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THE QUEST FOR A HOMEGROWN CRIMINAL JUSTICE SYSTEM FOR AFRICA: A CASE STUDY OF THE PROPOSED AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

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DECLARATION

I, **LEAH WANJA MATI**, do declare that this is my original work and it has not been submitted and is not currently being submitted for a degree in any other University.

Signed…… Date……..…….

LEAH WANJA MATI

This thesis has been submitted with my knowledge and approval as the university supervisor.

Signed…… Date……..…….

FELIX ODIMMASI

SUPERVISOR

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DEDICATION

I dedicate this work to post-conflict victims in Africa who are yet to find justice for the atrocities suffered.

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LIST OF ABBREVIATIONS

AU	-	African Union
ACJHR	-	African Court of Justice and Human Rights
ACHPR	-	African Court of Human and People's Rights
ACJ	-	African Court of Justice
APSA	-	Africa Peace and Security Architecture
ICTJ	-	International Centre for Transitional Justice
ICTY	-	International Criminal Tribunal for the former Yugoslavia
ICTR	-	International Criminal Tribunal for Rwanda
LRA	-	Lord Resistance Army
NEPAD	-	New Partnership for African Development
ICC	-	International Criminal Court
PALU	-	Pan African Lawyers' Union
PSC	-	Peace and Security Councils
REC's	-	Regional Economic Communities
SADC	-	Southern Africa Development Community
UN	-	United Nations

ABSTRACT

Judicial reform is an integral component of transitional justice because it helps achieve respect for human rights and due process. This research project seeks to explore a coherent, analytical and critical look at the need for an international criminal justice system that is devoid of the politics that tends to frustrate the operations of the current international criminal justice system. The objective of the study is to create and raise awareness on the existence of the Malabo Protocol which potentially adds a third section to the proposed African Court of Justice and Human Rights by demonstrating how the ICC has failed to deter perpetrators of crimes against humanity in Africa. In doing so, the researcher shall employ both primary and secondary means of data collection to advance the Neo-realism theory of International relations which shall form the basis of this research. The target population for this study shall comprise of policy makers, civil servants and practitioners, lawyers, judges, prosecutors, detention officers and civil society actors owing to their ability to furnish the author with the practical and innovative solutions in this thematic area. The researcher used her own judgment to select the population members who would make good prospects for accurate information. The findings of the study include among others, the fact that very few Kenyans know of the existence of the proposed ACJHR and so this study concludes that a lot of sensitization needs to be done alongside proper research on the need for homegrown solutions to African problems. The study finally recommends interagency collaboration in the unified pursuit for an African court that is both geographically and ideologically accessible to the people.

CHAPTER ONE

1.1 Background of the Study

> *"We refuse to be carried along in a vehicle that has strayed off the course to the detriment of our sovereignty, security and dignity as Africans."*

President Uhuru Kenyatta speaking at the AU Summit in Addis Ababa (30th January 2015). In June 2014, the Assembly of the AU adopted[1] the Malabo Protocol which upon signing and ratification would grant criminal jurisdiction to the existing Africa Court of Human Rights. Shortly thereafter, the African Heads of State and Government meeting in Malabo, Equatorial Guinea, adapted the Protocol on the Statute of ACJHR which is yet to be ratified. It is the full adoption and implementation of this latter court that this study seeks to vouch for considering that it's undisputable that the ICC has not fostered justice in Africa.

Upon ratification, this new court will have jurisdiction to adjudicate interstate disputes, address human rights violations and prosecute serious crimes committed by individuals and corporations in the African continent. The scope of this new court would ostensibly extend its jurisdiction to crimes under international law exemplified in aggression, piracy, genocide, crimes against humanity and wall crimes as well as transitional crimes exemplified in terrorism, money laundering, trafficking in persons, drugs, hazardous wastes and illicit exploitation of natural resources.[2]

[1]Decision on the Draft Legal Instruments, Assembly/AU/Dec 529 (xxiii)

[2] Malabo Protocol, Articles 28B(genocide), 28C(Crimes Against Humanity), 28D (War Crimes), 28M (Crimes of aggression)

During the last decade, Kenya, for example has become some sort of a touchstone in broader debates surrounding transitional justice[3]. After the post-election violence in Kenya that wrecked the country's reputation, the acquittal of the alleged perpetrators laid a basis for competing imperatives and conflicting ideologies. The country has been the focus of a sustained international effort to implement an ideologically normative agenda that addresses both the rights of the people and the sovereignty of the country as a free state.

Simply put, if a society is to be truly guided by the rule of law, access to justice is key and it should be secured. The relationship between criminal trials and peace remains empirically underexplored and inevitably, the importance of 'the local' in matters peace building and transitional justice has become increasingly common in the academic and policy discourse. Judicial reform has actually become a hallmark of transitional justice and an enabling condition or precondition of the field.[4]

Research has shown that justice is a key prerequisite for lasting peace. Indisputably therefore, international justice is pegged on long term peace, stability and equitable development in post conflict societies as these are the foundational elements for building a future free of violence. The ICC Prosecutor, Fatou Bensouda, noted in 2013 that 'history has taught us that the peace achieved by ignoring justice has mostly been short-lived and the cycle of violence has continued unabated[5]. She went on to argue

[3] Transitional justice refers to the range of formal, informal or grass root mechanisms deployed by societies emerging from civil war or authoritarian rule to address past human rights violations.

[4]M Ndulo & R Duthie 'The role of Judicial reform in development and Transitional justice (2015)

[5] Bensouda F (2013) International Justice and Diplomacy, New york Times. Global Opinion 19/2/2013

that justice can have a positive impact on peace and security through the shadow of the ICC where she is a prosecutor.[6]

However, the purpose for which all these institutions were founded has not borne fruits because victims of these atrocities remain disgruntled with whatever the outcome the courts gave and increasingly, we have heard threats of withdrawal from the ICC by these countries. Across the continent, the victims' cry for justice is loud, clear and perpetual with impunity reigning supreme

As a matter of fact, questions have inevitably been raised, for example, concerning the quality of any justice dispensed by a court that is only focusing on crimes committed in Africa and is completely powerless to act against the superpowers.[7] Ironically, the state parties of the International Criminal Court make twenty seven percent of the world population and 70% are outside its jurisdiction.[8]

There are good reasons to support the conduct of trials at regional levels because communities get access to education about past conflict, which process in turn leads to a homegrown support for the rule of law. In Argentina, Bosnia, Colombia and Germany, citizens and people in power were subjected to a national criminal justice system that successfully resulted in them being held accountable for war crimes and crimes against humanity.

[6] ibid
[7] T. Allen 'Trial Justice' *The ICC and the Lord's Resistance Army'* London: David Philip 2006 @ 22
[8] J.M.Mbaku, '*Africa's case against the International Criminal Court'* Paper for Panel discussion on the ICC in Africa; Bias, Legitimate Objections or Excuses for Impunity'

Justice for victims of serious crimes can only be fully achieved if the perpetrators of those crimes are brought to justice and held accountable by fair, credible and independent judicial bodies. Prosecution also plays a major role in reducing recurrence of commission of these heinous crimes in future.

Additionally, the stakeholders ought to implement policies that vouch for public education, mobilization, ratification (of the additional Protocols), and domestication, improving the quality of our litigation, implementation and enforcement. Presently, victims of atrocity in Africa either do not know what options are available and if they do, they are not knowledgeable on what mechanisms to employ as a basis to seek justice. This study therefore, employs a deliberate strategy to adopt the spirit of the ACJHR both in theory and in practice. The crucial role of civil society, academia and the media, geared to achieving this cannot be gainsaid.

It is against this backdrop that this study sought to outline the need for regional level prosecutions and subsequent dispensations of cases as opposed to the current system under the ICC which is geographically, linguistically and procedurally detached from the people.

1.2 Statement of the problem

The United Nations Charter[9] lays a basis for the purpose for which international community is the brainchild for lasting international peace and security. It also emphasizes the need to prevent the occurrence of threats and misconduct that can

[9] Article 1 (1) UN Charter

jeopardize this purpose.[10] Unfortunately, this cannot be said to be true about Africa as exemplified in the change of government in Zimbabwe's Mugabe, Kenya's Uhuru and Ivory Coast's Gbagbo that led to serious conflict over neighboring communities.

During the last century, millions of innocent people in Africa have been victims of unimaginable atrocities that deeply shock the conscience of humanity. These grave crimes threaten the peace, security and wellbeing of the world and although states are duty bound by their respective national jurisdictions to investigate and prosecute these crimes, impunity continues to reign supreme owing to lacunas in the existing criminal justice system.

Whereas international courts operate far from the scenes of crime, regional courts have a 'hands-on' access to both the scene of crime and the victims themselves. The other major challenge posed by the international court is the failure by the governments of alleged perpetrators to co-operate and the lack of resources to hold senior officials accountable for atrocities. As a result, international courts rarely, if ever, succeed in reconciling formerly warring communities.

It is against this backdrop that this study shall seek to answer the following question: Does the future of international criminal justice in Africa lie in the duplicity of international judicial institutions or in the development of homegrown regional court?

[10] Charter of the United Nations of 1945 (the UN Charter), article 1(1).

1.3 Research objectives

1.3.1 General Objective

The general objective of this study is to assess the quest for a homegrown solution to the injustice that is felt by victims of criminal activities in Africa. In doing this, the study shall demonstrate the way the dispensation of justice to victims of crime in Africa and the punishment for the alleged perpetrators has been elusive by outlining the failures of the Rome Statute in the realm of international criminal justice system.

1.3.2 Specific Objectives

i. To interrogate whether or not the existing international criminal justice system has failed in the management of conflict for Africa;
ii. To assess the need for the development of a homegrown criminal justice system for Africa;
iii. Ultimately, the study shall analyze the role played by the Malabo Protocol as an approach to dealing with post-conflict disputes.

1.4 Research Questions

This study sought to answer the following research questions**:**

i. Does Africa need a homegrown criminal justice system to achieve reparation for the victims of criminal activities within the region?
ii. How have the existing frameworks in the current international criminal justice system failed to achieve the objectives for which they were established?
iii. What is the role played by the Malabo Protocol as an approach to dealing with post-conflict disputes?

1.5 Literature Review

1.5.1 Introduction

There exists a lot of literature that examines the efficacy or otherwise of international courts and various scholars in support of the effectiveness of transitional justice mechanisms have endeavored to explore this field exhaustively. For purposes of this paper, transitional justice is understood as a variety of instruments and mechanisms, both, judicial and non-judicial that include criminal prosecution of perpetrators, truth seeking initiatives, reparation programs or institutional reform. This study shall substantially focus on institutional reform as a tool of transitional just.

In June 2014, the African Union Assembly Heads of state and government meeting in Malabo, Equatorial Guinea, adopted the Protocol on the Amendments to the Protocol on the Statute of ACJHR.[11] Upon signing and ratification, this Protocol will extend the jurisdiction of the yet-to be established ACJHR to crimes against humanity, war and transitional crimes (terrorism, money laundering, trafficking in persons, hazardous wastes, illicit exploitation of natural resources).

According to Ademolla Abass,[12] the three fundamental bases to support the prosecution of international crimes by an African Regional Court are the historical necessity for such a court to prosecute crimes which are committed in Africa but which are of no prosecutorial interest to the rest of the world, a treaty obligation to prosecute

[11] Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights AU Doc No. STC/Legal/Min 7(1) Rev 1 14th May 2014

[12] Ademola Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges,' European Journal of International Law 24(3) (2013): 933–946

international crimes in Africa and the existence of crimes peculiar to Africa but to which global international criminal tribunals such as the ICC, have no jurisdiction.

Cherief Bassiouni is quoted as having said:

> 'We no longer live in a world where conceptions of jurisdiction and sovereignty can stand in the way of an effective system of international co-operation for the way of an effective system of international co-operation for the prevention and control of international and transnational criminality.[13]

Christian Bell is one of the few scholars who have sought to study transitional justice as a scholarly enterprise[14]. She notes that transitional justice as a distinct field of study emerged sometime in the late '90's and early 2000 and whereas early literature in this field was dominated by debates over the meaning of justice; with the retributivists vouching for the need for criminal prosecutions and advocates for restorative justice vouching for non-prosecutorial trials, recent debates are centred on the question of whether or not the field and practice of transitional justice has prioritized civil and political rights over social rights.

Clara Sandoval[15] argues that the field of transitional justice has undoubtedly articulated the language of social change among communities and using a realist approach, she contends that it is the transformation of the ideologies that permit atrocities to happen that transitional justice scholars should attempt to pursue. By so

[13] Bassiouni 'The Time has come for and international criminal court' I IND & COMP L Rev 1 (1991)
[14]B, Christine '*Transitional Justice, Interdisciplinary and the State of the field or non-field*' International Journal of Transitional Justice (3) 2008: 5-27

[15]Sandoval C, 'Facing the Justice Dilemma' Oxford Transitional Justice Research, April 2015 available at http:the conversation.com/Can Columbia's new peace agreement hold all the parties to account?

doing, justice is delivered through reparation, truth and the instances of conflict recurrence are reduced.

Although there is currently a growing consensus of the nexus between peace and justice, for example the UN Secretary General has emphasized the importance of integrating justice into the peace process.[16] In the fullness of time, the researcher shall demonstrate how the ratification of the Malabo Protocol shall help the region to achieve this lasting peace.

In a report dated 23rd August 2004, the Secretary General to the United Nations Security Council noted that the recent years have seen an increased focus by the United Nations on the questions of transitional justice and the rule of law in conflict and post conflict societies, yielding important lessons for our future activities[17]. This success depends on a number of critical factors, one of which is the need to ensure a common basis in international norms and standards and to mobilise the necessary resources for sustainable investment in justice. It is this latter factor that this study has pursued with a view to embrace sustainable change for the judicial reform in the region.

