

**UNIVERSITY OF NAIROBI**

**INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES**

**EXAMINING GOVERNANCE IN AFRICA AND THE ROLE OF INTERNATIONAL  
LEGAL FRAMEWORKS IN PROMOTING INTERNATIONAL CRIMINAL  
JUSTICE IN AFRICA**

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REQUIREMENTS FOR THE DEGREE IN MASTERS OF ARTS IN DIPLOMACY,**

**OCTOBER 2015**

## DECLARATION

I Pauline Wanyonyi hereby declare that this research proposal is my original work and has not been presented for a degree in any other university

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Professor Amb. Maria Nzomo

## **DEDICATION**

This work is dedicated to my parents for the support they have accorded me since I embarked on this journey. May God bless them abundantly.

## **ACKNOWLEDGEMENT**

I thank the Almighty God for His grace and favor that enabled me to complete this study. I would also like to thank my research supervisor professor Amb. Maria Nzomo for her consistent guidance and support. My appreciation goes to my family for their support and encouragement. I would not have made this far without them.

## **ABSTRACT**

This research examines the role of international legal frameworks in promoting international criminal justice in Africa with a special focus on the ICC. In Africa the international criminal justice is entangled with politics hence lacks cooperation from member states. The International Criminal Court has been widely criticized by African leaders in the way it dispenses selective justice. This study examines the experiences regarding the enforcement of International Criminal Justice in Africa by the International Criminal Court. The major argument is that for the international justice in Africa to succeed the African Union should play a key role. The findings for this project are expected to offer recommendations on how AU can cooperate with ICC in order to execute its outlined mandate which is to secure peace and justice in Africa. The study also addresses the theoretical aspects of regional politics guided by institutionalism theory. It concludes that African state parties to the Rome Statute have a duty to domesticate the statute. The states must adopt the national mechanism to cooperate with the courts prosecution.

## **ABBREVIATIONS**

AU	African Union
ICC	International Criminal Court
ACPHR	African Commission on Human and Peoples' Rights
SADC	South African Development Community
TC	Trial Chamber
UN	United Nations
UNSC	United Nations Security Council
PSC	Peace and Security Council

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## CHAPTER ONE

### 1.0 Background of the Study

The Rome statute treaty led to the formation of the International Criminal Court. It entered into force on July 1<sup>st</sup> 2002 to investigate ,prosecute and try individuals accused of committing crimes against humanities, crime of genocide, war crimes and crimes of crimes. 123 states are parties to the Rome statute of which 34 of these are African countries. An investigation by the court's prosecutor may begin when an ICC party refers a situation to the court or when the UN security council refers a situation to the court. This international treaty did not introduce the concept of individual criminal accountability (ICA) wherein the subject is an individual perpetrator who faces a prison sentence if found guilty. The Nuremberg Trials, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) each punished individual state agents for grave human rights abuses committed. What distinguishes the Rome statute from ad hoc efforts is not only its permanent nature but also the principle of complementarity. The complementarity principle states that the court should be the last resort for justice when states are 'unwilling or unable' to genuinely carry out an investigation or prosecution<sup>1</sup>

Immense support was demonstrated by African states in regards to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome statute was finalized .This approach also replicated in other Regional Blocs was consistent with the idea of enhancing universal support, and was also seen as fostering a better understanding of the substantive issues raised in the draft text of the statute<sup>2</sup>.The African Commission on Human and Peoples' Rights was involved in intensive lobbying calling upon African states to ratify the Rome Statute to ratify the Rome Statute and take legislative measures to make the,

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<sup>1</sup> Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002, Article 17

<sup>2</sup> Phakiso Mochochoko, Africa and the International Criminal Court, in E Ankumah and EKwakwa (eds), African perspectives on international criminal justice, Ghana: Africa Legal Aid, 2005, pg 246

Rome Statute applicable in their domestic laws. In October 1998 at its 24<sup>th</sup> extra ordinary session the African Commission on Human and Peoples Rights passed a resolution calling African states to ratify the Rome statute and to take 'legislative and administrative steps to bring national laws and policies into conformity 'with it'<sup>3</sup>

To date, four States Parties to the Rome Statute Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali have referred situations occurring on their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan, and the situation in Libya both non-States Parties. After a thorough analysis of available information, the Prosecutor has opened and is conducting investigations in all of the above-mentioned situations. On 31 March 2010, Pre-Trial Chamber II granted the Prosecution authorization to open an investigation proprio motu in the situation of Kenya. In addition, on 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request for authorization to open investigations proprio motu into the situation in Côte d'Ivoire.

The International Criminal Court started witnessing a revolution by the African leaders when it indicted President Al Bashir of Sudan over crimes against humanities and war crimes in Sudan. African statesmen through the African Union have expressed their opposition to the court citing that all cases the ICC is currently investigating are in countries in Africa. African Union and the ICC share a common interest in dealing with crimes of impunity however the AU argues that it does not agree with externally exposed imposed strategies to fight these crimes on the continent.

## **1.1 Statement of the Problem**

Maintenance and respect of rule of law is a key factor that lays foundations for good governance, a democratic society as well as an effective society. Africa as a continent

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<sup>3</sup> Cole, Rowland JV. "*Africa's relationship with the international criminal court: More political than legal.*"(Melb. J. Int'l L. 14 2013): 670.

grapples with intra and interstate conflicts due to ineffective governance structures and lack of effective service delivery. Conflicts are also caused due to Lack of economic democracy, personal freedom, dictatorial leadership and undemocratic elections. These conflicts have led to gross violations of human rights, crimes such as genocide, war crimes, sexual violence and massive killings. International Legal frameworks if well utilized can play a key role in promoting the rule of law hence reducing social factors such as conflicts. This can only be possible if rule of law is respected and prevails. This research aims at examining ICC interventions in Africa; it will also analyze the limits and potentials of major legal instruments in Africa as well as challenges of International Justice in Africa.

### **1.3 Objectives of the Study**

The overall objective of this study is to examine governance in Africa and the role played by legal frameworks in Africa Framework's with a special focus on the International Criminal Court .

#### **1.3.1 Specific Objectives**

1. To Examine interventions by the International Criminal Court in in Africa
2. To analyze Africa's major legal instruments contributions to International justice in Africa
3. To examine the challenges of advancement of international criminal justice in Africa

### **1.4 Research Questions**

The study will focus on the following research questions

1. Do International legal frameworks interventions promote peace and Justice in Africa?
2. What are the limits and potentials of major Africa's legal instruments?
3. What are prospects and challenges for international Justice in Africa?

## **1.4 Justification of the study**

This study will seek to find out the role played by international legal frameworks in strengthening rule of law in Africa. It will examine how respect of the rule of law can be used as a tool that enhances good governance in Africa. The findings generated by this study are expected to lead to a better understanding of the States obligations with the International treaties. This will be of great importance to academic researchers in the sense that it will increase the body of knowledge. The finding might also lead to ways of enhancing cordial relationship between the ICC and the AU as means of ending impunity and injustices in the African continent.

## **1.6 Literature Review**

This review addresses Africa and the International Criminal Court by tracing the history of the Rome Statute in Africa, from the conception to negotiation to the ratifying of the treaty by African states and ICC cases and Investigations in Africa. Causes of ICC intervention in Africa ranging from conflict and governance in Africa, Institutional failure in Africa, Dictatorial leadership and bad governance in Africa will also be reviewed.

### **1.6.1 Africa and the Establishment of International Criminal Court**

Africa's top leadership called for the establishment of the International Criminal Court. Fourteen states of the South African Development Community (SADC) met in September 1997 and set out 10 basic principles that they wanted to be included in forming the ICC.<sup>4</sup>

A considerable number of African states are states parties to the ICC's Rome Statute but the AU is very critical of the ICC and has so far adopted a number of resolutions reflecting this. Most African states at one time strongly supported the ICC. They were very

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<sup>4</sup>Barnett, Laura. "*The International Criminal Court: History and Role.*" (2008).

active in the negotiation of the Rome Statute in the late 1990s. This was a time of great optimism, particularly because the statute had not just the backing of African governments but also of African NGOs, grouped under the International Coalition for the ICC<sup>5</sup>

Immense support was demonstrated by African states in regards to the preparations leading up to, during and after the diplomatic conference in Rome at which the Rome statute was finalized. This approach also replicated in other Regional Blocs was consistent with the idea of enhancing universal support, and was also seen as fostering a better understanding of the substantive issues raised in the draft text of the statute<sup>6</sup>

Africa played a significant and constructive role in the Rome negotiations that led to the creation of the court. The continent's strong backing for the court was not limited to state governments, many Non-governmental organization (NGOs) and civil society working under dictatorial regimes also made a significant contribution to the promulgation process. Their contribution was made principally through domestic advocacy and International organization bodies that comprised of activists from Africa and their counterparts in other parts of the world. Their objective was to stir conscience of world governments towards agreement on contentious issues and so paving the way for the Court's establishment<sup>7</sup>

120 countries adopted the Rome statute on July 17, 1998. Thirty Four African countries have ratified the Rome Statute making Africa the highly represented region. The ICC, which came into being in July 2002, is "a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern," which include "genocide; crimes against humanity; war crimes; and the crime of aggression." These countries believed that global justice would benefit from and be greatly enhanced by the creation of an "international criminal justice regime empowered to prosecute

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<sup>5</sup> Max du Plessis, et al *Africa and the International Criminal Court International Law* 2013/01

<sup>6</sup>Phakiso Mochochoko et al " *Africa and the International Criminal Court* ", African perspectives on international criminal justice,Ghana: Africa Legal Aid, 2005, pg 246

<sup>7</sup> C Jalloh 'Regionalising international criminal law' (2009) 9 *International Criminal LawReview*445

Individuals guilty of gross atrocities and human rights violations, including war crimes, crimes against humanity and genocide,”<sup>8</sup>

### **1.6.2 ICC Investigations in Africa**

The office of the ICC prosecutor has opened cases against 26 individuals from Africa in connection with five countries. The cases stem from investigations into violence in Libya, Kenya’s post-election unrest in 2007/8, rebellion and counter insurgency in Darfur region of Sudan, the Lord’s Resistance Army insurgency in central Africa, civil conflict in eastern Democratic Republic of Congo and 2002/3 conflict in the Central African Republic and 2002/3 violence in Ivory Coast<sup>9</sup>

The role of ICC in Africa has generated a controversial debate. Five of the situations currently under investigations by the court are all from Africa. African animosity towards the court may have been heightened by the Security Council’s referral of the situation in the Darfur to the court and the subsequent indictment of the Sudanese president AL Bashir. The indictment of the Sudanese president, particularly has led to criticism from some Africa Statesmen of the ICC as western tool designed to subjugate African Leaders of the African continent and advance an imperialist agenda. The exercise of proprio motu powers of the prosecutor in relation to the Kenyan situation hassled to too much criticism.<sup>10</sup>

The ICC’s investigations in Africa have stirred concerns on African sovereignty and the long history of foreign intervention on the continent. The court has been portrayed as a new form of imperialism that seeks to undermine people from poor African countries and other

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<sup>8</sup>Boell. “*Perspectives: Political Analysis and Commentary from Africa*,”(2012) p. 21

<sup>9</sup> Bekou, Olympia, and Sangeeta Shah. "Realising the potential of the International Criminal Court: the African experience." *Human Rights Law Review* 6, no. 3 (2006): 499-544.

