which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.



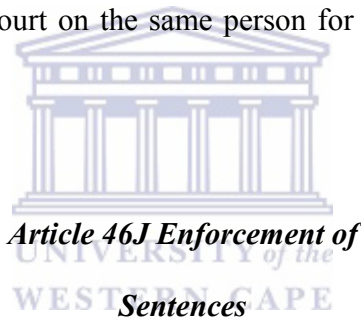
4. In order to determine that a State is unable to investigate or prosecute in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.



1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.
2. Except in exceptional circumstances, no person who has been tried by another court for conduct proscribed under Article 28A of this Statute shall be tried by the Court with respect to the same conduct unless the proceedings in the other Court:
 - a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;



- b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Court shall take into account the extent to which any penalty imposed by another Court on the same person for the same act has already been served.



1. A sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.
2. Such imprisonment shall be as provided for in a prior agreement between the Court and a receiving State and in accordance with the criteria as set out in the Rules of Court.



Article 46Jbis***Enforcement of fines and forfeiture measures***

1. States Parties shall give effect to fines or forfeitures ordered by the Court without prejudice to the rights of bona fide third parties, and in accordance with the procedure provided for in their national law.
2. If a State Party is unable to give effect to an order for forfeiture, it shall take measures to recover the value of the proceeds, property or assets ordered by the Court to be forfeited, without prejudice to the rights of bona fide third parties.
3. The Court shall determine in its Rules how real or movable property obtained by a State as a result of its enforcement of a judgment or order may be dealt with.

Article 46K***Pardon or Commutation of Sentences***

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Court accordingly. There shall only be pardon or commutation of sentence if the Court so decides on the basis of the interests of justice and the general principles of law.



*Article 46L**Co-operation and Judicial Assistance*

1. States Parties shall co-operate with the Court in the investigation and prosecution of persons accused of committing the crimes defined by this Statute.
2. States Parties shall comply without undue delay with any request for assistance or an order issued by the Court, including but not limited to:
 - a) The identification and location of persons;
 - b) The taking of testimony and the production of evidence;
 - c) The service of documents;
 - d) The arrest, detention or extradition of persons;
 - e) The surrender or the transfer of the accused to the Court.”
 - f) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties.



- g) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the court.
3. The Court shall be entitled to seek the co-operation or assistance of regional or international courts, non-States Parties or co-operating partners of the African Union and may conclude Agreements for that purpose.



1. The Assembly shall, by a Decision, establish, within the jurisdiction of the Court, a Trust Fund for legal aid and assistance and for the benefit of victims of crimes or human rights violations and their families.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly.

Article 23

Annual Activity Report



Article 57 of the Statute (Annual Activity Report) is deleted and substituted with the following:

“The Court shall submit to the Assembly an annual report on its work during the previous year. The report shall specify, in particular, the pending and concluded investigations, prosecutions and decisions and the cases in which a party has not complied with the judgment, sentence, order or penalty of the Court.”