Godfrey Musila of the International Criminal Law Research Department at Germany's International Numberg Principles Academy opines that the inbuilt mechanisms in the proposed African Court prevents it from prosecuting heads of states and government

[16] Draft report Wilton Park Conference, "Transitional Justice and Rule of Law in Post-Conflict Societies: The Role of International Actors", 24-26 January 2005, p. 2.
[17] The Rule of Law and transitional justice in conflict and post conflict societies: Report of the Secretary General dated 23rd August 2004 S/2004/616 at Paragraph 8

as exemplified in the Bashir case and a score of other African leaders whose unconstitutional transitions to power have been an object of scrutiny over the years.[18]

Kamari Clarke[19] further explains that although there are raging debates for the imminent withdrawal from the ICC, the need to stay on board is fuelled by the expressive will to demonstrate a commitment to international membership. This 'safety in numbers' kind of approach to conflict resolution further builds on the many arguments in support of a regional court.

John Mbaku [20] on the other hand, opines that the ICC has lost its glory and restoring it is a monumental task that would require the type of robust dialogue. This commitment is not felt among African states and moving forward, he recommends that each country must develop the capacity to effectively investigate and prosecute international crimes committed within its borders.

During an intellectual dialogue held at the Strathmore University in the aftermath of a ruling that saw the acquittal of President Uhuru Kenyatta and his deputy William Ruto, Kenyan scholars, among them Dr. Maluki of the University of Nairobi is quoted as having said that Kenya ought to apply all the instruments at its disposal to end the cases at the ICC because according to him, in the world of politics of international diplomacy, the end justifies the means.In keeping with the rules that govern international justice as analysed by these scholars, this study shall endeavor to

[18]Musila G Options for justice in Kenya (2000)
[19]K. M. Clarke 'Why Africa? In Richard H Steinberg (ed) Contemporary Issues Facing the International Criminal Court Brill 2016 326-332
[20]Mbaku J 'International Justice: The International Criminal Court and Africa (OUP) 2006

demonstrate that development of a regional court is the ultimate tool for conflict managers in the region.

Firstly, it remains arguable what rules of international law would apply in cases where states are expected to ratify a treaty to the exclusion of another treaty that governs the same subject as the pre-existing one[21]. In an attempt to explain this, Paul Seils[22] expounds on the rule of complementarity as envisioned by the drafters of the Rome Statute but this study further seeks to demonstrate that this goal is yet to be achieved.

In a concept paper dated October 2010, studies show that over the past 20 years, there has been a proliferation of transitional justice mechanisms that have promised more accountability for perpetrators and less redress for victims. However, a majority of these mechanisms have focused on the countries in the Global South which are often supported by intergovernmental organizations and not Africa. Needless to say, the performance and impact of such mechanisms has been at best ambiguous and at times disappointing. In critique, these mechanisms are said to be treating the symptoms as opposed to the causes of conflict.[23] These challenges are further expounded in the researcher's analysis of the data collection in Chapter 4 of this paper.

[21]The AU is not a signatory to the Rome Statute and the efforts to seek legality of its own court under that statute creates a legal, moral and political dilemma among scholars and practitioners alike.

[22] P. Seils 'A handbook to the role of National Courts and the ICC in Prosecuting Interantional Crimes (2005)

[23] Alexander. *A Scoping Study of Transitional Justice and Poverty Reduction*: Final Report. London: DFID, January 2003. L

1.6 Summary of Gaps in the Literature

It's evident from the literature analyzed that little has been done in respect to sensitizing Africans about the existence of an African court to hear criminal cases. The international criminal justice project is intended to help survivors, deter future crime, and act as a means to heal society within not only an international criminal law framework, but a transitional justice one as well. Judicial reform is specifically a very important component of transitional justice because it helps achieve respect for human rights and due process by repairing the citizen's trust in the state's impartiality.

The literature analyzed above has failed to demonstrate how the nexus between transitional justice and the international criminal law framework impacts on institutional reform. Further, the law is inherently unemotional and objective, yet the international community takes charged ownership over the core crimes without realizing that these crimes cannot and should not be severed from their local contexts. Moving forward, it would be imperative for scholars to pursue courses that seek to unify these crimes both contextually and in practice. Additionally, although the literature is rich in critique, the nexus between transitional justice and judicial reform is a field that remains interestingly underexplored. The debate as to whether or not a court that is created by a multilateral treaty requires the approval of another multilateral treaty creating a similar court is one that has also been scrutinized without any success of a consensus.

1.7 Hypothesis

This study was premised on two hypotheses:

i. There's need to have a homegrown criminal justice system in order to achieve justice for victims of crime in Africa;
ii. There will be a significant change in the dispensation of justice system in Africa if the Malabo Protocol is signed and ratified;

1.8 Justification of the Study

1.8.1 Policy Justification

The findings of this study will be instrumental in informing the next course of action for policy makers and international conflict managers who share in the spirit of pan Africanism with the researcher. Ultimately, the adoption of these policies and legislation shall enhance respect for the rule of law and dispensation of justice within the region.

1.8.2 Academic Justification

This study will also be beneficial to academia in the sense that it will add useful information to the body of knowledge and provide a reference point for scholars in the area of international conflict management.

1.9 Theoretical Framework

Theoretical paradigms in international relations are defined by distinctive causal mechanisms that link fundamental causes such as economic, technological, cultural, social, political and behavioural changes among states in world politics to world behaviour.

The theory that this study adopted is the theory of neoliberalism. This theory is premised on the concept that actors in the international system could reach a 'peaceful world order'. It has even been suggested that it is neoliberalism that dominantly shapes the ideology of the world today by acknowledging that non state actors are highly important in the international system as they are in the regional sphere. The neoliberalism theory also appreciates the role that political will plays in the prosecution of international crimes, an aspect that this study shall exhaustively explore.

According to Robert Keohane, liberalism has indeed led to a shift in international relations in the sense that since 1990's there has been an increase in legalisation, legalism and moralism expressed by civil society leaders, a factor that has led to the creation and modification of international institutions.[24] He also argues that the rise of human rights documents in recent decades is evidence of the increased emphasis on moralism by states in the international system.

This study shall rely on this theory to comparatively analyze the current international system of resolving and bringing an end to conflict with the proposed homegrown (self-help) model that is more intrinsically linked to the needs and aspirations of the conflict situation in the region.

Empirically, this study shall employ the use of questionnaires whose feedback the researcher shall use to compile a model akin to the current situation in the existing framework. In the mainstream international relations practice, states are rational actors

[24] Koehane R (2012) Twenty years of institutional liberalism International Relations Vol 26 Pp 125-138

who seek to maximize their power and security and it's necessary for them to create a necessary condition for durable domestic political order. The establishment of a regional court as vouched for by this study obviously accords the liberalist model outlined in the theoretical review.

1.10 Research Methodology

1.10.1 Research Design

Mixed method research employs the combination of qualitative and quantitative approaches. The study employed this method because it best utilized the strength of both qualitative and quantitative research. The researcher shall not only conduct surveys on the effectiveness of regional courts based on existing data on opinion polls, demographic charts and scholarly writings but she shall also interview respondents who are reachable individually and administer questionnaires to respondents who are not physically accessible.

1.10.2 Study Site

The location of the study was Nairobi, which is capital city in Kenya. However, the research also relied substantially on the information received from respondents living abroad who sent their views on email.

1.10.3 Population

The questionnaires were administered to one hundred (100) respondents who happen to be colleagues and friends to the researcher. The experts are drawn from the Kenya Judiciary, Office of the Director of Public Prosecutions, Kenya and University of Nairobi's Institute of Diplomacy and International Studies. These individuals enriched

this discourse by bringing to bear their unique experiences of living and working in a post-conflict society. The researcher introduced herself to the respondents explaining that she is a student at the university in an introduction note sent attached to the questionnaires and sent via email. She then sought their consent to participate in the research.

1.10.4 Sampling Technique

The researcher utilized Non-probability sampling and specifically judgment sampling. The researcher used his own judgment to select the population members who were good prospects for accurate information. This is because the nature of information/data that the researcher was collecting was from specific respondents and thereby their selection was vital for the success of the study.

1.10.5 Sample Size

The researcher was able to sample twenty respondents out of the target population who formed the sample size.

1.10.6 Tools for Data Collection

Questionnaires will also be administered to people in authority who have had the opportunity to actively influence the regulation of criminal justice in Kenya as a social institution and the victims of the violence. The professionals will assist with the clarification of some aspects of recorded/ secondary data if need be. All data collection instruments and procedures will be thoroughly pilot-tested prior to being used in settings similar to those in which they will be administered, but none of the interviewees that will participate in the study will take part in the tools piloting phase.

The study will be done in Nairobi to avoid influence of the pilot results on subsequent responses to the research questions.

Secondary data: This being the data that has been previously collected from secondary sources. In this study the secondary sources will be;

(a) Opinion Polls that have been previously conducted by other agencies

(b) Demographic charts compiled by other researchers

(c) The various debates that have been conducted by the practitioners in this field.

(d) Writings and publications on the realm of International law practice and its impact on international relations

1.10.7 Data Collection Techniques

Data collection was done using a questionnaire based on the fact that majority of the respondents that the researcher was seeking information from had gone through formal education and were therefore literate.

1.10.8 Data Analysis

Quantitative and qualitative data collected was analysed by the researcher and this formed part of the critical review discussion in chapter four of the study.

1.10.9 Presentation of Data

The data would be presented by way of pie charts for ease of reference and restructuring in the event of change of record.

1.11 Scope and Limitations of the Research

The scope of this study was mainly to sensitize the readers on the on the existence of a proposed ACJHR which, if ratified, would bring justice to Africa. The researcher acknowledges that very little sensitization has been done on this and so the focus of the study is to interrogate the quest for the need for a homegrown criminal justice system.

The greatest limitations to this research were allocation of time for interviews by experts in this field. The research was also limited by resources and time constraints.

1.12 Chapter Outline

Chapter one shall outline the background of the research topic based on existing theories, previous research and personal observation whereas chapter two shall cast aspersions on the existing structures by demonstrating the need for a homegrown criminal justice system for Africa. Chapter three shall illustrate how the current systems have failed Africans despite being in existence for a long time. Chapter four shall exhaustively analyze how the Malabo Protocol seeks to fill the gaps created by the current regime and ultimately, chapter five shall summarize the conclusion by providing suggestions that can aid in the reform of the current system by way of recommendations.

CHAPTER TWO

THE AFRICAN PROBLEM AND THE NEED TO EMPLOY HOMEGROWN SOLUTIONS TO INTERNATIONAL CRIMINAL JUSTICE

2.0 Introduction

Following the political-ethnic environment that followed the signing of the Arusha Peace and Reconciliation Agreement in 2000, the Burundi government proposed to set up a Truth and Reconciliation Commission. However, this Commission is yet to be established.

In Kenya, the aftermath of the post-election violence in Kenya in 2007 led to the establishment of two commissions to investigate the conduct of business during and after the elections: a commission of inquiry on post-election violence, and a commission to review the elections. These commissions recommended that a Truth and Reconciliation commission and a special tribunal be formed and whereas the Truth, Justice and Reconciliation Commission was established, attempts to establish a tribunal have been unsuccessful due to lack of support from the Parliament[25]. The inability to set up a tribunal prompted the ICC to conduct investigations into the post-election violence in Kenya, which had trigged politico-diplomatic actions at regional and continental levels to pursue a deferral of the ICC proceedings by the United Nations Security Council (UNSC).

[25] Report on the Workshop on Regional Approaches to International Criminal Law, Arusha Tanzania, November 2015

In Rwanda, the 1994 Rwanda genocide of Tutsis and moderate Hutus saw the collapse of the judicial system because many judges were either killed or had fled the country. When the new leaders took office at the end of the genocide period, it was felt that if the criminal cases compiled during this period were submitted to the traditional justice system mechanisms, the process would have taken up to 200 years to complete. In retrospect, the government therefore set up the Gacaca Courts within local communities. The Gacaca courts trials had the advantage of being expeditious, and their sentences included reduced periods of imprisonment and submission to reconstruction programmes. It had been documented that Gacaca courts contributed greatly to the country's reconciliation.

The International Criminal Tribunal for Rwanda (ICTR), whose main mandate was to prosecute the high-end criminals during the genocide is reported to have inherent limitations which attracted criticism, particularly among Rwandans, for the relatively small number of cases it handled, its high running cost, bureaucratic processes, length of time taken by trials and the fact that it was located outside Rwanda. The most significant failure of the ICTR has reportedly been its unwillingness to prosecute crimes committed by the RPF in 1994, many of which constituted war crimes and crimes against humanity.[26]

[26] For a detailed description of the Rwandan genocide, See Human Rights Watch/ International Federation of Human Rights 'Leave none to tell the story: Genocide in Rwanda (New York Human Rights Watch, 1999)

For the Ugandan case, the experience with transitional justice started following the failure to end the twenty year old war against the Lord's Resistance Army (LRA). The Government had passed the Amnesty Act in 2000, but after the ratification of the Rome Statute in 2003, it opted to refer the LRA situation to the ICC.

Despite attempts by cultural and religious leaders from Northern Uganda to persuade the ICC prosecutor to spare the rebels, arrest warrants had subsequently been issued against Joseph Kony, the LRA leader, and four of his closest commanders. This led to the failure of the 2006-2008 Government-LRA negotiations, as Joseph Kony had entered into the negotiations on the condition that ICC prosecutions would be suspended.