<sup>10</sup> Ankumah, E and Kwakwa E(eds) (2005) *African perspectives on international criminal justice* Africa Legal Aid: Accra/Pretoria



powerless countries in terms of economic and political development. Other pundits have used the cases before the court as an illustration of the prosecutor's selective focus on Africa. The view expressed in this respect is that the prosecutor has limited his investigations to Africa because of geopolitical pressures, either out of a desire to avoid confrontation with major powers as a tool of western foreign policy.<sup>11</sup>

The AU and the ICC have enjoyed a difficult relationship over the past few years. Following the ICC indictment of President Al Bashir in 2008 for war crimes and crimes against humanity, the debate around the work of the Court has been as controversial as it is heated. The AU and the African continent in general feature prominently in these debates. This may be attributed to the fact that all the situations currently being investigated by the Court' Prosecutor in Central African Republic, Democratic Republic of Congo, Uganda, Sudan (Darfur) and later Kenya and Cote d'Ivoire) all from the African continent, and the first case ever to be tried by the Court was that of Thomas Lubanga, is from an African country, there are other more compelling reasons. Among these is the fact that the AU inserted itself forcefully into the ICC debate as it relates to specific conflict situations. In particular, the AU Assembly and the PSC have been at their most vocal in respect to the situation in Darfur, by far the most controversial and clearly the epicenter of what some have called 'the struggle for the ICC in Africa'<sup>12</sup>

### **1.6.2.3 Case in Libya**

The International Criminal Court first became involved in Libya after the United Nations Security council passed Resolution 1970 which referred the case of Libya to the ICC

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<sup>11</sup> Anghie, Antony, and Buphinder S. Chimni. "Third World Approaches to International Law and Individual Repsonsibility in Internal Conflicts." *Chinese J. int'l L.* 2 (2003): 77.

<sup>12</sup> Musila, Godfrey Mukhaya. "African Union and the Evolution of International Criminal Justice in Africa: Challenges, Controversies and Opportunities." *Controversies and Opportunities.(June 5, 2013)* (2013).

on February 2011. The UNSC (2011) decided that the Libyan authorities shall cooperate fully and provide necessary assistance the court.<sup>13</sup>

The office of the prosecutor for the international criminal court issued arrest warrants for perpetrators of human violations after series of violent conflicts in Libya .Muammar Gadhafi, Saif al –Islam Gadhafi and Abdullah al-Senusi were accused of committing killings and other atrocities in their country. In the aftermath of the rebel victory, opposition forces captured and killed muammar Gadhafi on 20<sup>th</sup> October 2011 thus terminating the ICC investigations against him. However the cases of Saif al-Islam Gaddafi and Abdullah Senusi have remained in contention. The case of Libya’s relationship with the International Court is complicated by the fact that Libya is not party to the Rome Statute which is the foundation treaty of the ICC. UN security Resolution 1970 referred the case of Libya to the court and it obligates Libya to comply with the Courts demands. Libya and Sudan have an international obligation to cooperate with the court and that obligation arises from the UN charter. Though Libya is not party to the ICC treaty, it is a UN member and thus bound by Resolution 1970.<sup>14</sup>

On May 1<sup>st</sup> 2012 Libya filed a legal bid to prosecute Saif al-Islam Gaddafi domestically. On May 31<sup>st</sup> 2013 the ICC judges rejected Libya’s bid and ordered authorities to surrender Gaddafi son to the court. The court held that Libya had not provided enough evidence to demonstrate that it was investigating the same case as the one before ICC, a requirement under treaty for such challenges. The court also held that Libya was genuinely unable to carry out an investigation on Saif al Islam.<sup>15</sup>

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<sup>13</sup> Resolution 1970 (2011). (2011, February 26). United Nations Security Council.

<sup>14</sup> Akande, D. "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC." *Journal of International Criminal Justice* 10, no. 2 (2012): 299-334. 324

<sup>15</sup> Richard Dicker. (2013, August 29). It’s Time for Saif al-Islam Gaddafi to Go to The Hague. Think Africa

#### 1.6.2.4 Case in Mali

Mali state was gripped with violence following coup d'état which began on 21<sup>st</sup> march 2012 by soldiers who seized the presidential palace, state media and other buildings forced the then president Amadou Tounami into hiding and eventually led to his resignation on April 8<sup>th</sup> consequently the , the country's constitution was suspended. An interim government consisting mostly of technocrats was formed following the resignation of the president. Following the referral of the situation in Mali by the Malian state the prosecutor of the ICC Fatou Bensouda confirmed the receipt of the referral of the situation on 18<sup>th</sup> July 2012. The alleged crimes include execution of soldiers, rape of women and young girls, mass killings of civilians, recruitment of child soldiers and destruction of properties. The prosecutor conducted preliminary investigations into the alleged crimes in accordance with the Rome Statute. In the course of the preliminary examinations the OTP determined that there is a reasonable basis to believe that murder, mutilation, cruel treatment and torture, intentionally directing attacks, pillage and rape crimes were committed. <sup>16</sup>

The self-referral could be characterized as an attempt by the Interim government seeking support and legitimacy both locally and abroad to put down the rebellion north, and eliminate opposition from those who might seek to destabilize the new government. Mali has so far supported the ICC and its goals in Africa. Mali referral has also the support of the West African Region <sup>17</sup>

It is clear from the developments surrounding ICC and Africa that the court is not necessarily picking on Africans for persecution and victimization in an imperialistic manner. Those emphasizing that the court is only investigating African situations fail to concede the fact that the court is also investigating similar situations in Colombia, Afghanistan among

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<sup>17</sup> *Ottilia Anna Maunganidze & Antoinette Louw, Transnational Threats and International Crimes Division, ISS Pretoria*

others. It therefore behoves African countries as active participants in the creation of the International Criminal Court to continue to supporting the court in all manner possible.<sup>18</sup>

### **1.6.3 Governance in Africa**

The root causes of governance failure in Africa are colonialism, the nature of independence struggle, the character of the post-colonial state and their leaders, and the requirements of the global order. Colonial governance institutions were designed to promote domination and extraction these being colonialism's principle mission. These institutions slowly became colonialism's legacy to post-colonial governance. At independence, African countries maintained over- centralized state institutions that reposed enormous powers in the hands of their founding fathers. Political mobilization and decision-making dominated post-independence governance strategies, especially since the pursuit of development was the national preoccupation. Democracy was not significant item on Africa's post-independence governance agenda (Ake, 1996)

The 1970s and 1980s competition between the super powers in Africa was an important factor in starting conflicts in Africa. Americans, Russians, British, French competed for the hearts and minds of the African elites and their followers, political and diplomatic allies, strategic allies and mineral resources. The rivalry and competition took various forms which included supporting governments, overthrowing governments, supporting of or opposition to governments and supporting if not initiating a rebel movement. The support or opposition of one super power or another was a very powerful force in the political survival or demise of an African government. The cold wars were powerful that they set in motion socio-political forces in some of the strategic countries processes that lead to

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<sup>18</sup> O Bekou & S Shah 'Realising the potential of the International Criminal Court: The African experience' (2006) Human Rights Law Review 499 501

serious internal conflicts which have outlasted the cold war itself and continued to date.<sup>19</sup> Colonial boundaries forced on the newly independent states led to a simultaneous task of state-building. This in turn led to heavy centralization of political and economic power and suppression of pluralism in Africa. Forging a genuine national identity was a challenge among disparate and often competing communities. This created a long term distortion in the political economy of Africa. Political competition was not rooted in viable national economic systems; in many instances the prevailing structure of incentives favored capturing the institutional remnants of the colonial economy for factional advantage. Undemocratic and oppressive regimes were supported by the competing super-powers in the name of their broad goals but when the cold war ended Africa was suddenly left on its own<sup>20</sup>

External actors were very much part of governance arrangements that produced and maintained autocratic governance in Africa. Cold war produced alignments that deepened divisions within and among countries, often creating source of upward legitimacy and relieving leaders from any semblance of accountability to local leaders. Cold war became not the only dynamic factor affecting African governance since independence, Africa's development agenda has been determined either by the former colonial power or by the Bretton woods system. This has had a profound impact in strengthening autocracy as well as directly inducing conflict. Assessment of governance institutional failure in African countries remains incomplete unless the full impact of external factors is addressed.

Governance failure effects can be progressive and its effects incremental. What is happening in Africa could be a manifestation or consequence of a half a century or more of failed governance. Autocracies operating within the cold war global order destroyed the very fabric of their societies but were put in place because of their strategic role in the bipolar

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<sup>19</sup> Adedeji, Adebayo, ed. 1999. *Comprehending and mastering African conflicts* London: Zed Books

<sup>20</sup> Collier, Paul, and Hans Binswanger. 1999. *Ethnic loyalties, state formation and conflict*. A background paper prepared for the Africa in the 21st Century Project. Washington, D.C., World Bank

politics. Such regimes existed for decades and became despotic. Democratic Republic of Congo was one such regime, it failed after the end of the cold war. Predatory regimes seething in corruption can grind to a halt and implode, this ends up with ordinary people struggling to find ways to survive. Whatever the circumstance, Human toll and social consequences of governance failure in Africa have been of staggering magnitude<sup>21</sup>

Accounts of governance failure in Africa emphasize on phenomena associated with political insecurity and weak institutions centralization of political power and its arbitrary exercise are symptoms of at the states weakness in a hostile environment. Political opportunism routinely drives policymaking at the expense of developmental objectives. For instance some governments choose policies that benefit them politically and favor distribution of public resources. Weak institution checks on the private allocation of public resources led to massive corruption in the public sector. This pattern so profoundly affected the opportunities for social advancement since political power meant more economic resources. In order to achieve and maintain positions of power, many African leaders have relied on ethnic support from their constituents'. In return these leaders have favored their supporters with privileged access to the limited resources available. The politics of favoring the few over many others are major causes of internal conflicts in many African states. Many African leaders believe that despite country's ethnic, cultural, and regional diversity, development of a shared national identity and stable community can be achieved if ethnic, regional, or other affiliations who oppose their governments are eliminated. Hence, these leaders became dictators often without tolerance for an independent judiciary or effective local governance.<sup>22</sup>

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<sup>21</sup> Berkeley, Bill. 2001. *The Graves Are Not Yet Full: Race, Tribe and Power in the Heart of Africa*. New York: Basic Books.

<sup>22</sup> Magnarella, Paul. "Preventing Interethnic Conflict and Promoting Human Rights through More Effective Legal, Political, and Aid Structures: Focus on Africa." *Georgia Journal of International and Comparative Law* Vol 23 (1993): 32745.

Governance failure has attributed to toll violent conflicts in Africa, most noted is the alarming level of conflict related deaths and displacements. It estimated that there has been more than 6million conflict related deaths in Africa since 1983(CSIS Report 2000). According to World Population prospects UN population division report there is an estimated 20 million conflict related displaced persons these figures constitute to three percent of Africa's total population.

Some scholars argue that Africa has reached its tipping point and that corruption is now endemic in the region. Before independence colonial institutions particularly the judiciary systems, provided the checks and balances that curbed leadership excessive powers. After independence the struggle for political leadership to retain power for life became the overriding objectives of many African leaders. White colonialists were replaced with black neocolonialists that are corrupt and they disregard the checks and balances which existed during the colonial period.<sup>23</sup>

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#### **1.6.4 Dictatorial Leadership and Institutional Failure**

According to Calderis (2006) institutional failure and pandemic corruption in Africa has been intensified with the incursion of several thuggish dictatorial leadership upon gaining independence. African continent has its own share of dictators from Gabon's Omar Odimba

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<sup>23</sup> Ayittey, George(1998),Africa in Chaos New York: St Martin"s Press

who has been in power for 42 years, Equatorial Guinea Teodoro for more than 30 years, Zimbabwe's Robert Mugabe and many others. These dictators spent their entire careers enriching themselves, intimidating political opponents and promoting undemocratic regimes. Constitutions were either amended or re written or simply ignored by the same people who swore to uphold the constitutional rules. These leaders have wielded enormous power and authority which allowed them to subjugate all relevant institutions and prevent the necessary checks and balances common to good governance<sup>24</sup>

Transparency International estimates that corruption in Africa siphons off 20 to 30 percent of funding from basic services provision. Corruption has drowned institutions in African states and caused a huge impediment towards development. Many institutions have languished in corruption due to factors such as personal greed, low income, improper rules and norms guiding the institution and the absence of proper accountability.<sup>25</sup>

African history is littered with cases of misrule, dictators and tyrants as well as instances of inappropriate political policies. African leaders have introduced legislation policies that are far much worse than that of colonial powers, which hinders media freedom, the judiciary and civic and professional society. The military and secret services have become subservient institutions and members of ruling political parties and turn blind eye to the transgressions of the governments. The consequences of all these include thugocracy, anarchy, rape , murder, disappearances, massive hunger, poverty and diseases among masses that are not allowed to question any decision made by the ruling elite. For instance Kenya and Zimbabwe have resembled a state of nature where life is brutal and short hence survival

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<sup>24</sup> Calderisi, Robert. *The Trouble with Africa: Why Foreign Aid Isn't Working*. New York: Palgrave Macmillan, 2006.

<sup>25</sup> Aiyitay, George(1998),Africa in ChaosNew York: St Martin"s Press.



for the fittest scenario which degenerated to a state of war because of intolerance and politics exclusion between the rival parties.<sup>26</sup>

Economists and policy analysts of the world, the IMF and other institutional agencies agree that corruption is a universal problem but with more debilitating effect felt in developing nations. Public sector corruption or use of public office for personal gain is ranked as a major constraint that has hindered Africa's economic, political and social development<sup>27</sup>

### **1.7 Research Hypotheses**

The study tested the following hypotheses

- ICC interventions in Africa enhances International Criminal Justice
- Implementation of Africa governance structures promotes the International Criminal Justice
- Africa member states noncompliance with Rome Treaty hinders the International Justice

### **1.8 Theoretical Framework**

This research purports to rely mainly on institutional theoretical framework. According to Kraft's Public Policy (2007): Institutional Theory is "Policy-making that emphasizes the formal and legal aspects of government structures. "Institutional theory is "A widely accepted theoretical posture that emphasizes rational myths, isomorphism, and legitimacy." Institutional theory focuses on the deeper and more resilient aspects of social

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<sup>26</sup> Lawal, Gbenga (2007), "*Corruption and Development in Africa: Challenges for Political and Economic Change*," Humanities and Social Sciences Journal, 2(1):1-7.

<sup>27</sup> C, Leite, and Weideman J. "Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth." International Monetary Fund Working Paper, no. 99/85 (1999).

structure. It considers the processes by which structures, including schemes, rules, norms, and routines, become established as authoritative guidelines for social behavior (Scott, 2004).[3] Different components of institutional theory explain how these elements are created, diffused, adopted, and adapted over space and time; and how they fall into decline and disuse.

On the other hand, March and Olsen (1984; 1989; 1996) argue that the best way to understand political behavior is through a “logic of appropriateness” that individuals acquire through their membership in institutions. People functioning within institutions behave as they do because of normative standards rather than because of their desire to maximize individual utilities. Further, these standards of behavior are acquired through involvement with one or more institutions and the institutions are the major social repositories of value. The choice of this theory helps in understanding the central focus of this study which is about advancing International Criminal Justice in Africa.

### **1.9 Research Methodology**

This research will be both qualitative and quantitative in nature and will adopt a historical research design due to time and budget constraints. It therefore seeks to explore, explain and understand the critical elements of the study from already available data of a secondary nature. The research will observe the prevailing trends in the past upon this explain the present and predict the future. Historical study will be used to examine the objectives of the study. The study will attempt to trace the International Criminal Court initiatives in Africa and correlate with the impacts of African states non-cooperation

## **1.9.0 Data Collection**

### **1.9.1 Instrumentation**

The data collection instrument that will be employed in this study is document analysis. Critical evaluation of public or private records of information relating to the issue under study will be examined. This will aid in obtaining information and data with ease without interruption.

### **1.9.2 Research Procedure**

Quantitative data will be used to collect Data from African Union offices in Kenya, International Criminal court Offices in Kenya and from the ministry of Foreign Affairs. The data will be collected by the researcher.

#### **1.9.2.1 Data Analysis**

#### **1.9.2.2 Inferential Analysis**

Data from public documents will be analyzed to derive inferences from the findings. This analysis will be used since it offers relative ease in explaining relationship between variables

### **1.9.3 Ethical Considerations**

In carrying out this research, the researcher will make applications of the following ethical considerations which are critical for the information and data sources

#### **I Informed Consent**

No data will be used without the consent of the provider. However this will not apply to information that is publicly available.

## **II Privacy and Confidentiality**

Data providers who will want disclosure of their identities will be guaranteed of utmost privacy and their information will be handled with utmost confidentiality.

### **1.10 Scope and Limitations of the Study**

Due to time and budget constraints this research will not be conducted on a very large scale. Its preliminary findings will be basis for more intensive studies in the future. This study will be conducted between May-July 2015 by analyzing ICC and AU relationship with a much closer look of the Kenyan and Sudan ICC cases. Data will be collected by use of Document analysis technique.

**CHAPTER TWO**  
**INTERVENTIONS IN AFRICAN CONFLICTS BY THE INTERNATIONAL**  
**CRIMINAL COURT**

**2.0 Introduction**

This section will explore ICC interventions in DRC (self-referral), Darfur (UNSC referral) and Kenya (prosecutor proprio motu). First it will explore history of governance in Africa, and then explore on the overview the involvement of the ICC in these regions. Secondly the chapter will explore challenges the International Criminal court had while handling the situations and the impact it has made in these regions.

**2.1 History of Governance in Africa**

Africa woes can be traced back to the colonial era which began in Berlin conference of 1884 when European countries decided to partition Africa along the lines of economic spheres without putting into consideration its diverse culture and ethnic boundaries. The fragmentation caused division amongst ethnic groups and unified geopolitical entities were separated as well. When the countries began to acquire independence they it inherited same form of governance that was synonymous with their rulers. : guarded experimentation, military rule dictatorships which opened way for autocratic military rule, single party under autocratic civilian leaders and political and economic liberalization. A few countries in Africa today are in the fourth phase of political liberalization and thus are adopting the emerging trends in governance that include new concepts such as decentralization which is influenced by globalization.

The constitutional innovations introduced at independence partly sought to promote long-repressed local values. But these were unavoidably- ably blended with the formal structures of national governance introduced by European colonialism. With notable exceptions like Kenya and Zimbabwe, British colonialism bequeathed to its former dependencies the legacy of “indirect rule,” which provided considerable autonomy to “traditional” rulers—whether these were genuinely traditional or not— against the backdrop of English common law. In contrast, former French colonies inherited a metropolitan-centered system of direct rule extending to the remotest rural cantons, circles, and communes. Belgian administration in Burundi, Congo, and Rwanda was comprehensive and highly autocratic. Until its cataclysmic end in 1974, Portuguese colonialism in countries like Angola, Guinea- Bissau, and Mozambique abjured local participation in governance, much less indigenous representation. This complex patchwork of old and new state institutions produced a varied but generally disappointing record in national governance.<sup>28</sup>

Munya argues that Africa has never experienced a lasting peace. Peace and stability proved elusive in pre-colonial and colonial Africa. The scourges of slave trade, inter-tribal warfare and the imposition of colonialism did not allow it. It was emancipated that independence would create an era structure of the societies made conflicts disruptive and adventurous rather than catastrophic. With the invention artificially constructed modern state apparatus and weaponry, coupled with the pressure of external forces Africa has therefore been made one of the most unstable regions in the world and has made creation of peace to be an uphill task.<sup>29</sup>

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<sup>28</sup>World Bank, 1993, Can Africa Claim the 21<sup>st</sup> Century?

<sup>29</sup> Munya, P. (1999): “The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Examination

Weak and dysfunctional institutions, ethnicity, impunity, corruption and lack of an effective government to address the atrocities of perpetrators of violence in Africa led to the establishment of International Criminal Tribunals as a way of dealing with the injustices in the continent. The mechanisms adopted by the international community to address impunity by criminal prosecutions have so far generated a heated debate amongst various African leaders. It is however noted that International Criminal tribunals have played a fundamental role in responding to core crimes of aggressions, crimes of genocide, and war crimes gross violations of human rights in situations where the national legal systems are unable or unwilling to respond to the crises.

The international Criminal Court has so far produced diverse political and social effects in the countries and communities where it intervenes. Article 13 of the Rome statute provides different mechanisms through which the ICC can exercise its jurisdiction in different contexts. Situations may be referred to the court through state parties, through Security Council referral and the prosecutor to initiate an investigation in a given situation.

## **2.2 Discourse on the Legitimacy of International Legal Institution**

Thomas Frank argues that the legitimacy of a decentralized legal order is rooted in a perception that Only fair institutions are capable of generating fidelity among members and asserting influence more widely in the international system. The measure of ICC's legitimacy is the extent to which people in the world perceive it as a legal institution and are prepared to accept its commands as binds.<sup>30</sup>

Struett adds that rules have legitimacy when diverse members of a society agree in the abstract that such rules are fair to all concerned before particular interests come to play. This in essence is a useful starting point for the general notion of legitimacy. Legal institutions are

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<sup>30</sup> Thomas M. Franck (1990) Power of Legitimacy Among Nations. New York: Oxford University Press

hence formalized expressions of normative reasoning as treaties typically emerge when social norms are converted into aspirational standards then into a legal context. Interdependence gives international treaties their existence since individual state actors are not isolated. Legal rules are created in the shadow of the constitutive norms of the international system.<sup>31</sup>

International Criminal Court as a legal institution is anchored by a set of core legal norms that provide the animating purpose of the treaty. The Rome Statute which is embedded on the Rule of law has a duty of criminal prosecution and penal sanctions for grave crimes in which the perpetrators are the subject of criminal responsibility. One of the significant contributions of the statute is to identify crimes of aggression , war crimes, genocides, crimes against humanity which are the most serious forms of violence in the international system<sup>32</sup>

### **2.3 Self-Referral**

#### **The Democratic Republic Of Congo**

The Democratic republic of Congo gained independence on 30<sup>th</sup> June 1960. Since then the country has been synonymous with intra and interstate conflicts. The conflicts have resulted in human rights abuses, sexual violence, and humanitarian catastrophe. The first series of conflicts in the country began in 1996 by invasion of neighboring states which succeeded in replacing Mobutu with Laurent Kabila. The country witnessed a number of attempts by regional and international actors including UN Resolutions; individuals like Nelson Mandela, states and independent institutions to try resolving the conflicts. These attempts led to ceasefire agreements that failed to end the violence.