2.1 What are these African Problems; Is It a Case of Stereotyping?

The ICC has faced criticism for seemingly targeting African leaders to the exclusion of western and middle east leaders who have been reported to be embroiled in conflicts that have caused mass violations of rights and deaths of countless civilians in countries such as Iraq, Afghanistan, Israel and Palestine to name just but a few.

Fatou Bensouda is quoted as having said that 'no other continent has paid more dearly than Africa for the absence of legitimate institutions of law and accountability, resulting in a culture of impunity.'[27]

[27] H Fallow and F Bensouda 'International criminal law in an African context' African guide to International criminal justice 2008

In a passionate article voicing condemnation[28] of the perceived unequal application of international criminal justice, Aayesha Soni[29] writes:

> '*Why is George Bush not being tried, the man who led a modern day crusade against Iraq and Afghanistan with fabricated motives and responsible for the complete destruction of those countries (….)'*
> *'Why is Benjamin Netanyahu not being tried? A man who launches an offensive on the besieged people of Gaza, wreaking havoc and death that does not spare children, hospitals and even UN shelters. Extensive fact finding missions have concluded that Israel is guilty of war crimes already. That warrants a trial (….)'*

A stereotype is a fixed, over-generalized belief about a particular group of people or a co- culture. No matter how accurate or inaccurate a stereotype is, it is mostly based on some reality, some truth, albeit just a kernel of truth or half-truth, something that actually happened.

The ICC has been stereotyped as a court that unfairly targets Africans for crimes which other leaders have gotten away with. Whether this be true or untrue, this study advances an argument against this stereotype with a view to find a lasting solution for the region.

[28] Such sentiments have been echoed by the likes of Nobel Peace Price Winner, Desmond Tutu. See 'Tony Blair should face trial over Iraq' says Desmond Tutu, The Guardian 2nd September 2012
[29] S Aayesha, 'The ICC: When Law becomes injustice' http//www.politicsweb.co.za/opinion/why is the ICC not trying Bush, Blair, Netanyahu? Last accessed on 8th May 2015

2.1.1 War and Politics

Criminality and residual violence are commonly found in most post-conflict environments. Although one might assume that the signing of a peace agreement or the cessation of hostilities begins an era of peace and non-violence, in reality this is not generally the case. A post-conflict environment is often a breeding ground for violence and criminality for a number of reasons, including the culture of violence that surrounds the conflict; the free flow of weapons; the presence of a large number of ex-combatants; the breakdown of the criminal justice system; the lack of accountability mechanisms; and the existence of "spoiler" groups that were either not part of the peace process or that reject the results of the peace process and that turn to violence to pursue their objectives. Such crimes and levels of violence have a deleterious impact on peace, security, and development.

In the case of the Democratic Republic of the Congo, while the country was apparently on the road to peace in 2003–2004, widespread fighting between armed groups still continued, as did widespread human rights violations, including ethnic massacres and sexual violence. In Burundi, even after the signing of the Arusha Peace and Reconciliation Agreement for Burundi, war crimes and other grave violations of human rights continued unabated.

The activities of spoilers may continue for years after the official cessation of conflict or the signing of a peace agreement. The nexus between war and politics in the context of defunct judicial reforms, particularly in the African region cannot be gainsaid.

2.1.2 Unconstitutional Changes in Government

The problem of unconstitutional changes in government within Africa have taken the form of military coups as was seen in Mauritania and Guinea in 2008, Madagascar in 2009 and in Nigeria in 2010. Other examples include tenure prolongation through constitutional amendment by sitting presidents, manipulating the political system to facilitate father to son succession and rigging of elections by incumbent governments or their refusal to concede defeat. This poses a major challenge to democratic stability, development and consolidation in the region. The existing mechanisms that have been set up to deal with these include the AU's Constitutive Act, the Lome Declaration and the ECOWAS Democracy and Good Governance Protocols.

To say that these mechanisms have failed would be an understatement. The complicity is often rooted in colonial and postcolonial history, particularly among ex-colonial powers seeking to protect long-term economic or strategic interests, or could result from economic, strategic and energy security calculations by the world's established and emerging powers keen to pursue or preserve beneficial relations.

External actors who take the form of neighboring states with a stake in the outcome of elections or post-election violence are also a great stakeholder in what frustrates this course. The result of adverse external meddling in countries afflicted by unconstitutional power changes, or the crisis arising therefrom, is the undermining of the emergence of autonomous state structures and institutions that can give rise to indigenous democratic governance structures and processes.

With the ratification of the Malabo Protocol, the full implication would be that future generations would not have to grapple with the complex criminal actions resulting from unconstitutional changes in government because the Protocol envisages criminal activities associated with these changes.

2.1.3 Economic Crimes in Africa

Article 46 C of the Protocol provides for prosecution of both natural persons and entities on established bases- consent, territorial, passive personality and protective principles. Traditionally criminal elements within this sphere would get away with crime owing to the absence of a legal framework on the basis of which they would be prosecuted as was seen in the Gambian President's case where he looted the country's wealth and then went into exile.

In Cote'de Ivore, the government established a body to conduct investigations into violent crimes, economic crimes and attacks on state security[30] in the wake of post-election violence in 2010 that left 3,010 people dead and although investigations were conducted and trials initiated, structural and financial issues were a great setback. [31]

The lopsided nature of the indictments which appeared to focus on one group undermined the credibility of the entire process. To make matters worse, the ICC, upon Cote 'de Ivore's request, took over cases against Charles Ble Goude, an ally of the former president and the former first lady Simone Gbagbo but the government refused to transfer the latter to the ICC for trial.

[30] International Centre for Transitional Justice 'Disappointed Hope: Judicial Handling of Post-Election Violence in Cote 'd Ivore (April 2016)
[31] ibid

In Rwanda, the advent of the *gacaca* courts has been disparaged on grounds that it fails to meet international fair standards exemplified in impartiality, defense and equality before the law, especially because most of those who were ultimately trued were ethnic Hutus or their dissidents[32].

Similarly, international criminal law has not provided jurisdiction over corporate entities and this debate has domineered many a boardroom since as long ago as 1950's.[33]Recently, the debate was mooted during ICC negotiations but the incorporation of some ideas and not others has complicated enforcement and frustrated efforts of making any treaty[34]. The proposal by Malabo therefore, brings on board a serious advancement in the field of international criminal law[35] and this could enable states to respond more effectively to the challenges that have been previously posed by Corporations. [36]

[32] Susan Thomson, 'The Darker side of Transitional Justice ; The power dynamics behind Rwanda Gacaca Courts' Africa 81(3) 2011 373-390

[3333] See 'Report of the Committee on International Criminal Jurisdiction' UN Doc A/2136(1952)

[34] Joana Kyriakakus, Árticle 46C: Corporate Criminal Liability at the African Criminal Court' in 'The African Court of Justice and Humand and Peoples Court 'ed Kamari Clarke and Charles Jalloh Cambridge University Press (2017)

[35] See Philip Ambach *Ínternational Criminal Responsibility of Transitional Corporate Actors Doing Business in Zones of Armed Conflic*t in *Ínvestment Law within International Law'* Intergrationist Perspectives ed Freya Baetens (Cambridge University Press, 2013)

[36] Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources (2002) Final Report of the Monitoring Mechanism on Angola Sanctions UN/DOC/S/2000/1225 (2003) Report of the Panel of Experts, Sierra Leone UN/DOC/S2000/1195/00

2.1.4 Border Conflicts in Africa

Upon inheriting the colonial borders, the relevant institutions did not take up formal land distribution procedures that would allow for formal demarcations. This has caused great instability in the region arising from disputes that touch or border lines.[37]

The neglect of these borders has also contributed to criminality as it has made these areas susceptible to insurgents and terrorist groups[38]. West African has particularly been vulnerable to cross border criminal activities arising out of its geographical position[39] and the state in which the colonialists left it at. In East Africa the spate of terrorist attacks from Somalia has rendered Kenya particularly vulnerable.[40] In the Great Lakes sub region, the proliferation of light weapons has fueled conflict, to name just but a few.[41]

2.2 Has the Idea of Regional Courts Worked Elsewhere? Benchmarking Results

The European Court of Justice, the European Court of Human Rights and the Inter-American Court are the international courts that have proven that regional dispensations can work. Formed by the Statute of the Inter-American Court of Human Rights, the latter court goes beyond the court's strict human rights mandate to prosecute international criminal law violations as equitable remedies to human rights

[37] Francis Nguendi Ikome, África's International Borders as Potential sources of Conflict and Future Threats to Peace and Security'Institute for security studies Paper No. 233(May 2012)
[38] See África̱n Union Leaders Look to enhance terror fight' Telesurtv 3rd September 2014 http//www.telesurtv.net/English/newa/African Union leaders look to enhance terror fight- 20140903-0056.html)
[39] Prosper Addo, *Çross Border criminal activities in West Africa: Options for effective Responses'* Koffi Annan International Peacekeeping Training Centre Paper No.12/ May 06
[40] Joshua Meservey, 'False Security in Kenya' When counterterrorism is counterproductive' *Foreign Affairs,* 21st May 2015
[41] Paul Elvis, '*SALW in the Horn of Africa and the Great Lakes region: Challenges and Ways forward*' Brown Journal of World Affairs 9(1) 2002 251-260

violations.[42] These courts collaborate with national authorities and national elites to promote a deliberate democratic approach to heinous crimes against humanity that are committed within their jurisdiction.

The ECJ and the ECHR have worked closely with domestic actors-courts, agencies, organizations and private citizens to ground their legal authority[43]. These courts even go as far as sharing and coopting domestic law makers, judges and citizens who then pressured governments for compliance. The incorporation of the concept of the 'right to truth'[44] also goes a long way in achieving this.

Reports have shown that the European Union is one of the biggest financial contributors to transitional justice initiatives worldwide. The union does this by employing both geographical and thematic European Union external instruments that promote democracy, the rule of law, justice and security sector reform, good governance, gender equality and support for the vulnerable groups worldwide. The EU Policy on Transitional Justice provides a framework for the European Union to support transitional justice mechanisms so that it enhances the EU's ability to play an active role in dealing with past violations and abuses.[45]

Observers of the ECJ have emphasized the extent to which the ECJ has relied on national courts to reinforce and expand its jurisdiction.[46] The success and the

[42] Alexander Hunees '*International Criminal Law by other means: The Quasi-Criminal Jurisdiction of the Human Rights Court'* American Journal of International Law 107(1) 2013
[43] Paul McKaskle 'The European Court of Human Rights: What it is, How it Works, And its Future' University of San Francisco Law Review 40 (1) 2005 1-84
[44] The Right to Truth is a maxim that is contained in the international legal and policy instruments and it has been affirmed by the Inter American and European Court of Human Rights
[45] Federico Mancini 'The Making of a Constitution for Europe' 26 Common Market l reV (595, 605 (1989)
[46] Andrew Moravcsik, 'Explaining International Human Rights Regimes' Liberal Theory and Western Europe 1EUR INT'L REL 157

subsequent declaration of the Nuremberg and Tokyo as the cornerstone of the existing international legal order greatly demonstrate the fruits of collaboration with national governments in the prosecution and conviction of the perpetrators and reparation for the victims.

2.3 Why 'Homegrown' Solution; Is This Feasible?

It is said that charity begins at home. A less hierarchical international criminal justice system that resonates with the needs of the population is likely to ideal for a society like Africa. When diverse perspectives of the local populations are incorporated in the policies, the goals of any organization are met wholesomely.

The Malabo Protocol envisages a scenario where the judges who are appointed to hear cases appreciate the diversity of opinions and ideology despite them have received a relatively uniform level of training.

Whereas the researcher admits that internationally driven programs might not entirely suit the situation for Africa[47], this study seeks to give hope for victims who have to deal with the existing structure that is mulled by infrastructural and ideological setbacks.

[47] Okereke, Chukwumenje 'Homegrown Development in Africa. Reality or Illusion (2004)

2.4 Conclusion

This study seeks to create more awareness about the existence of the ACJHR among international conflict managers. A theory that promotes transitional justice in reform was therefore useful. This chapter has demonstrated that Africa is in dire need of a homegrown court that is accessible to the victims of atrocity in pursuit of justice. The study has demonstrated that there are no ideal solutions in the field of transitional justice as there will always be tensions between the desire and the need to prosecute the perpetrators of crimes. For accountability to be achieved, studies have shown that there will be need to be multiple compromises in which justice can only be imperfectly implemented[48]. This study has shown what compromise would work with the criminal system within the region.

[48] Siram C. L and S Pillay (eds) 2009 'Peace versus Justice in Africa, Scotsville SA University of Kwazailu Natal Press

CHAPTER THREE

CHALLENGES FACING THE CURRENT COURT SYSTEM FROM ACHIEVING ITS OBJECTIVES; IS IT A TYPICAL CASE OF MULTIPLICITY INLEGISLATION OR ABSENCE OF A UNIFIED REGIONAL BODY?

3.0 Introduction

The main focus of the chapter is the challenges hindering the successful prosecutions of cases at the ICC and other arbiters that have been established for that purpose in Africa. It also discusses the challenges which have crippled the signing and ratification of the Malabo Protocol which would probably act as a backup plan for the region. It is tailored to particularly address uniform challenges affecting both dispensations in the management of conflict within Africa.