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<sup>31</sup> J.Struet(2008) The politics of Constructing the International Criminal court NewYork:palgrave macmillan pg 153-157

<sup>32</sup> Robert Cryer (2005) Prosecuting International Crimes: Selectivity and the International Criminal Law Regime Cambridge: Cambridge University Press, 144



In 2001 Joseph Kabila ascended to power after his father Laurent Kabila was assassinated by one of his body guards. Peace agreement signed December 2002 in South Africa ushered in a transitional government in which Joseph Kabila shared power with four vice presidents. The transitional government adopted a new constitution by referendum in 2005 and went into force in February 2006.

The country continued to witness low intensity conflicts with frequent outburst despite the introduction of the democratic governance. Several rebel groups and militias have continued to fight for land and natural resources. The militia groups include Congre's National pour la defense du peuple (CNDP) formed in 2006 supported by the Rwandan government and Forces Democratiques pour la Liberation du Rwanda(FARD) made up of the Hutus that flee Rwanda in the wake of 1994 genocide. The country's weak military has been unable to suppress these armed groups.<sup>33</sup>

### **2.3.1 DRC Legal System**

The Judicial sector plays a key role in establishing the rule of law in any given society. DRC being a post conflict society the justice system plays a major role in guaranteeing stability and peace as well as promoting, safeguarding and protecting values of equality and fairness. According to a research conducted by Africa governance Monitoring Advocacy project, lack of an effective justice system can plunge a country into anarchy and social unrest. The country adopted a new constitution in 2006, which divided the court system into three separate jurisdictions: the judicial (civil and criminal) jurisdiction, the administrative jurisdiction and the military jurisdiction. The supreme court was further divided into three separate high courts namely the constitutional court (cour constitutionnelle),

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<sup>33</sup> Resolution 1856 of the UN Security Council extended MONUC's mandate until 31 December 2009. Doc S/RES/1856

the supreme court (cour de cassation) and supreme court for administrative matters ( conseil d'état). The country is still struggling to implement the new structures that are designed to bring justice closer to the population. The changes provided by the constitution are costly complex, lack financial and human resources and does not seem realistic to expect their implementation in the short term.<sup>34</sup>

Currently the DRC's national justice system is in a state of disarray. The population lacks confidence in the judiciary's administration of justice. Not a single political crisis of a constitutional nature that has been resolved by the judiciary. It is estimated that very small percentage of disputes end up in the court of law because parties to the disputes are suspicious of the judiciary that they prefer other means like traditional arbitration to solve the disputes. It will take years to establish a functioning, independent, impartial and fair judiciary<sup>35</sup>

### **2.3.2 Main Problems Facing the DRC Judicial System**

Certain key factors that undermine provision of justice in the DRC include lack of financial resources, lack of independent judiciary, and shortage of qualified legal human resource personnel, corruption, and adequate investigations amongst others

#### **a) Transparency and Corruption**

Ojaide (2000:18) defines corruption as any systematic vice in an individual, society or a nation which reflects favoritism nepotism, sectionalism, undue enrichment or amassing of wealth, abuse of office, power position and derivation of undue gains and benefits.

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<sup>34</sup> International legal consortium Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo August 2009

<sup>35</sup> Human Rights Watch reports, "Ituri: Covered in Blood: Ethnically Targeted Violence In Northeastern DR Congo," July 2003

Political crises, poor infrastructure, incapacitated judicial system, lack of institutional capacity and weak rule of law are among major factors that have plunged DRC into high level corruption. According to transparency International Report of 2014 DRC was rated the most corrupt country in the sub Saharan region. There exists an ethics and anti- corruption commission but it has made minimal impacts since it lacks resources, independence and credibility. Political actors continue to manipulate the administration, customs services, judiciary, army and natural resources to embezzle funds.

Corruption in the judicial sector has had a profound effect on the overall national justice system of DRC. Article I52 of DRC constitution led to the creation of conseil superieur de la magistrature (CSM) a superior body which is responsible with appointing , supervising, and disciplining magistrates at all levels was seen as a positive step towards independent judiciary. CSM faces various problems which include insufficient funds and staff hence unable to carry out it stipulated mandate.

**a) Lack of an Independent Judiciary**

Article 151 of the 2006 DRC constitution which provides for an independent judiciary has not been implemented. Executive power continues to issue instructions to the judges and if not enforced the Judges may be transferred to remote rural areas against his/her will. Poor working conditions of the judges, delayed salaries, low paychecks, on payments of salaries also contribute undermining their independence. It is common for judges to give in to corruption or ask money from parties to be able to provide for their families.<sup>36</sup>

**c) Investigative capacity**

Lack of investigative capacity is also a major obstacle that faces the criminal justice system in DRC. Lack of cooperation between the police, prosecutor and the judge and lack of

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<sup>36</sup> ibid

knowledge among the judicial police of how to conduct criminal investigation are among factors identified as obstacles to the justice system in the country. The country also lacks modern technical facilities that are needed for qualitative criminal investigation such as forensic laboratories leading to faulty investigations that will often cause acquittal of suspects due to lack of enough evidence.<sup>37</sup>

#### **d) Financial constraints**

Lack of financial resources has crippled the judicial sector in DRC. DRC allocates insufficient funds from its budget to the justice sector. Lack of funding makes it difficult to run courts efficiently as it does not allow acquiring of essential office supplies and equipment or even undertaking basic repairs needed on court houses. Irregular payments of the salaries also serve as a serious inducement to corruption.

### **2.3.3 An overview of ICC interventions in DRC**

DRC has been tragically marked by more than a decade of uninterrupted violence. Since 1960 there have been more than 11 civil wars in Congo including the assassination of Patrice Lumumba, and the thirty two year dictatorial and predatory regime and Mobutu Sese Seko. The first Congo war was between 1996-1997 pitted Laurent Kabila's Alliance of Democratic Forces for the Liberation of Congo (ADFL) against President Mobutu Sese Seko. The ADFL was supported by Rwandan and Ugandan troops and Eastern Congo was the focal point for war. Tens of thousands of child soldiers were recruited to fight in the war. In 1997 Kabila took over as president. He alienated his Rwandan allies and they threw their support behind Congolese Rally for Democracy (RCD)<sup>38</sup>. The second civil war was more

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<sup>37</sup> Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, supra n 18 at para. 53

<sup>38</sup> Vinck, Patrick et al. Living With Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo. The Berkeley-Tulane Initiative on Vulnerable Populations, August 2008

catastrophic than the first and it is estimated to have killed more than 3.3 million people making it the world's deadliest war since the Second World War. It was also referred to as Africa's First World War because Uganda and Rwanda, sent troops supporting the rebels, while Zimbabwe, Angola and Namibia sent troops to support the Kabila government.

Laurent Kabila was assassinated in 2001 and his son Joseph Kabila became president. President Joseph Kabila agreed to sign the Sun City peace accord which created a transition government that included his administration, the unarmed political opposition, the RCD and the movement for the Liberation of Congo. This brought relative peace but it did not end the atrocities in Ituri and south Kivu regions.<sup>39</sup>

The Congolese government referred the situation in the country to the office of the prosecutor in March 2004. In June 2004 the prosecutor formally decided to open an investigation into the situation of the DRC. The DRC case was the first situation to be handled by the International Criminal Court. The International Criminal Court focuses its attention on Ituri province since it was deemed that gravest crimes were committed in that region.

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<sup>39</sup> Baldo, Suliman. "The Impact of the ICC in Sudan and DR Congo." Paper, International Conference: Building a Future on Peace and Justice. Nuremburg, Germany. 25-27, June, 2007.

#### 2.3.4 Arrests and Trials

The courts investigations were greatly boosted by the DRC government and the United Nations mission in the DRC. The DRC government surrendered Thomas Lubanga Dyilo to the ICC on March 2006. He was the president of the union des patriots Conglais (UPC and was the commander in chief of its military wing. Lubanga is allegedly responsible, as co-perpetrator of war crimes of enlisting and conscripting children under the age of 15 years and using them to participate in hostilities. Arrest warrants were also issued for Germaine Katanga the former senior commandant of the *Force de Resistance Patriotique en Ituri*(FRPI), Bosco Ntaganda former Deputy of the Chief of The General staff of the *Forces Patriotiques pour la liberation du Congo*(CNDP), Mathieu Ngudjolo Chui the former Senior commander of the *Front Nationalistes et Intergrationistes* (FNI). Thomas Lubanga trial started on 26<sup>th</sup> January 2009 and concluded on August 2011. On March 2012, Trial Chamber I decided unanimously that Thomas Lubanga is guilty of war crimes of enlisting children under the age of 15 and using them to participate actively in hostilities. On 14<sup>th</sup> July 2012, Trial Chamber 1 sentenced Thomas Lubanga to a total of 14 years imprisonment. Germaine Katanga and Mathieu Ngudjolo trials began on 24<sup>th</sup> of November 2009. Trial chamber II decided to drop Ngudjolo case

The choice of Lubanga, Katanga, Ngudjolo as the ICC first prosecuted suspects in the DRC and the cases against them manifested four major problems. First, immense political caution was displayed when the OTP settled for Ituri as a region that experienced gravest atrocities in the DRC. Ituri is isolated from the political arena in Kinshasa hence it raised questions about the validity of the approach. This approach was a crucial consideration for the ICC as it needed to maintain good relations with Kinshasa to ensure security of the ICC investigators as well as personal working in the volatile Eastern provinces of DRC. There is evidence that president Kabila supported various Rebel groups that committed atrocities in

Ituri but the OTP Chose to ignore that .The ICC also wanted to avoid implicating government officials in the lead up to DRC first post-independence elections that were held in July 2006. The ICC also encountered pressure from the UN and the European Union that had donated over US \$ 500M towards elections the most expensive in the UN'S history to avoid causing political instability that was severe in DRC. While it is important for the ICC to avoid destabilizing fragile political situations, the court faced serious dilemma since many political leaders and military officials were major perpetrators of gravest crimes and had to remain untouched for the sake of peace. This sent a message of continued impunity for the leaders to the Congolese population <sup>40</sup>

Second problems that arose from the ICC judicial caution in the DRC situation was that Ituri provided the ICC with a simpler legal task than other provinces. Ituri had the best local Judiciary which had already shown adeptness at investigating serious crimes including those committed by Lubanga, Katanga and Ngudjolo. The EU had invested more than US\$40m towards reforming the Congolese Judiciary which had led to remarkable progress. ICC started investigations when major militia leaders were already in custody. This led to observers to question the validity of the ICC's strategy in Ituri asking why the court focused energies where judicial task is straight forward due to substantial local capacity, while atrocities continued in provinces lacking judicial frameworks. Another factor that arose from the narrow geographical approach was that the ICC resisted investigating the wider dimensions of Lubanga's crime since it is alleged that Lubanga rebel group was financed by the Ugandan and Rwandan governments. Such investigations could have further implicated key figures in Kampala and Kigali and the OTP had indicated that was beyond their scope. The prosecutor appealed the pre- Trial chambers on January 29 2007 requesting that references to crimes in the international conflict dimensions be removed from the charges