The role that regional organizations can play in matters of peace and security has long been recognized. For example, in a 1992 Report of the former UN Secretary General Boutrous Boutrous Ghali, he stated that regional arrangements and agencies possess a potential that should be utilized in preventive diplomacy, peace keeping, peacemaking and post conflict peace building[49]. This report also notes that regional arrangements for which it provides a flexible definition could help lighten the burden of the UN Security Council and at the same time contribute to a deeper sense of participation, consensus and democratization in international affairs.[50]

[49] UN An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peacebuilding 1992
[50] ibid

The brutal colonial domination that followed a post- independence Africa brought authoritarianism and repression of peaceful political opposition which brought about successive episodes of human rights abuses. Governments in Uganda, Democratic Republic of Congo and Mali, for example, have referred situations in their territory to the International Criminal Court but in all these cases, the ICC investigated rebel crimes rather than state crimes. Progressively, many commentators in Africa have opined that the quest for a regional court to prosecute international crimes cannot be gainsaid.

In September 2013[51], the African Union held a summit to discuss the possibility of collective African withdrawal from the ICC and although this failed this continued backlash against the ICC has rendered the institution weak and politically irrelevant.[52]

Whereas there is nothing continentally-specific about crimes committed during conflict it is not disputed that the first investigations of the International Criminal Court (ICC) are concentrated in Africa. The absence of direct Great Power involvement in these conflicts makes Africa more susceptible than other parts of the world to such investigations. Africa is inevitably showing itself as a strenuous testing-ground for the future work of the ICC.

[51]AU Summit on ICC Pullout over Ruto Trial, BBC News (September 20, 2013)
[52] Jack Snyder and Leslie Vinjamuri ' Trials and Errors: Principle and Pragmatism in strategies of International Justice''28 INTL SECURITY, 2003-2004

The questionnaire was designed in a manner to allow the respondents to comment on the challenges in respect of what they think is the reason the ICC cannot meet its objectives. The outcome of the fieldwork corroborated secondary data that has identified the challenges hindering the ICC from achieving a peaceful Africa.

Presently, the only court that exists in Africa is the Africa Court of Human and People's Rights which came into existence in 2006 following the adoption of the Protocol to the African Charter on Human and Peoples rights in 1998. Most recently, following an Assembly decision[53], the AU phas taken steps to add a criminal section to the Human Rights and general affairs of the ACPHR which provides for the prosecution of perpetrators of unconstitutional changes of government by the competent court of the Union.

According to Deya,[54] three issues are key for the adoption of this court: the concern by the AU member states concerning the abuse of the principle of universal jurisdiction by non-African states, problems encountered in the prosecution of the former president of Chad for international crimes and the need to give effect to Article 25(5) of the African Charter on Democracy, Elections and Governance.

Murungu[55], on the other hand, suggests that the main reason for giving the court criminal jurisdiction is the AU's strained relations with the ICC which issued an arrest warrant for sitting head of state Omar Hassan in 2007.

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[53]Assembly/AU/Dec 213 (XII) adapted at the 12th Ordinary Session of the HSoG Assembly in Addis Ababa, Ethiopia from 1-3 Feb 2009

[54] D Deya '*Worth the wait: Pushing for the African Court to exercise jurisdiction of International crimes 6/3/23* Open Society Initiative for SA

[55]CB Murungu '*Towards a criminal chamber in the African Court of People and Human Rights'* A journal of the International Council of Jurists 1067-1079

Be it as it may, the researcher aims to demonstrate that the ACJHR is a noble idea which ought to be operationalized and sustained for the victims of atrocities in Africa to find reparation.

3.1 The Current Court System

3.1.1 Domestic Courts

Domestic courts, also known as municipal courts, have failed dismally when it comes to conducting prosecutions for perpetrators of violence in the region. This failure can be attributed to the absence of a uniform legal framework to address this, inadequate competencies, human and technical resources, lack of legitimacy and local ownership of the process, lack of political will and the influence of international politics associated with the ICC-related cases. There's a general distrust between the investigating police offices and the general public and the judicial arm of government and the general public. [56]

A government's political commitment to the entire process of transitional justice is equally critical. However, domestic efforts towards holding the alleged perpetrators of international crimes accountable for the atrocities has been largely characterized by a lack of political will as was seen in the Uhuru Kenyatta case in the ICC.

[56] Human Rights Watch 'Turning pebbles: evading accountability for post election violence in Kenya (2011) 4

Moving forward, the introduction of an International Crimes Division within the High Court as a special prosecutorial unit for these kinds of crimes has been proposed but for how long should the Kenyans, for instance, wait for this given that the inception of this division has never taken root?

3.1.2 African Court on Human and Peoples' Rights (ACHPR)

This court has a mandate to hear cases and disputes in relation to the interpretation and application of the African Charter, its Protocol and any other relevant Human Rights instrument ratified by the States concerned. Additionally, it provides an advisory opinion on any legal matter relating to the African Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission on Human and Peoples' Rights (African Commission).

3.1.3 African Court of Justice (ACJ)

This is the principal judicial organ of the AU that has jurisdiction over the interpretation and application of the African Union Act, the interpretation, application or validity of Union treaties and all subsidiary legal instruments adopted within the framework of the Union, any question of international law, all acts, decisions, regulations and directives of the organs of the Union, all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court; the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the Union and the nature or extent of the reparation to be made for the breach of an obligation

3.1.4 African Court of Justice and Human Rights (ACJHR) (merged court)

This was a merger by the ACHPR and ACJ to establish a single court, the ACJHR. - Jurisdiction over the interpretation and application of the Constitutive Act; the interpretation, application or validity of other AU Treaties and all subsidiary legal instruments adopted within the framework of the AU or OAU; the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), or any other legal instrument relating to human rights, ratified by the States Parties concerned; any question of international law; all acts, decisions, regulations and directives of the organs of the AU; all matters specifically provided for in any other agreements that States Parties may conclude among themselves, or with the AU and which confer jurisdiction on the Court; the existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or to the AU; the nature or extent of the reparation to be made for the breach of an international obligation - Complementary mandate with the African Commission and the African Committee of Experts on the Rights and Welfare of the Child. - Divides the court into two sections: general affairs and human rights.

3.1.5 The International Criminal Court

'An International Criminal Court (the Court) is hereby established. It shall be of 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 criminal jurisdictions. The Jurisdiction and functioning of the court shall be governed by the provisions of the Statute.'[57]

The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, international criminal court established to help end impunity for perpetrators of the most serious crimes of concern to the international community. Outside of the arena of international criminal law, regional mechanisms have often become the implementation means of choice, and sometimes have proven more effective than universal mechanisms, including in relation to human rights.

Legal scholar William Burke-White observes:

> 'The creation of the ICC has given states an excuse to shift, at least rhetorically, the burdens of prosecuting international crimes from national governments to the new international tribunal. As a result of unrealistic expectations and limited resources, the court may well be seen as a failure[58]. As an alternative, Burke proposes a policy of proactive complementarity which would require the ICC to co-operate with national governments and use political leverage to encourage states to undertake their own prosecutions of international crimes.[59]

Other scholars opine that the ICC is a politicized mechanism, no less rooted in the double standards of the international system than other bodies that are heavily

[57] Article 1-Rome Statute
[58] William W Burke- White ' Practice Complementary: The International Criminal Court and National Courts in the Rome System of International Justice' 49 HARV INTERNATIIONAL LAW JOURNAL (2008)
[59] ibid

influence by the United Nations Security Council (UNSC).[60] Others argue that self-referring governments have used the ICC to delegitimize and incapacitate political enemies[61]. These states have appeared to be co-operating while undermining the ICC's ability to be effective.[62] Needless to say, the ICC has been unable to disentangle itself from the geopolitics of Africa and the selective discrimination and failure by P5 members to ratify the Rome Statute clearly demonstrates this[63]. The blatant ignorance of human rights violations in Sudan and Libya suggests a hierarchy of impunity based on the nationality of individuals that perpetrated the crimes.

Geographical proximity, common languages and values, and shared historical heritage could promote greater understanding and cooperation at the regional level. The ICC operates on the basis of complementarity and will only assume jurisdiction where the State concerned is unwilling or unable to prosecute crimes coming within the ambit of the Rome Statute. The ICC does not act if a case is being investigated or prosecuted by a domestic judicial system with jurisdiction unless the domestic proceedings are not genuine. Furthermore, the ICC prosecutor lacks subpoena powers and cannot collect evidence (e.g. compel witnesses, conduct exhumations or seize bank accounts and government documents) without the co-operation of domestic authorities.[64] The ICC cannot sanction states directly for failure to comply with the orders. Rather, it has

[60] Mc Namee T (2014) 'The International Criminal Court and Africa; Between Aspiration and Reality: Making International Justice work better for Africa' Discussion Paper 2/2014 Johanersberg

[61] Sarah Nouwen 'The International Criminal Court: A peace builder in Africa? In Peacebuilding, Power and Politics in Africa ed Devon Curtis and Gwinyayi (Anthens OH: Ohio University Press) (2012) 187

[62] For a discussion of Kenya's Strategy of non-compliance with the ICC to exemplify this see Victor Perskin 'Things Fall Apart: Battles of Legitimation and the Politics of Non Compliance and African Sovereignty from the Rwanda Tribunal to the ICC (2015)

[63] Ifeona Eberechi 'Rounding up the usual suspects; Exclusion, Selectivity and Impunity in the Enforcement of International Criminal Justice and the African Union's emerging resistance' Africa Journal of Legal Studies 4(1) 2011 51-84

[64] Article 93, Rome Statute

to refer the findings of noncompliance to the Assembly of state parties or Security Council in which case if a state party refuses to co-operate with the court the court may refer the matter to the Assembly of state parties or where the Security Council referred the matter to the court, to the Security Council.

The Rome Statute did not anticipate a role for regional courts to exercise criminal jurisdiction over crimes that would otherwise be tried by the ICC or at the domestic level; that responsibility rests with domestic systems. That the ICC is perceived as just another means used by the west to control Africa is another debate that has taken over the world.[65]

According to the ICTY President Antonnio Cassese, the ICC 'remains very much like a giant without arms and legs and it needs artificial limbs to walk and work[66].' These artificial limbs are state authorities. The operations of the ICC, for instance have been paralyzed by the lack of co-operation by the states and the tribunal has no means of forcing states to co-operate with it at its disposal. Therefore, the creation of the ICC is seen as both problematic because it potentially obstructs efforts to reach peace accord and is regarded with the active suspicion by local people who are most concerned to get peace[67].

[65] David Chuter 'The International Criminal court; A place for Africans or Africans in their Place 'in Africa and the Future of the International Criminal Justice' ed Vincent Nmehielle (The Hague Eleven International Publishing) (2012)
[66] A. Cassese '*Is the ICC still having teething problems*' A Journal of International Criminal Justice System, (2005)
[67] ibid

The failure by the ICC to arrest suspects further weakens its course.[68] Despite his indictment, the Sudan's President Omar Al-Bashir was re-elected and thereafter received in China, Qatar, Saudi Arabia and Kenya. This shows the ICC's lack of influence and failure to perform as it was also exemplified in he suspended Darfur investigations.[69]

In summary, the researcher opines that there is need to have a court that is geographically, linguistically and procedurally accessible to the people to improve and enhance visibility and appreciation of its work.

3.1.6 The African Union

In the last several years, the AU has provided a platform for discussing the concerns of African Member States with the ICC. It has also played a central role in seeking engagement with the UNSC. At the same time, AU structures are presented as offering alternatives to the ICC, notably the ACJHPR, which was established in 2014 but which is not yet operational. The ACJHPR has a mandate that goes beyond the one currently given to the African Court on Human and Peoples' Rights (ACHPR). But what potential do these structures hold? [70]

[68] Dawn R Rothe and Victoria E Collins '*The ICC: A pipe dream to end impunity? Realities of International Criminal Justice'* ed Leided 2013

[69] David Smith 'The International Criminal Court Chief Prosecutor Shelves Darfur War Crimes Probe' Guardian 14th December 2014

[70] Appiagyei-Atua, Kwadwo, 2010, 'A Critical Look at the Post-Ivoirian Election Crisis through the Prism of Recognition of Governments by the African Union (AU) and Economic Community of West African States (ECOWAS)', 8 December. Available at http://www.thenigerianvoice.com/nvnewsthread1/40415/1/ (accessed on 13 January 2011)

However, the AU lacks the capacity to mediate owing to inadequacy in relevant training and experience of the caliber required to fulfill the role of ending conflict. In 2014, the AU Commissioner for Peace and Security Ambassador Smail Chergui highlighted how daunting the challenge of post conflict reconstruction and development is. Citing the recent examples of Central African Republic and South Sudan, the ambassador demonstrated how the two countries appeared to be emerging from conflict only to plunge back to violence.[71]

According to the AU, the organization has along with the REC's put enormous efforts into the facilitation and negotiation of peace agreements but the challenge has been the inability to sustain and consolidate such peace processes by rebuilding institutional and governance structures and creating the infrastructure necessary for national reconciliation, social economic recovery and growth[72].[73]

The AU is a political body tasked with the mandate of fighting impunity. Unlike the ICC, the AU opts for political solutions which are focused on peacemaking and reconciliation. However, some observers argue that the AU should adopt a nuanced approach in which it supports ICC related interventions to promote accountability for past crimes.

[71] African Union Policy on Post Conflict Reconstruction and Development (2006)

[72] AU, Opening Remarks by Ambassador Chergui, AU Commissioner of Peace and Security of the open session of Peace and Security Council on enhancing AU efforts in Post Conflict Reconstruction and Development in Africa

[73] Werle G L Fernandes and M Vormbaum (eds) (2014) Africa and the International Criminal Court (International Criminal Justice Series) Vol 1 2014: 187

The AU's formal mandate is to address justice and human rights on the continent. Article 3(h) of the Constitutive Act of the African Union outlines the aim of the AU to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights (African Charter) and other relevant human rights instruments.

In addition to this, Article 4(h) provides for 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.

This is a shift from non-interference under the Organization of African Unity (OAU) to the AU's policy of non-indifference. Under Article 4(m), the AU shall respect democratic principles, human rights, rule of law and good governance. Article 4(o) provides for respect for the sanctity of human life and for the condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.

These articles of the Constitutive Act give the AU its authority to engage in cases of accountability for international crimes. Article 3(d) empowers the AU to 'promote and defend African common positions on issues of interest to the continent and its peoples'.65

Article 3(2)(b) of the Statutes of the Commission of the AU give the AU Commission the right to initiate proposals to be considered by other organs of the AU. Article 3(2)(i) mandates the Commission to 'work out draft common positions of the Union and coordinate the actions of Member States in international negotiations'.66 The AU

Commission, through the AU Mission in Brussels, will serve as the secretariat to the open-ended MCMFA and provide institutional support to the African Group in The Hague to ensure effective coordination of its activities in summit decisions.

However, instead of the AU focusing on the reasons for its establishment, the AU has been pushing for states' non-co-operation with the ICC as was the case in Kenya[74] where its delegation also identified that the proposal to include regional courts would "allow judicial proceedings to take place closer to the location where the alleged crimes had been committed.[75] Burundi, South Africa and Gambia[76] have also formally announced their intention to withdraw and the ICC's failure to manage this crisis has greatly undermined it.

3.1.7 Hybrid Courts

These courts address the local needs because their jurisdiction incorporates both domestic and international law. These courts comprise of international and national judges who prosecute international crimes on the territory where those crimes occurred. Such courts have already been created in Sierra Leone, East Timor and Kosovo and have been proposed in Cambodia and Iraq.

[74] Agence France-Presse África̓n Union Members bank Kenya's Plan to leave the International Criminal Court' The Guardian 1st February 2016

[75] International Criminal Court Assembly of States Parties, Report of the Working Group on Amendments, Fourteenth Session (18-26 November 2015) ICC-ASP/14/34, para. E, p.3.

[76] Fletcher Simwaka África's Retreat from the ICC is about Impunity, not Dignity' The Washington Post on 8th November 2016

3.2 Challenges Facing the Current Regional Criminal Justice System

3.2.1 The Immunity Clause

Article 46A of the Protocol provides:

> *No charges shall be commenced or continued before the Court against any serving African Union 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'*

This is one of the most controversial aspects of the Malabo Protocol. The immunity from prosecution before the Court granted to serving "Heads of State or Government", or "other senior state officials" prevents the investigation of heads of state and senior state officials who often abuse their position to commit crimes under international law. It has been argued that this immunity clause also undermines the legitimacy of the court and the fight against impunity.

In defence of this course, the researcher found out that official immunities have actually been confirmed to be necessary to maintain international peace and co-operation.[77]

[77] Dapo Akande and Sangeeta Shah '*Immunities of state officials, international crimes and foreign domestic courts*' European Journal of International Law 21(4) 2011 815-852

3.2.2 Failure to Advance the Complementarity Principle

Complementarity means that a national jurisdiction should try international crimes only if the national justice system is unwilling or incapable to hear such trials. The legal basis for this is contained in Article 17 of the Rome Statute which addresses admissibility.

While the ICC only exercises jurisdiction over those who bear responsibility, domestic courts are expected to hold to account mid and lower level perpetrators or those who do not bear the highest responsibility for the commission of international crimes. The ICC only complements the local courts.[78]

The Malabo Protocol as it is currently constituted, does not in any way override the obligations undertaken by the states that have ratified the Rome Statute. It is the obligation of the states that shall ratify the Malabo Protocol to co-operate with the ICC regardless of the Malabo Protocol and regardless of the establishment of a criminal section of the ACJHR.

According to Mr. Donald Deya, the Chief Executive Officer of the Pan African Lawyers Union (PALU), recent developments in international criminal law at the regional and sub-regional levels and developments of international criminal law in Africa were part of a wider context, by the civil society engagement to ultimately define factors of the future for international criminal justice mechanisms.

[78] Article 17(1), Rome Statute

According to Deya, the last twelve years had been a busy time for Africa with preoccupations concerning democracy, good governance, the rule of law, human rights, and peace and security taking the center stage at an AU level. During the twelve years of its existence, the AU had instituted a remarkable 1.5 legal instruments per year, and unveiled over ten treaty bodies. Pointing to the case of the ACHPR, Deya notes that in a period of four years, the court had only managed to handle twenty-two cases and three applications for advisory opinions, and in the process delivered two judgements and eleven orders dismissing matters on admissibility/ jurisdiction grounds, with only eight matters still pending before the court.

The ACHPR has been seized of jurisdiction on state responsibility for mass atrocity crimes. Some of these processes could trigger follow-up action in national or international courts or tribunals, including referring cases to the ICC

Similarly, the interventions by the AU to domesticate international concerns, such as the Working Group on Extractive Industries, Environment and Human Rights Violations in Africa; the Working Group on the Death Penalty in Africa; the Committee for the Prevention of Torture in Africa (The Robben Island Guidelines); the Special Rapporteur on Prisons and conditions of detention in Africa; and the African Committee of Experts on the Rights & Welfare of the Child have not bore much.

Arguably, the general trend at the African regional level is more in line with international standards and initiatives to understand the import of their commitments under the Rome Statute and other international conventions by African leaders are

underway. As one observer put it "the ICC is neither as good as proponents think it is nor is it nearly as bad as critics believe it to be. It is certainly not as potent as either side of the debate insists." Rather, it is the different actors' narratives and perceptions of its role that have significantly shaped the debate on the role of the Court.[79]

Those in support of regional complementarity have argued that "a purposive interpretation of the [complementarity] principle can include regional courts. In assessing the admissibility of a case before the Court, it is important to consider whether any action, if any, has been taken not only in the national courts of the State, but also at regional courts[80]

In the context of the ACJHR, it is argued that such an approach undermines the universal commitment to ending impunity, largely because of Article 46.[81] Thus, the tendency to view the ACJHR as an attempt to insulate politically powerful Africans from the ICC is unduly hollow and provides an inaccurate narrative of its trajectory.[82] Since a key aspect of complementarity is the integration of the Rome Statute into domestic law, it remains unclear how double signatories might implement competing obligations (e.g. head of state immunity; potential conflicts with respect to the definition of crimes such as terrorism and unconstitutional change of government).[83]

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[79] Kesten, M. 2016. Seeing the forest for the trees: International Criminal Court and the peace-justice debate. International Criminal Justice Today, 20 July 2016. October 2016: www.international-criminal-justicetoday.org/opinion/seeing-the-forest-for-the-trees/.

[80] Gerhard Werle, Lovell Fernandez and Moritz Vormbaum eds., *Africa and the International Criminal Court* (Asser Press), 2014, Annex 1: Africa and the International Criminal Court – Recommendations, 231.

[81] See: Kristen Rau, "J*urisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Right*s," Minnesota Law Review 9.2 (2012): 669708.

[82] Sirleaf, "Regionalism, Regime Complexes, and the Crisis in International Criminal Justice," 702

[83] Malabo Protocol, Article 28G: Terrorism; Article 28E: Unconstitutional Change of Government; some NGO's (Amnesty International in particular) have identifies that the definition of terrorism is overly broad, and the

Moving forward, the ACJHR could seek to work with other structures in the AU such as the Peace Fund or the Post Conflict Reconstruction and Development Framework to provide redress.

3.2.2 Political Interference

History has shown that states are reluctant to grant the court power in the area of enforcement, a fact that frustrates collection of evidence and arrest of suspects. The unfortunate thing is that states cannot be directly sanctioned by non-co-operation. No international institution with political capital as limited as that of the ICC is likely to be powerful. The overreliance on the goodwill of domestic authorities sabotages any court's effort to enforce its mandate. Political calculation always factor into the decisions and efforts to pursue international criminal justice universally.

On 5 December 2014, the ICC Prosecutor filed a notice to withdraw charges against Kenya's President, Uhuru Kenyatta, stating that 'the evidence has not improved to such an extent that Mr Kenyatta's alleged criminal responsibility can be proven beyond a reasonable doubt. [84]Whilst the notice did not state the reasons behind the failure to collect evidence, an open letter[85] by the ICC Chief Prosecutor, Fatou Bensouda, stated that two key witnesses had withdrawn their testimonies in 2013, and in court filings, prosecutors indicated that their witnesses were blackmailed, bribed and intimidated into withdrawing, and blamed the Government of Kenya for creating

definition of unconstitutional change of government may potentially criminalize popular protests; both laws are drafted broadly and "raise serious concerns as to the compliance with the principle of legality established under international law" taken from "Malabo Protocol: Legal and Institutional Implications of the Merged and ExpandedAfrican Court," Amnesty International (2017), 6. Available at: https://www.amnesty.org/download/Documents/AFR0161372017ENGLISH.PDF

[84] See 'Notice of withdrawal of the charges against Uhuru Muigai Kenyatta' <https://www.icc-cpi.int/iccdocs/doc/doc1879204.pdf> accessed 20 October 2015

[85] See F Bensouda, 'Why I applied to adjourn Kenyatta case' KenyaMOJA 2013.

a 'climate of fear and intimidation'[86]. The political interference given the status of the suspect in this case cannot be gainsaid.

Government political commitment to the entire process of transitional justice, including prosecution is fundamental to it. However, domestic efforts towards holding alleged perpetrators of international crimes accountable for past atrocities in Kenya has been largely characterized by a lack of political will. A report by Human Rights Watch, for instance, labels domestic prosecution efforts as a 'halfhearted' effort at accountability, with the result that 'hundreds of [...] perpetrators of serious crimes continue to evade accountability. Moving forward, a less hierarchal international criminal justice system that relies significantly on national governments is likely to be better informed by diverse perspectives on legal practice.

3.3 Conclusion

Scholars have argued that regional problems of criminality deserve regional approaches.[87] A regional approach recognizes the interconnectedness of states and regional institutions can be created with mandates which do not ignore these dynamics.[88] A regional court's jurisdiction could be based on the reality of conflict lines, both territorially or temporarily. Prosecutions here are able to examine all

[86] Allison, 'Kenyatta escapes the ICC, and shows others how' (6 February 2014), <http://www.daiS Allison, 'Kenyatta escapes the ICC, and shows others how' (6 February 2014), <http://www.dailymaverick.co.za/article/2014-02-06-analysis-kenyatta-escapes-the-icc-and-shows-others-how-its-done/#.VmB9ZdJ97Mx> accessed 20 October 2015. 131

[87] Charles C. Jalloh 'Regionalizing International Criminal Law? International Criminal Law Review 9(3) 2009 445-499

[88] William A Schabas 'Regions, Regionalism and International Criminal Law' New Zealand Yearbook of International Law 4(2007) 3-23

aspects of criminality including the transnational nature of abuses, limiting problems posed by lopsided investigations and related setbacks.

Regional approaches also limit the difficulties of determining competing claims. A regional body is able to circumvent situations where several states have a keen interest in exercising jurisdiction, and where one state's exercise of jurisdiction inevitably frustrates the aspiration of other state(s). It also enhances the victim's rights by not attempting to adjudicate which society has the most valid claim. There exists a trust fund for victims for legal aid and assistance too. Whereas the ICC has similar provisions, the Protocol envisages a situation where the fund helps the victims based on their need. Additionally, the Protocol is able to order communal reparations or formulate broad reparation measures.

So far, the researcher has managed to outline the existing international criminal justice in the region. From the foregoing, it goes without saying that these systems have failed and the cure is not in merging them but in the creation of a court which shall address the existing system's inadequacies. The next chapter looks at the critique of the proposed system and gives recommendations on the way forward based on the analysis of the data collected by the researcher.

CHAPTER FOUR

CRITICAL REVIEW, DATA ANALYSIS AND INTERPRETATION; IS THE AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS THE LASTING SOLUTION FOR WAR TORN AFRICA?

4.0 Introduction

The previous chapter discussed the challenges hindering the ICC and other institutions from achieving a peaceful Africa. This chapter recommends the ACJHR as the reform required to address the challenges discussed. Although the challenges require a broad based approach that encompasses political and socio-economic reforms, this chapter focuses on the reforms that touch on conflict resolution as this is the ambit of the study.

4.1 Historical Perspective

In June 2014, the African Union Assembly Heads of state and government meeting in Malabo, Equatorial Guinea, adopted the Protocol on the Amendments to the Protocol on the Statute of ACJHR. Upon signing and ratification, this Protocol will extend the jurisdiction of the yet-to be established ACJHR to crimes against humanity, war and transitional crimes (terrorism, money laundering, trafficking in persons, hazardous wastes, illicit exploitation of natural resources).

The Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which seeks to grant criminal jurisdiction to the ACHPR, had proposed three sections for the new Court. These sections were Human and Peoples' Rights; General Affairs; and International Crimes.

The International Crimes section would have three chambers: Pre-Trial; Trial; and Appellate. This amendment envisaged a court that would have an independent Office of the Prosecutor with two deputies as well as an empowered Registry with one Registrar and three Assistant Registrars in addition to having fully-fledged Victims and Witnesses Unit, as well as a Defence Counsel and Detention Management Unit.

The Protocol also provides for compensation and reparations. It recognizes a wider range of crimes including genocide, war crimes, crimes against humanity, unconstitutional change of government, corruption, money laundering, illegal exploitation of natural resources, piracy, terrorism, aggression, mercenarism, and trafficking of persons, drugs, and hazardous waste.

According to Ademolla Abass, the three fundamental bases to support the prosecution of international crimes by an African Regional Court are the historical necessity for such a court to prosecute crimes which are committed in Africa but which are of no prosecutorial interest to the rest of the world, a treaty obligation to prosecute international crimes in Africa and the existence of crimes peculiar to Africa but to which global international criminal tribunals such as the ICC, have no jurisdiction. These arguments are in tandem with the progressive school of thought that has been advanced by this study.