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<sup>40</sup> M.Brubacher, "The ICC, National Governments and Judiciaries" in N.Waddell and P.Clark (eds.), Peace, Justice and the ICC in Africa, Meeting Series Report, London: Royal African Society, March 2007, pp.22-23

against Lubanga as the OTP's evidence related only to crimes committed in the internal conflict.<sup>41</sup>

It is therefore clear that self-serving pragmatism rather than pragmatism geared to the needs of the Congolese population was a major consideration in the ICC case selection. The Lubanga case did not address the gravest crimes he had committed for fear that it would greatly complicate the judicial process. It also represented the ICC's attempts to maintain good working relations with the Congolese government in order to maintain and support the court's principal donors in the context of the Congolese elections and their aftermath. This highlights the dilemma the ICC encounters when operating in fragile political unstable and military environments. This undermines the courts legitimacy among affected populations which had hoped it would finally hold accountable those responsible for the atrocities.<sup>42</sup>

## **2.4 United Nations Security Council Referral**

### **The Republic of the Sudan**

#### **Backgrounds to the Conflicts in Darfur**

The republic of the Sudan gained independence in 1956 from Egypt which dominated the northern part and the United Kingdom which dominated the southern part. It is one of the largest countries in Africa with a population of more than 40 million people. It is also one of most ethnically and religiously diverse countries with about 20 linguistic groups and over six hundred sub- dialect<sup>43</sup> .Sudan has experienced a number of civil wars with the first one civil beginning soon after independence. The war was initiated by a southern based rebel group referred to as Anya nya. The rebel group was fighting for the independence of the south

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<sup>41</sup> Clark, Phil. "Law, politics and pragmatism: The ICC and case selection in the Democratic Republic of Congo and Uganda." *Courting Conflict* (2008): 37-44.

<sup>42</sup> Ibid

<sup>43</sup> Schirch, Lisa. 1995. *Keeping the Peace: Exploring the Civilian Alternatives in Conflict Resolution*. Uppsala: Life and Peace Institute.



which later on gained independence in 2011. The country has suffered a number of Intra state conflicts in 1970 a small scale conflict over governmental power took place involving a communist group and an Islamic group. In 1983 the second war broke out between the north and south when the Sudan People's Liberation Movement/Army (SPLM/A) initiated a second liberation.

Crisis in Darfur began in February 2003 when two armed rebel groups the Sudan Liberation Army (SPLA) and the Justice and Equity Movement (JEM) rose against the Arab dominated government for discriminating against the Black Africans. Rebels claimed that blacks were being politically and socially marginalized by the Arabs. Mediation efforts led by Chad president Idris Deby led to signing of a ceasefire between the government and the rebel groups. In December 2004 the ceasefire fell apart and Janjaweed

Militias who were mostly of Arab descent started to attack villages populated mostly by blacks. The Janjaweed militia group is estimated to have killed more than 300,000 civilians and more than 1 million. In 2004 the AU sent peace keepers to Darfur the UN took command over these forces in December 2007. The Darfur Peace Agreement (DPA) was signed by the Sudanese governments and a faction of the SLA led by Mi nnei Min a wi on May 2006. The DPA was however in effective in ending the hostilities.

#### **2.4.1 The Political and Legal System**

Omar Bashir the current Sudan president assumed power through a military coup on 30 June 1989. He was elected president by popular vote march in 1996 and re- elected in April 2010 and April 2015 . Sudan's bicameral legislature includes the council of States and the National Assembly. The council of States comprises of 50 seats and its members are indirectly elected by state legislature to serve a six year term. The national assembly

comprises of 450 seats 60 percent from geographical constituencies, 25 percent from a women's list and 15 percent from party lists and members also serve a six year term.

The Sudan government inherited its legal system from the Egyptians and British rule that had two main court systems: the Mohamedeen Law courts which was basically Egyptian dealing with Islamic personal law matters such as marriage, divorce, inheritance, and the civil law courts which were under British rule dealing with all other criminal and civil litigation. In 1973 the government unified the court systems. Sudanese law has been changed and modified by those in power and the changes have mainly served the interests of those in power. After the military coup d'etat in 1989 the National Islamic Front declared that it wanted to apply the Islamic laws of Sharia.

According to (Deng 2005:14) the imposition of Islamic law faced criticism from secularized Muslims and Christians. Several judges especially those trained in civil law lost their jobs and were replaced with men with no or little legal knowledge. The process of enforcing Sharia law throughout the country had a significant impact on the customary laws.

In the past few years Sudan has been creating new legal norms to enable the prosecution of atrocities. In 2007 the country adopted the Armed Forces Act (AFA) which criminalizes war crimes, genocide and crimes against humanities and it applied only to members of the armed forces. Criminal act of 1991 was amended to cover genocide, crimes against humanity and war crimes with respect to the general population. As much as these developments are significant in that they allow Sudanese national courts to prosecute atrocities as international crimes. Several legal obstacles impedes such prosecutions<sup>44</sup>

First, genocide under Sudanese laws must be committed through homicide or murder and in the context of a widespread systematic murder. These requirements do not exist under international laws. The Sudanese law fails to cover war crimes that are criminalized under the

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<sup>44</sup> Elliesie, Hatem et al. (2009): *Different Approaches to Genocide-Trials under National Jurisdiction on the African Continent - The Rwandan, Sudanese and Ethiopian Case, Recht in Afrika*, Volume 12/1, Köln, pp. 21

international law such as sex slavery and other gender related crimes and this prevents national authorities from charging certain crimes even though they amount as crimes under the international law. A system of immunities granted to state officials and soldiers under the AFA are also a major obstacle to national prosecutions of international crimes in Sudan. The government of Sudan went further to introduce special courts and a special prosecutor to investigate and prosecute the Darfur atrocities. However pro- government forces were not prosecuted in these courts. The courts were biased and handled the cases inadequately since they relied on confessions obtained under torture, and also they applied speedy procedures since the defense counsel had very limited time to examine witnesses.<sup>45</sup>

Sudan has adequate international human rights legal standards in its constitution that also mandate legislative reforms to reconcile existing laws with international obligations. However , the criminal law framework remains flawed and a record of legislative reforms since 2005 shows the governments lack of political to uphold the standards stipulated in the Bill of Rights and the international instruments to which Sudan is a party.

#### **2.4.2 Sudan and The ICC**

On March 31, 2005 the Security Council acting under chapter VII of the UN charter adopted Resolution 1593 that mandated the government of Sudan and all other parties of conflict in Darfur to cooperate fully and provide any necessary assistance to the International Criminal Court. Article 13(b) of the Rome Statute, authorizes this referral procedure as a means of gaining jurisdiction over certain crimes. Previously the Security Council had established an International Commission of Inquiry on Darfur under Resolution 1564, maintaining that the Sudanese government had not met its obligations under previous

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<sup>45</sup> Mohamed Abdelsalam Babiker, “The Prosecution of International Crimes under Sudan's Military and Criminal Laws:Development, Gaps and Limitations”, in *Criminal Law Reform and Transitional Justice: Human rights Perspectives for Sudan*(Ed. Lutz Oette, Ashgate UK, 2011)

Resolutions. The confidential report compiled by ICID listed potential war crimes suspects and strongly recommended that the Security Council refers the situation to the ICC.<sup>46</sup> The Security Council had established an International Commission of Inquiry on Darfur Resolution 1564 to investigate on Darfur crisis. In January 2005 the commission submitted a report it had compiled to the Security Council the report had a confidential list of potential war crimes suspects and strongly recommended the situation to be referred to the ICC.

The office of the Prosecutor initiated an investigation in Darfur in June 2005. In April 2007, the pre-Trial Chamber publicly issued arrest warrants for Ahmad Muhammad Harun former minister of state for the interior government of Sudan and Ali Muhammad Ali Abd-Al Rahman an alleged leader of the Janjaweed Militia group. Both of them were charged with over 40 counts of crimes against Humanity, murder, persecution, forcible transfer of population, rape, torture and destruction of property. Sudanese government refused to comply with either warrant. In May 2009 Harun was appointed governor of South Kordofan state. In July 2008 the PTC issued warrants of arrest for president al-Bashir he was alleged to be responsible for ten counts of crimes against humanity, murder, extermination, torture, rape, genocide, forcible transfer and intentionally directing attacks against a civilian population.

On July 14, 2008, Moreno-Ocampo issued a warrant of arrest for President Al Bashir for genocide, criminal acts against humanity, and atrocities against individuals from the Fur, Masalit, and Zaghawa bunches from 2003 to 2008. Bashir was indicted on March 2 2009 as an indirect perpetrator. The court found that there was enough evidence that President Al Bashir used the Sudanese military as well as Sudan's Government to carry out criminal activity. He was indicted for committing five counts of crimes against humanity and two counts of war crimes; however the ICC did not find that enough evidence existed to indict him for genocide. Notably this was the first time that the ICC issued an arrest warrant for a

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<sup>46</sup> S/RES/1564 (2004), September 18, 2004

sitting head of state. On March 5, 2009 the ICC asked for that Sudan captures and surrenders President Al Bashir. In as per Article 89(1) of the Rome Statute the ICC asked member states to capture and surrender Al Bashir if presented with the opportunity to do so.

The Government of Sudan, under Al Bashir, has questioned this activity of purview in connection to Sudan. It has contended that Sudanese sovereignty is being violated both by the Council, which alluded the matter, and the ICC, which was accused of executing the decision. Sudan's complaints have typically brought about a strained relationship and constrained participation with the Court. Therefore, in May 2010, after a prosecutorial solicitation for a finding of non-participation, the Pre-Trial Chamber issued a decision holding that Sudan had neglected to consent to its commitments to coordinate with the Court and welcomed the Council to make any move it regards appropriate. It thereafter directed the ICC Registrar to inform the UNSC and Sudanese authorities of that decision. While the Council has not so far cajoled Sudan to cooperate with the Court, it could impose sanctions or other punitive measures though that power has not yet been invoked in favor of international criminal tribunals.<sup>47</sup>

President al-Bashir has so far visited more than three countries in Africa who are members of ICC but nothing has been done. On 22 July 2010, he headed out to Chad to go to a summit of the Community of Sahel-Saharan States. On 27 August, he set out to Kenya to go to festivities for the nation's new constitution and most recently in South Africa for the African Union summit. Some African authorities have defended the visits by referring to extraordinary circumstances including, for the visit to Chad, the normalization of relations in the middle of Sudan and Chad following quite a while of intermediary war and, for the visit to Kenya during new constitution promulgation in august 2010. However, the visits ran counter to Chad and Kenya's tying commitments under the Rome Statute. The ICC reported

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<sup>47</sup> Mark Ellis, Richard Goldstone, eds, *International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century*, Idebate Press, 2010

Kenya to the UN Security Council, but the African Union and the Commonwealth came to Kenya's defence.

It was hard to promote international criminal justice in the situation in Darfur since it involved the head of state. Atrocities committed in Sudan were systematic and perpetuated by or with the endorsement of governments. In international law each actor is responsible for the acts of their subordinates hence Bashir carried the largest responsibility.