4.2 Critique of the ACJHR

Lack of Expertise

Ideally, justice institutions and actors will often have gaps in their capacity to administer criminal justice in states that are recovering from conflict as is the case in a couple of African countries.

Capacity permeates every facet of rule of law reform efforts. Thus, capacity development may be an ancillary result of any reform project. For example, the capacity of the criminal justice sector grows from legal education reform—as judges, prosecutors, and criminal defence attorneys become better educated, their capacity to support a well-balanced criminal justice system is enhanced. Capacity development can also be pursued as a goal of its own[89].

Capacity refers to the tangible things such as resources, infrastructure, education, health, organizational structure, and legal framework, among others. Development of these tangible capacities is pursued through technical assistance, which is touched upon in other chapters. Intangible capacities on the other hand are the skills, experiences, values, motivations, habits, knowledge, and traditions of individuals and the organizations for which they work[90].

Capacity development, on the other hand, is a process used to enhance the human capacity of individuals and organizations. Human capacity development is neither linear nor streamlined; it is a continuous process, with no real beginning or end. The

[89]Criminal justice reform in post-conflict states—a guide for practitioners 38 6.3

[90] Réal Lavergne and John Saxby, Canadian International Development Agency (CIDA) Policy Branch, Capacity Development: Vision and Implications, Capacity Development Occasional Series, No. 3 (CIDA, 2001), http://www.acdi-cida.gc.ca/inet/images.nsf/

often-used term "building capacity" is misleading in relation to human capacity development, because rather than creating capacity where none previously existed, the aim is to stimulate the growth of existing capacity.

According to the United Nations Development Programme (UNDP), "Capacity development starts from the principle that people are best empowered to realize their full potential when the means of development are sustainable—home-grown, long-term, and generated and managed collectively by those who stand to benefit.

Other criticisms concerning capacity, funding, and resources have been levied, as well as concern over the selection of judges, which some argue appears to reinforce a "club of old school boys" approach to justice on the continent, rooted in a protectionist agenda rather than fighting impunity.[91]

Summarily, the researcher opines that these criticisms are substantially rhetorical because they do not touch on the operations of the actual court. It is only when the court is up and running that some of these fears can be ruled out.

Financial Constraints

When it comes to funding, "the unit cost of a single trial for an international crime in 2009 was estimated to be US $20 million. This is nearly double the approved 2009 budgets for the African Court and the African Commission standing at US $7 642 269 and US $3 671 766, respectively[92]

[91] Betu Kajigi, The International Criminal Court in Africa: NGOs' Perceptions of the ICC's Legitimacy in Uganda, Lambert Academic Publishing (2012), 75-77.
[92]Max du Plessis, "Implications of the AU decision to give the African Court jurisdiction over international crimes," Institute for Security Studies 235 (June 2012), 9.

For the purpose of comparison, "the ICC budget [in the same year] …for investigating just three crimes, and not the caliber of offences the African Court is expected to tackle – is more than 14 times that of the African Court without a criminal component; and is just about double the entire budget of the AU.[93] In 2012, the Pan-African Lawyers Union estimated that it would cost US $4.42 million and 211 people to staff the ACJHR.[94]

From the foregoing, it can be deduced that investigating and prosecuting international criminal cases on the continent is flagrantly expensive. Inevitably, the ICC's budget continues to increase annually as was the case in 2016 when the approved budget was 17.3% over what it was in 2015.[95] As it stands, the AU has the requisite resources to operationalize and sustain a regional court. As shall be seen in the recommendations, the policy makers should adopt a transparent budgeting appropriation and allocation of the ACJHR and this noble cause shall come to fruition.

Breadth of Jurisdiction; Will This be an Overloaded Court?

Usually, a post conflict society is characterized by a large number of victims and perpetrators. This is coupled with inadequate expertise in dealing with mass atrocities and such this court would obviously be overwhelmed. The early establishment of coherent and effective investigative and prosecutorial strategies would go a long way in dealing with this crisis.

[93] ibid
[94] Amnesty International, 2017, 9.
[95] International Criminal Court Assembly of States Parties. 2015. Proposed Programme Budget for 2016 of the International Criminal Court. Fourteenth Session ICC-ASP/14/10, 18-26 November 2016. The Hague. 60

The Immunity Clause

In the event that this clause is not repealed altogether, it is recommended that an amendment be done to include a clause that will except the perpetrators of the very serious crimes, whatever 'serious' is perceived to be.

Expertise of Judges and Investigators

During its inception, the court might suffer the results of a limited number of judges whose relatively uniform training and outlook on international law narrows the range of opinions likely to be presented at the court. The judges/investigator's likely lack of appreciation for the diversity of opinions about the content of international criminal law might compromise the legitimacy of the court's verdict in the face of rising civil society concerns.

The introduction of experts who share in the experience of a post conflict society as envisaged by the Malabo Protocol can deal with this shortcoming.

Massive Ignorance of the Litigants

Just like in the case in our domestic courts, litigants at the regional level are ignorant of the court requirements and knowledge of the law. As a result, serious violations in the procedural aspect of legal process are felt by the experts in the field. Many perpetrators and the victims cannot afford the services of a trained advocate or a paralegal. This greatly sabotages the dispensation of justice.

Duplicity in Legislation

The ICC statute affirms that:

> 'It is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.'

This clause obviously creates a dilemma because cases filed at the regional court stand the risk of being opposed on the basis of lack of jurisdiction.

4.3 Approaches of the Malabo Protocol

The preamble of the Malabo Protocol clearly identifies "respect for democratic principles, human and people's rights, the rule of law and good governance." This supports the idea that the ACJHR is mindful of international standards[96] and therefore its objectives cut through all the principles that guide universal jurisdiction. Further, the protocol seeks to correct perceived biases that exist in the current international criminal justice system as it is currently constituted.[97] Initially, the regional human rights system consisted of the African Charter on Human and People's Rights[98] and the quasi-judicial African Commission[99]. The Organisation of African Unity (OAU) later created the African Court on Human and People's Rights[100] in 1998 to be the

[96] Malabo Protocol Preamble, paragraph 10.
[97] Matiangai Sirleaf, 'The African Justice Cascade and the Malabo Protocol'International Transitional Justice Journal, March 2017
[98] African Charter on Human and People's Rights'OAU Doc CAB/LEG/67/3/rev, 5-1520 UNTS 217; 21 ILM 58 (27TH June 1981: entered into force on 21st October 1986)
[99] ibid
[100] Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (10th June 1998: entered into force on 25th January 2004)

judicial organ for enforcing the African Charter as well as other human rights treaties.[101]

The Malabo Protocol potentially provides more contextually tailored solutions than previously provided at the international level by criminalizing conduct that is regionally salient and expanding the actors that can be held liable to include corporations, the protocol seeks to improve upon inefficiencies in the justice cascade that exists from relying on the domestic judiciary of the member states or the creation of hybrid courts.

It is the failure of these courts together with domestic, hybrid and international courts that has informed the formation of a regional court. In response to African realities, the Protocol envisages security threatening crimes and conflict arising out of African borders and complex political problems. Moving forward, the researcher opines that this would be the ideal solution to the problem facing Africa.

4.4 Contribution of Homegrown Regional Courts to Transitional justice

The Malabo Protocol is the best equipped to account for variations in procedural traditions. Here's why; in some communities, justice is conceptualized in terms of restoration, interpersonal forgiveness and reconciliation. This is redistributive as opposed to retributive and could as well be the best description of finding African solutions to African problems.

[101] Muna Ndolo, 'The African Commission and Court under the African Human Rights System in Africa's Human Rights Architectureéd John Akokpari and Daniel Shea Shimbler

In South Africa, for example, forgiveness and *Ubuntu*[102] underlies the conduct of business in the truth commissions established under the premises of transitional justice. Moving forward, the protocol can envisage something akin to the Margin of Appreciation doctrine in the European Court of Justice to avoid determining issues where there is no regional diversity on international criminal law issues.

4.5 Victim Reparation

In terms of victim reparation, the guiding principles of proper preparation programs are meant to acknowledge the wrongdoing done to victims to improve their quality of lives, to afford recognition through affirmation and acknowledgement of the harm suffered and to build civic trust and solidarity. Yet, reparation is often the point at which most countries and governments squander the opportunity to restore civic duty by not acknowledging victims through an appropriate reparation programme.

The right of victims of human rights violations to remedy is enshrined in international law[103] and it has been reaffirmed in the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[104] The Malabo Protocol envisages the above and in coming up with a Victims Fund, it is believed that this will address the above concerns.

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[102] *Ubuntu* is a concept which encompasses and emphasizes healing and not vengeance, restorative justice not retributive justice and nurturing of social relationships.

[103] Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Convention got Civil and Political Rights, Article 6 of the International Convention on the Elimination of All forms of Racial Discrimination, Article 14 of the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment, Article 75 of the Rome Statute of the ICC, Article 39 of the Convention on the Rights of the Child

[104] UN General Assembly 2005 A/ RES/60/147

4.6 The Nexus between Judicial Reform and Transitional Justice as Envisaged in the Malabo Protocol

States are and have always been embedded in a domestic and transnational society, which creates incentives for economic, social and cultural interactions across borders. State policy may facilitate or block such interactions. Some domestic groups may benefit from and be harmed by such policies and later exert undue pressure on government for policies that facilitate the realization of their goals. The ratification of the Malabo Protocol is in tandem with the human rights standards that have been chequered in the 20th Century. This is a great incentive by member states because it's aimed at enhancing human rights and dignity.

Just like in any other transitional justice mechanism, local prosecutions must be relevant to the local communities[105]. That is to say the new court must take into account the priorities of the local community in the identification and prosecution of the alleged perpetrators. The existence of this court should show the elites that the process is not only in existence for their benefit but also for the local population. This is the position favoured by both scholars and human rights organisations.[106]

[105] Evelyn Asaala in *Ínternational Criminal Justice in Africa'Strathmore* University Press at Page 39
[106] See for example Human Rights Watch 4: E Lutz 'Transitional Justice: Lessons learned and the road ahead' in N Rotht Arriaza and J Mariescurrena (eds) 'Transitional Justice in the twenty first century Beyond truth versus justice'(Cambridge University Press) 2006 352-372

4.7 Data Analysis Presentation and Interpretation

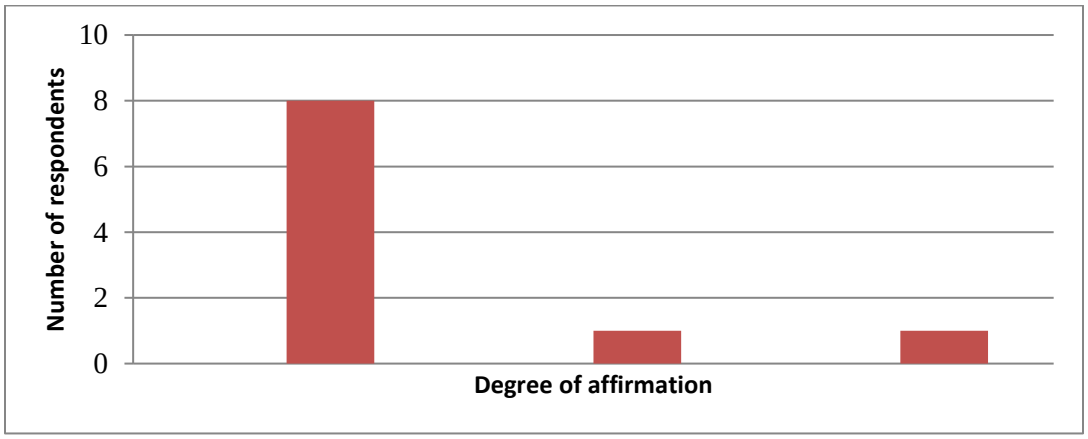
The study benefited through the application of mixed method research design which takes into account qualitative and quantitative designs. The data presentation was done using pie charts and graphs and tables as appropriate. A copy of the questionnaire dispatched during the research is annexed to this project for ease of reference.

4.7.1 Bio Data

Asked whether the outcome of the ICC met their expectations, (80% n=8) out of the ten Kenyans sampled answered in the negative and 10% n=1) were of the view that the status quo should be maintained whereas the other (10% n=1) was of the view that Kenya should pull out of the ICC.

4.7.1.1 Should Kenya pull out of the ICC?

Figure 1: Withdrawal from the ICC

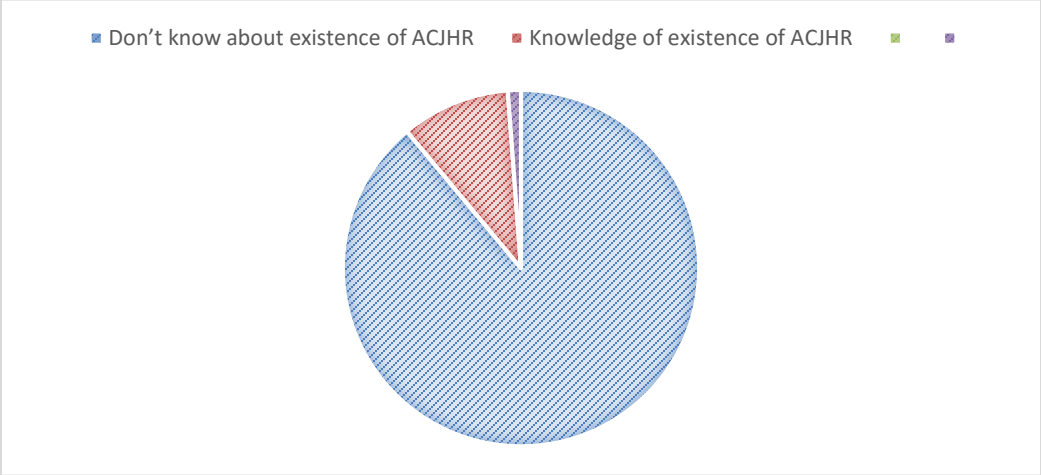


Source: Researcher, 2017

4.7.1.2 Knowledge of the Existence of the ACJHR

When asked about their knowledge of the existence of the proposed ACJHR, 9 out of the 10 respondents did not know of the existence of this court.