## **2.5 Prosecutor's Own Initiative Kenya**

Following the announcement of the presidential results in December 2007, violence broke out in several parts of Kenya. There were claims that the electoral commission of Kenya (ECK) under the leadership of Samuel Kivuitu had rigged the presidential results. People who were not satisfied with the election Results resorted to violence. Attacks targeting certain ethnic groups induced revenge attacks, resulting in over two months of civil unrest throughout Kenya. Almost one thousand people were reported killed and around 500,000 people were, internally displaced due to the post-election violence (PEV) (Human RightsWatch, 2008).

Domestic quagmires over how to ensure justice for victims of the Post-election violence led to ICC involvement in Kenya. Waki commission led an official investigation into the post-election violence, and identified potential suspects and recommended the establishment of an independent Kenyan tribunal with international participation. In December 2008, the government accepted the Waki Commission's findings and agreed that it would refer the situation to the ICC if the Commission's recommendations were not implemented. International communities, including the United States and the European Union, expressed support for an independent domestic tribunal, and the Kenyan parliament was expected to pass legislation establishing such a tribunal by March 2009. In July 2009, following the

delay by the Kenyan legislation, chief mediator Kofi Annan submitted a list of individuals suspected to be masterminds of orchestrating the violence to the International Criminal Court. The Kenyan Cabinet subsequently announced that it would not establish a special tribunal, but would instead convene a Truth, Justice and Reconciliation Commission (TJRC) which would not prosecute suspects but rather to oversee reforms in the judiciary, police, and other investigatory bodies that may, in turn, deal with the issue.<sup>48</sup>

The Kenyan domestic electoral process became deeply imbricated by the International Criminal Court intervention. The political alliance between two politicians that is Uhuru Kenyatta and William Ruto was forged after they were identified as subjects of the International Criminal Court Investigations. Relations improved between these former political rivals in early 2011, about a month after the Prosecutor announced summonses for the six suspects.<sup>49</sup> Members of the two most affected communities in the post-election violence Kikuyu and Kalenjins jointly attended the rallies as a working relationship between Uhuru and Ruto developed. During this period, Kalonzo Musyoka who was the Vice president undertook diplomatic trips to try to convince members of the African Union a Kenyan request to defer the situation under Article 16 of the Rome Statute<sup>50</sup>. The Kenyan intervention contributed to recalibrations of the domestic political field, unifying formerly opposed groups of the electorate and deepening the rift between the Kenyan state and domestic civil society organizations. There has been a long history of shifting alliances among political elites in post-independence Kenya, yet the ICC's intervention has polarized Kenyan politics in new ways. While the formation of an alliance between past political rivals

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<sup>48</sup> Muthoni Wanyeki “*The International Criminal Court’s cases in Kenya: origin and impact*” Institute for Security Studies 237(2012):9

<sup>49</sup> Sarah Kendall “*UhuRuto and other Lethivians: The International Criminal Court and Kenyan Political Order*” African Journal Of Legal Studies 7(2014):399-427

<sup>50</sup> Nation Reporter, *VP vows to press on with Shuttle Diplomacy* “Daily Nation march 28 2011 <http://www.nation.co.ke/News/113488//accessed March 31 2014>

may have contributed to a peaceful election in 2013, this was tenuously based upon a shared enemy, the ICC, while the structural bases of past violence remained unaddressed.

Kenyan government employed various diplomatic efforts for instance Kenya's permanent representative to the UN presented a brief to the Security Council calling for "the immediate termination of the case at The Hague"<sup>51</sup>. The government of Kenya involvement kept increasing. Between 2011 and 2012, Kalonzo Musyoka, Kenya's vice president, engaged in shuttle diplomacy to numerous African countries as well as to the African Union (AU) and UN. He wanted their support for a deferral of the ICC's investigation so that Kenya could try its cases in its own courts, an option it had previously rejected. In January 2011, the

AU said it would back Kenya's attempts to defer investigations. The UNSC demurred, instead advising Kenya to initiate any challenges through Article 19 of the *Rome Statute* on admissibility and jurisdiction<sup>52</sup>

In seeking ways to evade the ICC, the Kenyan government through the President and Deputy President, but also the Foreign Affairs Secretary, Attorney General, and other state officials have focused on a number of issues. These include the argument that the indictments are political and have been driven by Western powers that have become desperate in their attempts to control and exploit Africa and its citizen's<sup>53</sup> Kenyan government through Kenya's permanent representative to the UN presented a brief to the Security Council calling for "the immediate termination of the case at The Hague"<sup>54</sup>. The Kenyan government requested an extraordinary summit of the African Union to discuss ICC related issues, which was convened in October 2013 and resulted in a resolution asserting that the trials of Kenyatta and Ruto should be suspended until their terms in office were completed.

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<sup>51</sup>"Brief on the situation in Kenya and the International Criminal Court", Permanent Mission of the Republic of Kenya to the United Nations, No. 167/13, 3 May 2013

<sup>52</sup> Menya, Walter. "Kenya: Fresh Shuttle Diplomacy on ICC Cases." *The Star* April 30, 2012.

<sup>53</sup> Decisions and Declarations, Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia

<sup>54</sup>"Brief on the situation in Kenya and the International Criminal Court", Permanent Mission of the Republic of Kenya to the United Nations, No. 167/13, 3 May 2013



### **2.5.1 Kenya's Justice Sector**

Kenya's Judiciary has since independence been transformed from a dual to a unified Judicial system which applies both English law and African Customary law. Hitherto, there existed two systems – one for the African native and another for European settlers. In 1967 three major laws were enacted. These were the Judicature Act (Chapter 8), the Magistrates' Courts Act (Chapter 10) and the Kadhis Courts Act (Chapter 11). These Acts have streamlined the administration of justice in Kenya

The 2007–2008 post-election crisis in the country gave the law reform agenda a big impetus. The traumatic events witnessed throughout the crisis incontestable a true want for the analysis and overhaul of elementary establishments of governance. Above all, the lack of the system to resolve the electoral disputes through a legal method re-emphasized the requirement to rework Kenya's justice system and build it genuinely free of political interference. Two Commissions of inquiry with international representation on the post-election violence and on the election management system itself highlighted problems with the rule of law and exemption for abuses in their recommendations. The reinstated government of President Kibaki realized, that it should become serious regarding implementing the initial reforming agenda with that it had entered office in 2003.

Lack of judiciary independence has been one of major problems threatening the rule of law in Kenya. Lack of trust within the courts directly contributed to the post –election violence of 2007/2008 and has undermined the rule of law in all aspects of life. The 1963 constitution gave the president complete discretion within the appointment and dismissal of the jurists. These powers undermined the legitimacy of the judiciary and also the decisional independence of the magistrates. The system for appointing judges has conjointly been hospitable abuse since it establishes no standards or criteria for vetting candidates. Consequently the people who became judicial officers do not seem to be essentially the most

worthy. Arguably such judicial officers such judicial officers are likely to perceive it to be in their best interest to protect the interests, and even misdeeds, of the appointing authority. Although the constitution allows the courts to be free and impartial, there have been no constitutional provisions on immunity of judges and magistrates. Judges and magistrates who acted with independence and impartiality to the executive's detriment have been penalised by transfers to outlying stations.

The constitution also failed to establish due process mechanisms to ensure that the process of removal was transparent, impartial and fair. The importance of this issue was highlighted by the Integrity and Anti-Corruption Committee established in 2003 to investigate corruption in the judiciary (the Ringera Committee). While the purge of judges that followed the Ringera Committee's recommendations was partially welcomed, and it fulfilled the technical letter of the 1963 constitution's requirements for dismissal of judges, it was at the same time heavily criticized for failing to respect basic due process and therefore for implicating some judges who were not in fact guilty of corruption. Some judges were not even informed of the action that was to be taken against them.

The culture of executive impunity has manifested itself in various forms throughout the history of the Republic of Kenya, and is a common subject of debate in various media houses. In many cases those in power behaves with total disregard for the existing statutory requirements in the comfortable knowledge that their actions will not be subjected to any sanctions, since the established public accountability mechanisms are weak. Executive actors also tend to stretch the boundaries of their statutory powers, so that in practice that which is not expressly outlawed by any statute implicitly becomes at least in their eyes permissible. As far as these executive actors are concerned, the law seems to count for little; in many cases they perceive law as an inconvenience that must be cast aside when political exigencies demand it. Ironically, they are quick to embrace the law when it suits their fancies.

Kenya has been slow and irregular in following the reporting procedures related to the international human rights treaties to which it is a party; though this has improved in recent years. For example, after submitting its initial report on the International Covenant on Civil and Political Rights to the Human Rights Committee in 1979, due in 1977, it then submitted its next report consolidating the second, third, fourth and fifth reports in 2004. Kenya has so far failed to submit any report to the Committee Against Torture despite acceding to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 1997, which obliged it to submit reports at intervals of four years from 1998. The report to the Committee on Economic, Social and Cultural Rights submitted in 1992 was rejected by the Committee for being too scanty and not following the established guidelines, and then only resubmitted in 2007. Kenya submitted its first report to the African Commission on Human and Peoples' Rights in 2006, combining all overdue reports into one

In general, successive governments in Kenya have not always adhered to the prescriptions of law, especially where law is seen to be a hindrance to the attainment of political or other regime interests. Whenever this happens, the message that government sends to the citizenry is either that law does not matter and can be dispensed with whenever it is convenient to do so, or that law only matters where it serves to protect the interests of the rich and powerful. Whereas it is the executive branch of government that is typically notorious for disrespecting the law, the legislature (or Parliament) and the judiciary also, and increasingly, display a lack of respect for the law in significant respects. An unfortunate consequence of governmental disregard for the law is that the law then ceases to be authoritative, and a culture of impunity and lawlessness begins to emerge. Thus, the worrisome development of a culture of impunity in Kenya can be attributed to the government's lack of respect for the law. Indeed, this emerging culture of impunity may have been a significant contributing factor to the post-election crisis of December 2007–January

2008. Inquiries into the post-election violence indicate that both public actors including public security forces and private ones acted with impunity in many cases.

## **CHAPTER THREE**

### **LIMITS AND POTENTIALS OF MAJOR AFRICA'S LEGAL INSTRUMENTS**

#### **3.0 Introduction**

This chapter will focus on historical antecedents before the Establishment of the African Union. It will outline a brief historical perspective of factors that led to formation of AU from AU. Organs of the African Union and Major legal instruments under African Union will be discussed in order to establish their contributions to the Rule of Law in Africa.

#### **3.1 OAU as a Predecessor to the African Union**

The organization of African Union was established on 25 may 1963 to promote regional cooperation among newly independent African States. The organization charter lists its purposes as promoting unity and solidarity of African states, coordination and cooperation among them to improve the lives of the African peoples, defending their sovereignty, territorial integrity and independence, eradicating all forms of colonialism and promoting international cooperation. These goals were added to the Abuja Treaty which established the African Economic community which since 1994 was the legal basis of the OAU.