Figure 2: Knowledge of the existence of the ACJHR

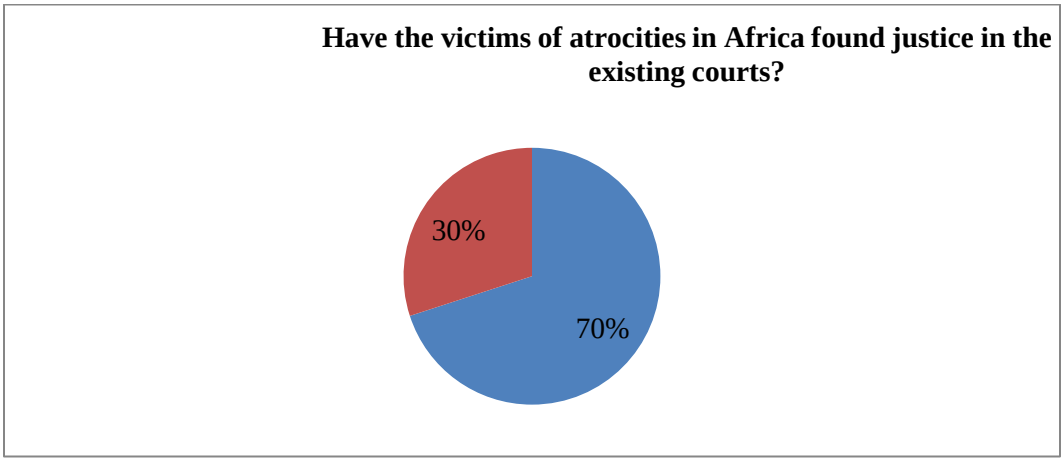


Source: Researcher, 2017

4.7.1.3 Justice for the VICTIMs

Most (70%; n=7) of the respondents were of the view that victims of atrocities in the region are yet to find justice (30%; n=3) the referral of the cases to an international court that does not have local judges was a great lesson to future perpetrators of the offences.

Figure 3: Justice for the victims



Source: Researcher, 2017

4.7.2 Approaches to dealing with ignorance of the existence of Malabo Protocol

4.8.2.1 Civil society activism

Asked if the conduct of trainings and sensitization activities by the civil society for the benefit of practitioners and lay communities would help with the growth and development of the ACJHR, the respondents unanimously answered in the affirmative. (100% n=10).

4.7.2.2 Popularising political will

Asked whether or not the geopolitics of the region affect the outcome of the results of the ICC, all responded (100% n=10) in the affirmative, (80% n=8) also added that this can be countered by the concept of universal jurisdiction, 30% n=3) added that political calculations always had a hand in the decisions and efforts of international criminal justice practitioners and (30% n=3) opined that international crimes impair political acceptability of a state in the global arena.

4.7.2.3 Budgetary Allocations

There was agreement that operationalizing a regional court is both functionally and administratively expensive going by the expenditure of the current system. (100% n=10)

4.7.2.3 Independent Investigations

Regarding the issue of why the cases in the current system fails (80% n=8) attributed the undoing to dysfunctional investigative bodies which the system did not have confidence in and (20% n=2) attributed the acquittals to lack of inter-agency collaboration between the key stakeholders.

4.7.2.4 Disparity of Opinion Among Judges

The regional court should diversity the personnel of the ICC to involve judges and prosecutors from communities most affected by the decisions of the international criminal justice system. (77% n=10). Their relatively uniform training and outlook on international law narrows the range of opinions that are likely to be presented at the court (15% n=2). Finally, the establishment of an international and organized crime division within the regional courts (8% n=1) were the main recommendations for reform noted.

4.7.2.5 The Nexus Between Peace and the Criminal System

Asked if there was a link between peace building and the criminal system, a majority of the respondents held the view that the trial process promotes post conflict reconciliation (50% n=7), a good number opined that the regional for a is more likely to fulfil the victims' expectations for the 'highest form of justice' (36% n=5) and are better at upholding the rule of law (14% n=2).

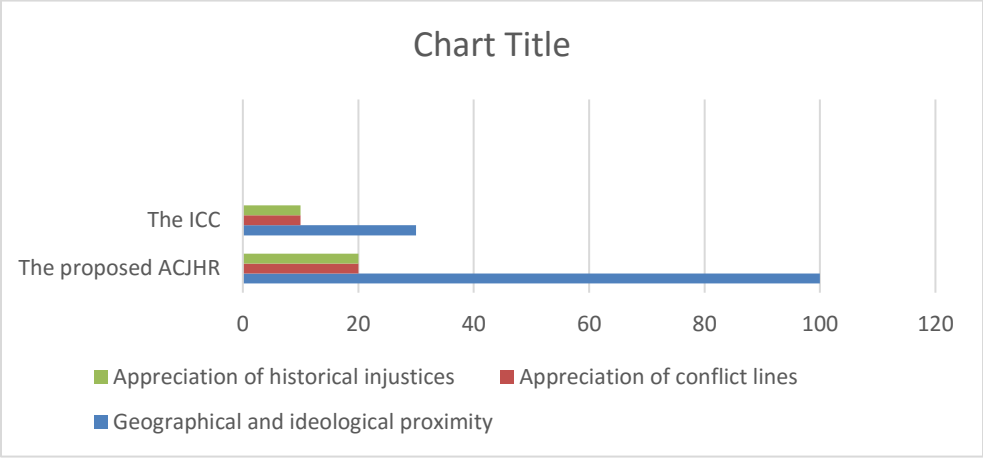
Figure 3: Peace and the International Criminal Justice System

Source: Researcher, 2017

4.7.2.6 Why the Malabo Protocol?

Judicial reform is an important component of transitional justice. The following graph shows the indicators that this study came up with in support for the ratification of the Malabo protocol. A regional court is more geographically and ideologically connected to the people (100% n=10). Regional approaches recognize jurisdictions that are based on the reality of conflict lines, both territorially and temporarily (20% n=2). The ACJHR would be best equipped to account for historical injustices of the kind that are prevalent within the region. Pursuant to the research, a majority of the respondents (90% n=9) were of the view that the ACJHR would perfectly complement the existing court system(s) as it does not in any way override the obligations undertaken by the states that have ratified the Rome statute. The other important factor (60% n=6) was that states have an obligation to co-operate with the ICC regardless of the formation of the ACHJR making the regional court the best alternative for international criminal justice practitioners.

Figure 4: Benefits of a Regional Court as Envisaged by the Malabo Protocol



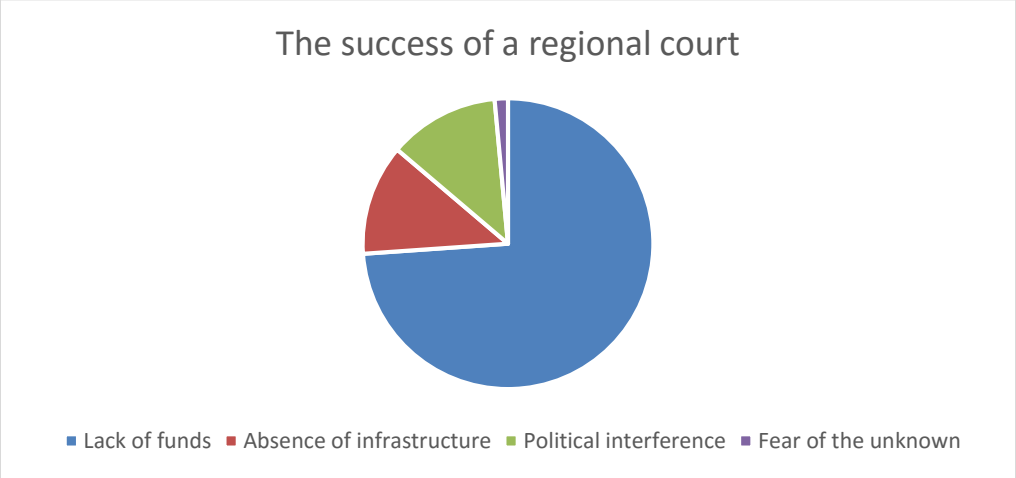
Source: Researcher, 2017

4.7.3 Success of Regional Court

4.7.3.1 Success of Regional Court as Envisaged by the Malabo Protocols

When asked what chances of success the proposed ACJHR had (80% n=8) were very sceptical citing inadequacy of funds (60% n=6), absence of infrastructure (10% n=1) and political interference (10% n=1). The remaining (20% n=2) did not give reasons for why they were sceptical and would be best categorized as those who were not in support of the idea for fear of the unknown.

Figure 5: Success of a regional court as envisaged by the Malabo Protocol

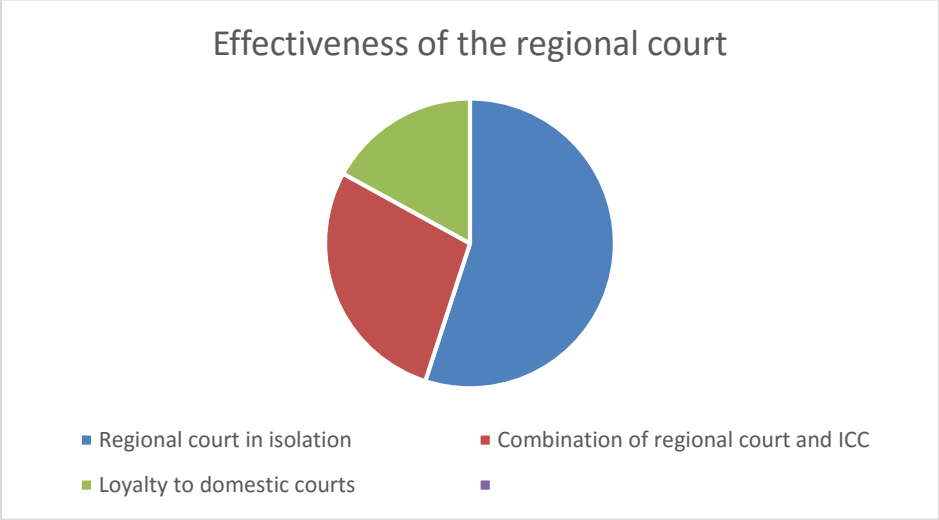


Source: Researcher, 2017

4.7.3.2 Effectiveness of the Regional Court Approach

Asked what the chances that the operations of the regional court will be effective in addressing the conflict situation in the region, most of the respondents (55% n=10) indicated that the court's operation would be effective if it works in isolation, (28% n=5) indicated a combination of the current system and regional court would be more effective and (17% n=3) indicated that we should stick to our domestic courts in preservation of our Sovereignty.

Figure 6: Effectiveness of Regional Court Approaches



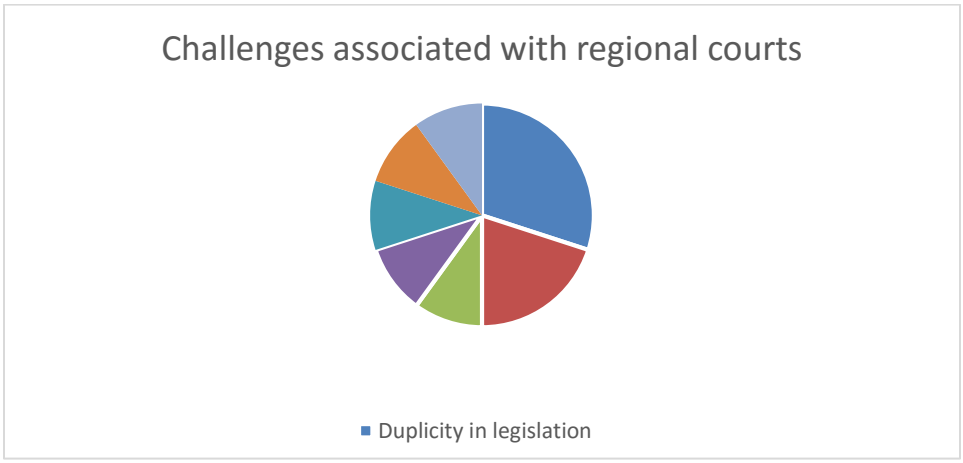
Source: Researcher, 2017

4.7.4 Challenges Associated with Regional Courts

4.7.4.1 Challenges of Ratifying a Regional Court

Asked what the likely challenges associated with ratifying the Malabo Protocol, the respondents cited duplicity in legislation (20% n=2) in the existence of the ICC, domestic and hybrid courts. Majority (80% n=8) cited the lack of co-operation by domestic authorities in collecting evidence and arresting suspects. The overreliance on the goodwill of domestic authorities to enforce the regional court's mandates is greatly frustrated by the doctrine of sovereignty.