OAU faced major challenges in achieving its mandate since it was not created as a legislative body. Its objectives were to be carried out primarily through the harmonization of member states' policies. This was to occur through the Assembly of Heads of State and Government (AHG) which was the OAU supreme organ. The work of the AHG was to be operationalized by the council of ministers composed of member states foreign affairs ministers or other ministers assigned with the task of implementing the AHG coordinating inter- African cooperation in accordance with AHG instructions. OAU also composed of an Addis Ababa based General secretariat and a commission of mediation, conciliation and

Arbitration. In 1993 the Mechanism of conflict prevention, management and resolution was established composed of representatives of member states. The mechanism was formed to prevent future conflicts and to engage in peace building.

African States wanted to determine clashes among themselves on an ad hoc basis and in a more casual way including contemplation and assuagement by famous statesmen. The barrenness of the OAU even appeared to be counterproductive when it went to the various intra-State clashes. In any event up until the mid-1990s, the OAU and its Member States deciphered the standard of non-impedance in (other) States' locale to suggest that the association was not qualified for intervene or to appease in inside clashes. The OAU couldn't even talk about interior occasions or pass resolutions against the Member's will State concerned. As an outcome, various leaders, for example, Amin of Uganda, Bokassa of Central African Republic and Nguema of Equatorial Guinea, had the capacity stifle and adventure their people and violate human rights on a substantial scale without being censured by other African States. The OAU Assembly chose not to see to the various abominations submitted. Due to this, the Assembly, made as it was out of such a large number of egotistical and heartless despots uninterested in the conventional's destiny individuals, procured a notoriety of constituting a "cartel" of 'OAU gangsterism' and a 'shared profound respect club' for pioneers, singularly focusing on propagating their syndication of force<sup>55</sup>

According to Zard the OAU eventually came to be viewed as ineffective. The organization strict adherence to the principle of non-intervention and its subordination to state interest , combined with chronic financial difficulties often precluded the organization from asserting any form of moral authority or leadership in tackling the continent chronic problems. Having focused on decolonization and liberation from minority rule and committed to the principle of non-interference in internal affairs of member states, the organization was

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<sup>55</sup> van Walraven 1999, op. cit. n. 40, at pp. 311-314

not well equipped to deal with contemporary issues such as economic growth and conflict management.

### **3.2 The Formation of African Union**

The end of cold war in the late 1980s brought drastic changes in the continent. The Soviet Union distanced itself from Africa politics and the United States was equally less interested in the continent. Many Africa leaders who had clinged to power due to dictatorial leadership lost the political protection and financial support that had enabled them to stay in power for decades. The international donors started to demand for democracy, good governance and human rights protection. The continent shifted from military and dictatorial regimes to democratically elected governments.

The withdrawal of super powers likewise had negative destabilizing impacts. The world group showed up progressively unwilling to assume liability for peace and stability of the continent. African states were left powerless and excessively feeble, making it impossible to manage ethnic contention and entomb and intra state clashes. The OAU secretary General Salim Ahmed chose to replace the Commission for Mediation, Conciliation and Arbitration with a Mechanism for Conflict Prevention and Management Resolution. The primary objective was to build up a successful component for ceasing and forestalling conflicts with a perspective to consequent settlement, for the most part by building up a focal organ and engaging the Secretary – General to assume more dynamic part in conflict resolution<sup>56</sup>. Africa chose to pool its assets together and talk with one voice. In 1991 the continent embraced the Abuja Treaty which set up the African Economic Community (AEC). The principle target of the AEC was to create a common market in six progressive stages. The Regional Economic Communities were given prime obligation to create local free markets that would be

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<sup>56</sup> M. Meredith, *The State of Africa – A History of Fifty Years of Independence* London, Free Press 2006 Chapter 26

converged into a continental wide market involving free development of merchandise, services, individual and capital. The AEC Treaty had likenesses with European Economic Community.<sup>57</sup>

The OAU Thirty-fifth Assembly of Heads of State and Government met in Algiers in July 1999, the meeting concluded that the OAU Charter Review Committee had failed to achieve its purpose. The OAU Assembly of Heads of State and Government accepted a call for an extraordinary meeting on the issue of the transformation of the OAU and decided to hold its 4<sup>th</sup> extraordinary meeting 'to discuss ways and means of making the OAU effective so as to keep pace with political and economic developments taking place in the world and the preparation required of Africa within the context of globalization so as to preserve its socio-economic and political potentials'. Accordingly, the fourth extraordinary session of the OAU Assembly of Heads of State and Government met in Sirte, Libya on 8-9 September 1999 and adopted the Sirte Declaration, which *inter alia* called for the establishment of the African Union<sup>58</sup>.

In February 2000, Constitutive Act of the African Union was drafted by a group of experts. The Constitutive Act draft was later presented to the two consecutive meetings of Experts and Parliamentarians on the Establishment of the African Union that were held on April 2000 in Addis Ababa and May 2000 in Tripoli Libya respectively. The meetings of Experts and parliamentarians reviewed the draft Constitutive Act and presented their assessment to the Ministerial Conference on the Establishment of the African Union on 31 May 2000. The Ministerial Conference later on established a working group to further elaborate on the draft Constitutive Act. The working group submitted the revised draft of the Constitutive Act to the Seventy second ordinary session of the OAU council of ministers on

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<sup>57</sup> G. Naldi, 'The African Economic Community: Emancipation for African States or yet another Glorious Failure?' 24 North Carolina Journal of International and Commercial Regulation (1999) p. 601.

<sup>58</sup> Organisation of African Unity (Assembly of Heads of State and Government) 'Sirte Declaration' (Sirte 1999) EAHG/Draft/Decl. (IV) Rev.1



8<sup>th</sup> July 2000 in Lome Togo<sup>59</sup>. The OAU council of Ministers approved the draft Constitutive Act and recommended its submission to the Assembly of Heads of State and Government adoption. The thirty –sixth ordinary Session of the OAU Heads of State and Government adopted the Constitutive Act of the African Union and further urged member states of the OAU to ratify the Constitutive Act as soon as possible. The Fifth extraordinary meeting of the OAU Assembly of Heads of State and Government declared the formation of the AU and noted that it would enter into force after the deposit of the instruments of ratification by two-thirds member states of the OAU, as provided under article 28 of the Constitutive Act. The African Union came into force on 9<sup>th</sup> July 2002.<sup>60</sup>

### **3.3 Institutions of the African Union**

The objectives of the African Union are provided in Article 30 of the Constitutive Act of the African Union and Article 3 of the Constitutive Act of the protocol to amend the Constitutive Act. The African Union has seventeen objectives in view. The Constitutive Act Article 5 of the AU provides for the establishment of the Assembly, the Executive, the Specialized Technical committees, the Pan African Parliament, the Court of Justice, the Financial Institutions, the Commission, the Permanent Representatives Committee and the Economic Social and Cultural Council. The AU peace and security was not directly established by the Constitutive Act.

#### **3.3.1 The Assembly**

The Assembly is the supreme organ of the African Union composed of Head of states and Governments. The Assembly is chaired by a head of State or Government from among the member states. Article 9 of the Constitutive Act of the African Union lays down the

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<sup>59</sup> Organization of African Unity (Council of Ministers) 'Report of the Seventy-Second Ordinary Session of the Council of Ministers' (Lome 2000) CM/Rpt (LXXII)

<sup>60</sup> Assembly of the African Union, First Ordinary Session, 9-10 July 2002, Durban, South Africa

mandate of the Assembly. The powers and functions of the Assembly are based on the principle of cooperation among member states that is guided by the common understanding of the Heads of states and the Governments of its member states.

The Assembly determines the policies of all organs of the union. It monitors the implementation of policies and decisions by its organs and takes decisions on reports and recommendations from its organs such as the recommendation for intervention in member states from Peace and Security Council. The Assembly is also mandated to impose sanctions on member states for violation of the principles enshrined in the Constitutive Act. In addition to this the Assembly adopts the budget of the Union and appoints and removes judges to both the African Human Rights Court and the Court of Justice of the Union.<sup>61</sup>

### **3.3.2 The Executive Council**

The Executive Council is composed of Ministers of Foreign Affairs who meet twice a year in ordinary session. The Executive Council is directly accountable to the Assembly. Article 13 of the Constitutive Act of the African Union provides a list of functions of the Executive Council. Executive Council has the power to make its own binding decisions on common interests of Member states such as foreign trade, energy, transport and communication, education, cultures, health and immigration.<sup>62</sup>

### **3.3.3 The Pan African Parliament**

Article 5(1) of the Constitutive Act outlines the Pan African Parliament as one of the organs of the African Union. The Pan African Parliament was however first outlined in the 1999 Abuja Treaty and was formally inaugurated in 2004. The Abuja treaty outlined the Protocol for the Establishment of the Pan African Parliament. The Pan African Parliament is

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<sup>61</sup> Constitutive Act ( n 17) art 9(h)

<sup>62</sup> Constitutive Act (n 17) art 13(1) (a –l)

composed of Parliamentarians elected from the parliament or equivalent legislative organs of each member state. Each member state of the AU has five parliamentarians in the Pan African Parliament selected from both ruling and opposition parties participating in the national parliaments of member states and at least one of whom must be a woman. The Pan African Parliament is supposed to be a platform that through which citizens of member states can share their views on how to strengthen democratic governance in the region. The Pan African Parliament is also mandated to exercise oversight on issues of governance and development on the continent. It can also discuss or express an opinion on any matter, either on its own initiative or at the request of the African Union Assembly. It can also make recommendations on how to achieve the objectives of the AU and strives towards coordination and harmonization of policies and programs and activities of the Regional Economic Communities and African's national parliaments<sup>63</sup>

### **3.3.4 The Court of Justice**

Article 5(1) and 18 of the Constitutive Act states that the AU Court of Justice is the principal Judicial organ of the Union and it has both advisory and contentious jurisdiction. The Court under its contentious Jurisdiction is given competence over all disputes that pertain to the interpretation and application of the AU constitutive Act, the interpretation and application or validity of all treaties and legal instruments adopted and ratified under the auspices of the AU. The AU Assembly may also confer a special jurisdiction over the court in addition to its statutory jurisdiction. The Court has powers to make binding decisions on member states.<sup>64</sup> In July 2004 the AU Assembly of Heads of States and Government decided to merge the Court of Justice and the African Court on Human Rights Peoples' into one.