Figure 7: Challenges of Regional Courts

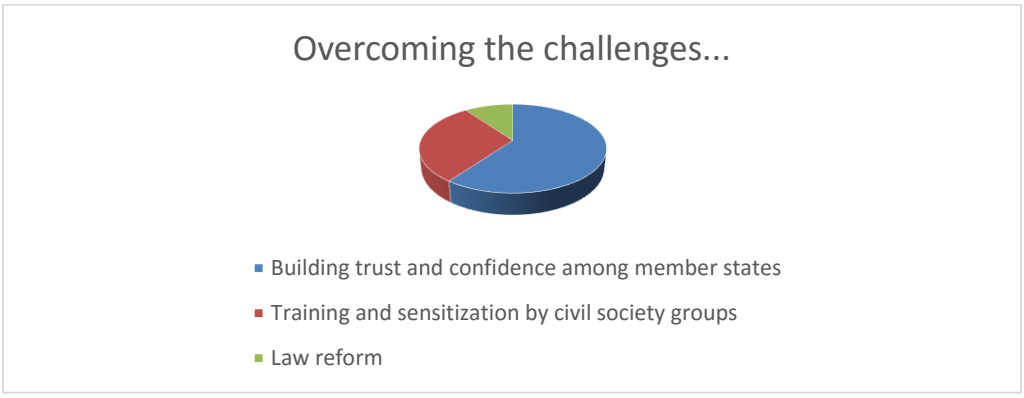


Source: Researcher, 2016

4.7.4.2 Overcoming the Challenges

Asked how the challenges can be overcome, most (60% n=6) indicated that trust and confidence building is an important element in conflict resolution. Mentorship and training (30% n=3) by civil society groups and sensitization activities for the benefit of other practitioners and lay communities and compelling governments to comply with the treaty (10% n=1) or to incorporate exception clauses that embrace international conventions in their constitutions like the case in Kenya.

Figure 8: Overcoming the challenges associated with regional courts



Source: Researcher, 2017

4.8 Conclusion

The arc of the moral universe is long, but it bends towards justice.[107] The success of any project in international criminal justice is primarily vested in the willingness and ability of national courts to investigate and prosecute the perpetrators that are the most responsible for crimes against humanity. Prosecutions must be relevant to local communities. They must take into account the priorities of local communities in the identification and prosecution of the alleged perpetrators. The Malabo protocol envisages this scenario in its entirety. The ACJHR's close proximity to the communities affected by international crimes allows for appreciation of the background of all the parties involved. If the judges, prosecutors, legal practitioners and the litigants share unique experiences of living and working in a post conflict society, they are more likely to enrich the discourse and dispense justice in the best way, moving forward.

[107]Martin Luther King Jr

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary

This study assessed the quest for a homegrown solution to the problem of injustice created by the existing international criminal justice system. The study provided a general overview of the need for a judicial reform from a global, regional and national perspective and the application of a regional court as a conflict resolution mechanism within the region. It pointed out the importance of not relying entirely on the ICC as it is currently constituted and instead focus on a regional system that is more geographically and ideologically connected to the people. This study therefore seeks to add to the body of knowledge relating to the international criminal justice system by staging an academic discourse that will lure member states into ratifying the Malabo Protocol.

Chapter one formed the foundation of the study discussing the background of the study highlighting the failures of the current system and demonstrating how a regional court will be a cure to the problem, statement of the research problem provided the case for the study highlighting the problem of lack of political goodwill on the part of member states, the selective application of justice by the ICC, objectives of the study were to demonstrate the need for the development of a homegrown criminal justice system for the region; to illustrate how the existing international criminal justice system has failed to resolve conflict in the region and ultimately, to analyze the role played by the Malabo Protocol as an approach to dealing with post-conflict disputes. The literature

review looked at the literature from various scholars in the subject, justification, theoretical framework, hypothesis, research methodology and chapter outline.

Chapter two discussed the African problem and why it is unique and problematic to solve. Various African problems such as border conflicts, unconstitutional changes of government, politically instigated wars and economic crimes were discussed. Chapter three looked at the existing court system and the challenges that the current international criminal justice system is facing in dealing with the African problems discussed in chapter 2. The challenges were grouped as state immunity, political interference, lack of capacity in terms of the number of judges and existence of infrastructure, lack of funds and failure to advance the complementarity principle. Chapter four provided a critical review of the Malabo Protocol as it is currently constituted and the probable shortcomings that its implementation might face, the approaches used as well as the benefits and challenges of a regional court and the nexus between the theoretical basis of the study and the application of a regional court's jurisdiction in Africa. Primary and secondary data was also analyzed, presented using graphs and pie charts and interpreted. Chapter five provides the summary, key findings conclusion and recommendations.

5.2 Key Findings

The data analysis supports the objectives and also confirms the three hypotheses stated for the purpose of the study. The study sought to demonstrate the need for the development of a homegrown criminal justice system for the region; to illustrate how the existing international criminal justice system has failed to resolve conflict in the region and to analyze the role played by the Malabo Protocol as an approach to dealing

with post-conflict disputes. The study relied on the expert opinions of lawyers, prosecutors, judges and laymen who were victims of the post-election violence experience in the country. The study also relied on working papers and journals that have been compiled by experts of this field in the region and across the world.

It was also evident from the data analyzed that a majority of the respondents had no knowledge of the existence of the Malabo Protocol and they acknowledged that the current system has failed in terms of administering justice and/ or reparation to the victims of crime in the region. It was pointed out that the regional court approach would be more ideal given its ability to among other reasons, embrace the traditional role played by reconciliation and people- based solutions to conflict management.

The challenges experienced by the international criminal justice system and specifically the ICC in the dispensation of justice in the region include absence of political goodwill on the part of member states, absence of a police force to effect arrests and collect evidence, judges who are foreign to the substance of the crime before them and lack of co-operation on the art of the member states. In the ICC, as the study found out, the major challenge is lack of co-operation on the part of member states in the collection and preservation of evidence, arresting suspects and availing witnesses to testify before the court.

The other challenge was disparity in opinion on the part of the judges due to the disparities in their fields of practice prior to joining the bench. It was however proposed by those interviewed that this challenge can be addressed by hiring judges who share a history of the injustice suffered in Africa, a fact that is embraced by the

Malabo Protocol. This therefore confirmed the hypothesis that there's need to have a homegrown criminal justice system in order to achieve justice for victims of crime in Africa.

5.3 Conclusion

It is said that society cannot forget what it cannot punish and for the majority of the victims of atrocity in Africa, that is true[108]. In sum, the Malabo Protocol provides a solution that is contextually and appropriately tailored for criminal trials in the regional level by availing a broad array of workable options that resonate with the special needs for the victims and perpetrators of heinous crimes in the region. This paper has illustrated the need for a homegrown criminal justice system as an alternative to the failed domestic and hybrid courts. To do this, the strategies to improve on the inefficiencies of the existing system have been explained in detail. In the fullness of time, the researcher is optimistic that these recommendations will inform panellists in policy formulation debates around the continent.

By outlining the failures of the ICC and other mechanisms that exist to deal with this, the researcher opines that the ratification of the Malabo Protocol will solve this problem. In the researcher's view, penal justice by holding those who had committed punishable acts accountable, by acknowledging the suffering of the survivors and by establishing a record of the past misdeeds are inevitably the first steps in the process of healing the societal and the individual trauma.

[108] See: Landsman, Stephen, "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions", Law and Contemporary Problems, vol. 59, nº 4 (1997), pp. 83-85. 18

5.4 Recommendations

It is evident that the Africa will continue to experience conflict as conflict is endemic in society due to various factors such as struggle for power, resources as well as a feeling of marginalization among communities. Each dispute/conflict is unique in its own way due the fact that each has different issues and actors involved in the dispute/conflict. It is therefore paramount that different approaches are adopted for each conflict based on the needs for each society and its appreciation for what would be the best solution for what problem.

In the case of the Africa, one unique approach that the study found out is the combination of the existing system with the ACJHR. A less hierarchical international criminal justice system that relies significantly on national governments is likely to be better informed by diverse perspectives, more acceptable goals to local populations and more effective in accomplishing its ultimate goals. The ICC should not be abandoned altogether. The ICC can still play its role in a less centralized regime. This study therefore recommends the refining and scaling up of the ACJHR as proposed by the Malabo Protocol so that it can be utilized at the regional level to try perpetrators of crime within the region.

Another recommendation is the sensitization of the practitioners and lay communities on the existence of the proposed ACJHR by civil society groups. The adoption of a transparent budgeting appropriation and allocation process of the ACJHR will also go a long way in achieving sustainable result for the court. The universal ratification of the member states is also a recommendation that the leaders in the region should consider. With a wide consultation with civil society groups, member states can also

amend Article 46A of the Malabo Protocol or in the absence of an amendment, enter reservations akin to those created by Article 143(4)[109] of the Constitution of Kenya 2010.

5.5 Areas for Further Research

At the time of writing this research project, the Malabo Protocol had not entered into force, since it is yet to receive the necessary fifteen ratifications by AU member states.[110] For purposes of further research, researchers can find out the reason why states are adamant to ratify this Protocol given that this paper has exhaustively addressed the need for the said Protocol by member states in the region at the earliest opportunity.

[109] Article 143(4) provides that the immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which provides such immunity.

[110] As of May, 2017, 9 countries have ratified the Malabo Protocol: Benin, Chad, Congo, Ghana, Guinea Bissau, Kenya, Mauritania, São Tomé and Principe, Sierra Leone. See: https://www.au.int/web/en/treaties/protocolamendments-protocol-statute-african-court-justice-and-human-rights

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APPENDICES

Appendix 1: Questionnaire

NAME OF RESEARCHER: Leah Mati

INTERVIEWEE'S OCCUPATION:_____

QUESTIONNAIRE CODE;

SECTION A; OPINION POLL

Please fill out the following questions accordingly.

1. Background training_____
2. Field of Practice:_____
3. Age: _____ (in years)
4. What is your scope of interaction with the peace and conflict field of International Relations?

   ……

   ……

   ……

   ……

   Do you think Kenya should withdraw from the ICC? YES ( ) NO ( )

5. If no, why do you think the status quo should be maintained?

   ……

   ……

   ……

SECTION B: FACTUAL ANALYSIS

Please answer the following questions about YOURSELF. (Indicate appropriate number in the box provided)

1. Do you agree with the verdict(s) given by the Judges of the International Criminal Court?

   ……

   ……

   ……

   If the answer to Question 1 above is in the affirmative, what is your argument against it?

   ……

   ……

   ……

2. If the answer to Question 1 above is in the negative, what would your recommendation be?

   ……

   ……

   ……

3. Did the trial process of the perpetrators of Kenya's post election violence in 2007-2008 at the International Criminal Court give the outcome you expected?

   ……

   ……

   ……

4. What challenges do you think cripple operations of the current system?

   ……

   ……

   ……

   What would be your recommendation with regard to these challenges be, moving forward?

   ……

   ……

   ……

5. What do you know about the Africa Court of Justice and People's Rights?

   ……

   ……

   ……

PROJECT TITLE: THE QUEST FOR A HOMEGROWN CRIMINAL JUSTICE SYSTEM: A COMPARATIVE STUDY OF THE INTERNATIONAL CRIMINAL COURT AND THE PROPOSED AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS.

INTRODUCTION: GENERAL INFORMATION

You are invited to join a research study to establish the viability of a home grown criminal justice system within African countries. Please take whatever time you need to discuss the study with your colleagues, friends or anyone else you wish to. The decision to join, or not to join is voluntary.

In this research study, we are interrogating the need to push for reforms that make the criminal justice system smarter, fairer and more effective in keeping communities safe especially in the face of growing incidents of conflict.

PURPOSE OF THE STUDY

To determine the efficacy or otherwise of Kenya's ratification of the Rome Statute and to push for a homegrown national court to try the serious crimes that have previously been referred to the ICC.

PROCEDURE OF THE STUDY

This study has three components:

a) Observation of the emerging trends in the ranging debates among scholars, international conflict managers and legal practitioners
b) Interviewing victims of past atrocities on their perception on the efficacy of the International Criminal Court

c) General Research on the alternative avenues that can be explored and improved by legal practitioners who are of the opinion that Kenya should pull out of the ICC

WHAT IS INVOLVED IN THE STUDY

If you decide to participate, research assistants shall hold pre-arranged meetings with the interviewees in the company of trained data collectors. Legal aid shall also be offered during the data collection sessions whose timing shall primarily be in the morning hours. Questionnaires will be used to capture data from interviews and the interview is also encouraged to make appropriate entries upon observation.

RISKS

This study has no foreseeable risks associated with it.

BENEFITS OF THE STUDY

The findings of this study will produce important information that will be used inform future jurisprudential and related debates in the field of international conflict management in the coming years.

CONFIDENTIALITY

The records related to this study will be maintained in confidence. We will protect the data from unauthorized disclosure, tampering, or damage and any information obtained will be treated with utmost confidentiality. No identity of any respondent in this study will be disclosed in any public reports or publications.

BASIS OF PARTICIPATION

You are free to withdraw the consent to participate in the study at any time.

INCENTIVES

The children of the victims of any atrocity participating in this study will be awarded an exercise book, pencil and a rubber.

YOUR RIGHTS AS A RESEARCH PARTICIPANT

Participation in this study is voluntary. You have the right not to participate at all or to leave the study at any time. Deciding not to participate or choosing to leave the study will not result in any penalty or loss of benefits to which you are entitled, and it will not harm your relationship with the researchers.

CONTACTS

Call Leah Mati at 0725823305 or leahmati@gmail.com, if you have questions about the study, any problems, unexpected physical or psychological discomforts, any injuries, or think that something unusual or unexpected is happening.

If you have any questions that you would like to be answered by persons independent of this study about your rights please contact THE INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES, UNIVERSITY OF NAIROBI on Tel No.318262 Ext 28087

_____

Participant:

_____ _____

Name Date

Thank you for taking time off your busy schedule to answer this questionnaire.

Mati, Leah Wanja

Master of Arts in International Conflict Management student,

Institute for Diplomacy and International Studies

University of Nairobi.