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<sup>63</sup> Constitutive Act (n 17) art 5 (1)

<sup>64</sup> Constitutive Act (n 17) art 6(4); Assembly Rules of Procedure (n 56) Rule 15 (1)

### **3.3.5 The Permanent Representatives Committee**

It comprises of Permanent representatives accredited to the Union and other duly accredited plenipotentiaries of member states. The Permanent Representatives Committee (PRC) is accountable to the Executive Council and serves as an advisory body to the Executive Council. The PRC monitors the implementation of the budget of the Union and the decisions of the Executive Council. It also facilitates the communication between the Commission of the AU and the member states.<sup>65</sup>

### **3.3.6 The Specialized Technical Committees**

Article 14 of the Constitutive Act of the African Union legally established the Specialized Technical Committee as an organ of the African Union. The Specialized Technical Committees are various committees responsible for preparation and coordination of projects and programs of the Union and supervision follow up policies of the union. They are composed of Ministers or senior officials of member states responsible for rural economy, agriculture, monetary and financial affair, trade customs and immigration matters, industry, science and technology, energy, natural resources and environment, transport, communication and tourism, health, labour among others. It is accountable to the Executive Council<sup>66</sup>

### **3.3.7 The Economic Social and Cultural Council**

Article 22 of the Constitutive Act of the African Union established the Economic, Social and Cultural Council (ECOSOCC). Its major function is to act as a bridge between governments and all other segments of the African Civil society.it also acts as an advisory body composed of representatives from civil societies, professional groups, non-

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<sup>65</sup> ] PRC Rules of Procedure (n 95) Rules 2, 4(1) (a)

<sup>66</sup> ibid art 16

governmental organizations groups both in Africa and Diaspora. The ECOSOC is given the task of publicizing AU norms among the public population of Africa and giving free advisory services to the organs of the AU on how best to implement the norms and policies of the organization at its own initiative or at the request of the union.<sup>67</sup>

### **3.3.8 Financial Institutions**

The Constitutive Act of the African union determines that the Union shall establish the African Central Bank, the African Monetary Fund and the African Investment Bank as three financial institutions under the union. The Constitutive Act however does not state the rules and regulations of each of the above three financial institutions. It simply indicates that such matters shall be defined in protocols relating to each financial institution. The Africa Monetary Fund is needed to advance monetary integration in the continent. It does not aim at having same responsibilities as the International Monetary fund. Article 19 of the Constitutive Act of the Union establishes the African Central Bank. The African Central Bank has not been established yet but discussion of the same are ongoing. The African Investment Bank is supposed to collectively address the main economic and development challenges facing the continent today and provide finance for regional integration and private sector investment projects in Africa.<sup>68</sup>

### **3.3.9 The Peace and Security Council**

The Constitutive Act of the African Union does not establish the Peace and Security Council as one of the organs of the AU. It was initially the Mechanism for Conflict Prevention and Management Resolution under the OAU and it was changed to Peace and Security Council under the African Union based on Article 5(2) of the Constitutive Act. The

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<sup>67</sup> Economic, Social and Cultural Council of the African Union' (Addis Ababa 2004) AU/Dec.48 (III) arts 2 & art 3(2)

<sup>68</sup> Constitutive Act (n 1) art 19

African Union established the Peace and Security Council on 26 December 2003 when the protocol relating to the council entered into force. Establishment of the Peace and Security Council demonstrated the Unions commitment to good governance in a continent where numerous states are engaged in conflicts of varying degrees. The Peace and Security Council is a permanent decision making organ of the AU for the prevention, management and resolution of conflicts in Africa. The objectives of the t Peace and Security Council are elaborated in Article 3 of the protocol. The main objectives of the council inter alia include promotion of peace, security and stability in Africa, anticipation and prevention of conflicts, assisting the peace building and post conflict reconstruction activities, join African hands in the fight against terrorism and developing a common defense policy for the African Union.<sup>69</sup>

## **Major African legal instruments**

### **3.4. Constitutive Act of the African Union**

The Constitutive Act of the African Union was adopted in Lome Togo Summit and entered into force in 2001. The Constitutive Act of the African Union represents a serious commitment of the promotion and protection of human rights as compared to the OAU charter. The charter has been applauded as a document which departs from the norms in that it contains civil, political, economic, social, and cultural rights. Three of its fourteen objectives and six of its sixteen guiding principles focus on human rights. Additionally, it provides that the African Union aims to encourage international cooperation taking due account of the charter of the United Nations and the Universal Declaration of Human Rights and to promote people's rights in accordance with the African Charter on Human and peoples' Rights and other relevant human rights instruments. It also provides that the African Union shall function on the basis of respect for democratic principles human rights, the rule

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<sup>69</sup> Peace and Security Council Protocol (n 109) art 8(1)

of law and good governance. The Act promotes gender equality and women empowerment, social justice to ensure balanced economic development, respect for the sanctity of human life, the condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities as well as condemnation and rejection of unconstitutional change of government. The Constitutive Act 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 such as war crimes, genocide and war crimes against humanity.<sup>70</sup>

Murray (2004) states that the principle of non-intervention in member states affairs was a principle upheld by the OAU. The Constitutive Act of the African Union on the other hand has adopted a more interventionist approach to end genocide, war crimes against humanity, human rights violations and unconstitutional changes of government through the mechanism of employing sanctions. The AU has also continued to develop legal frameworks and establishing relevant institutions. The Union is trying to create a culture of non-indifference towards war crimes and crimes against humanity in the continent.

Research has shown that unlike the UN charter the Constitutive Act offers few possibilities to ensure conformity with norms set out in the Act. It does not provide for expulsion of a member state that persistently violates the principles set out in the Act. The AU's commitment has been tested in a few areas such as its response to the disputed elections in Kenya, Violence in Central Africa Republic, Zimbabwe as well as its response to situations of grave violations of human rights such as Darfur and Libya. It has been noted that violations of human rights, constitutionalism and democracy in Zimbabwe and other African countries were not met by African leaders with the same condemnation and rejection as they did in Togo and Mali.<sup>71</sup>

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<sup>70</sup> AU Constitutive Act

<sup>71</sup> Mangu, André Mbata. "The African Union and the promotion of democracy and good political governance under the African Peer-Review Mechanism: 10 years on." *Africa Review* 6, no. 1 (2014): 59-72.

### 3.4.1 The African Charter on Human and Peoples' Rights

Human rights discourse played an important role in the struggle against colonialism. The first pan African congress held on the findings of the Versailles peace conference in 1919 called for the abolition of slavery, forced labour and corporal punishment. Calls for human rights were made again at the third pan African Congress in Lisbon in 1923 and the fourth congress in New York in 1927. When more African states gained independence less focus was given to human rights except as a tool in the fight against colonialism and white minority rule in South Africa.<sup>72</sup>

The African charter on Human and peoples, Rights (ACHPR) the basis of African continental Human Rights system entered into force on October 21, 1986 upon ratification by simple majority of member states of OAU.

According to Okoth Ogendo the decision to establish the ACPHR was taken not because there was juridical void in Africa with respect to promotion and protection of human rights. He outlined three reasons for the establishment of the charter. First, because the charter of the OAU affirms commitment to the UN charter and the Universal Declaration, the ratification by African states of those instruments in addition to other human rights instruments, imposed an obligation for the promotion and the protection of human rights. Secondly, there was no existing machinery at the regional level for institutional coordination, supervision, or implementation of efforts towards the promotion and protection of human rights, despite international commitment to that effect. Lastly the need to develop a scheme of human rights, norms and principles founded on the historical tradition and values of African Civilizations.<sup>73</sup>

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<sup>72</sup> W E Burghardt Du Bois, 'The Pan-African movement' in G Padmore (ed) Colonial And Coloured Unity A Programme of Action (1963)Etext,

<sup>73</sup> H.W.O ogendo Human and peoples, rights;what point is Africa Trying to make in Human rights and Governace in Africa 74-77 Florida University Press 1993



Ourgeogouz on the hand ascertains that there is a remarkable resemblance between the charter and the Universal Declaration on Human Rights. It is clear that the drafters of the charter have been inspired by a number of international treaties including the ICCPR and the ICESCR, the American Declaration of the Rights and Duties of Man, American Convention on Human Rights and thje European Convention on Human Rights.

### **3.4.2 The Contents and structure of the African Charter**

The African Charter on Human and Peoples Rights draws its inspiration from the OAU and the UNDHR. In the preamble of the Charter member states pledge to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples' of Africa. The Charter contains provisions dealing with rights and duties, on one hand and the organs for the protection and promotion of those rights and duties on the other hand. The Charter is unique in that it places same emphasis on the enforcement of the rights as well as the duties. It also places emphasis on the rights and duties of the community such as the family, society, nation and the states.<sup>74</sup>

According to Davidson the African charter differs considerably from other regional human rights instruments both in the catalogue of rights protected and in the means of implementation and protection. This is on the grounds that it was drafted to make note of African society and legal philosophy, and is particularly coordinated towards African needs which can be effortlessly seen from the prelude. In this way, the first area in which the African Charter varies from others is that not just the Charter seeks to secure individual common and political rights, it additionally tries to advance and ensure inside of the single instrument, economic, social and cultural rights and a classification of certain third generation

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<sup>74</sup> The African Charter on Human and Peoples' Rights, Article 1

rights. Close examination of the African Charter demonstrates to us that both categories of rights are in dissociable from each other in both conception and universality.<sup>75</sup>

The African Charter is the main regional human rights instrument to fuse what are called third generation rights or 'privileges of solidarity.' In securing the privilege to self-determination, the Charter not just traverses the well-known ground of the UN agreements it likewise incorporates rights, for example, the privilege to economic, social and cultural improvement with due respect to their freedom and recognize and identify equal enjoyment of common heritage of mankind [Art. 22]. The Charter additionally incorporates the privilege of people groups to national and international peace and security (Art. 23) and to a general acceptable environment positive to their development (Art. 24). Obviously, these rights force commitments on states not just to order their internal undertakings so as to protect to enhance ecological variables; however they additionally oblige that they seek after specific types of foreign policy strategy computed to accomplish such end. Therefore, by devoting six articles to the rights of the people in general, the African Charter thus seems to reflect a very special conception of human rights, according to which "the reality and respect of peoples' rights should necessarily guarantee human rights."

The common and political rights which are secured by Articles 2-15, involve the customary scope of rights that are incorporated into the ICCPR and the other regional instruments. Article 12, specifically prohibits disallows the mass removal of non-nationals and aimed at national, racial, ethnic or religious groups. This provision was incorporated after the experience of a great deal of occasions of mass ejections in numerous African nations in the 1970s. In addition, the African Charter alone sets out the standard of personal punishment [Art. 7 (2) and the privilege of all to equivalent access of all public property and services [Art. 13 (3)

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<sup>75</sup> Scott Davidson *The African system for protecting human and peoples' rights*, Open University Press, 1993.

The Economic and Social rights contained in the charter largely reflect the range of such rights in other international instruments. However, there are additions in the charter that are unique such as the Article 17 which contains the right to education is supplemented by a duty upon the state whose obligation is to promote and protect the morals and traditional African values recognized by the community. Article 18 of the charter spells out one of the most comprehensive clauses concerning the prohibition an discrimination against women by providing that the state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

The African Charter is likewise known for its consolidation of the idea of individual obligations. This idea was initially incorporated into the non-binding American Declaration of the Rights and Duties of Man of 1948 and to some degree under article 29 (1) of the UDHR. On the other hand, it is just in the African Charter that obligations are imposed on individuals as an issue of global legal concern. This starts with the preamble section 6 which says that "the enjoyment of rights and freedoms also implies the performances of duties with respect to everybody. In spite of the fact that opens to level headed discussions and reactions, the explanation behind this is that the African sense of family and community places extraordinary accentuation upon the individual's obligation to both groups. The greater part of the rights contained in the Charter along these lines have a correlative obligation connected to them including the third generation rights such as sovereignty over resources, development, international peace and environment

The Charter thus covers possibly all civil, political, economic, social and cultural rights including the third generation rights such as sovereignty over resources development, international peace and environment. Each state party in accordance with the Charter obligation is required to submit every two years a report on the legislative or other measures

taken with a view to giving effect to the rights, duties and freedoms recognized and that it has a duty to promote and ensure the respect of rights and freedoms through teaching, education, and publications so that these rights, duties and freedoms could be understood by the people. The state also has a duty to guarantee the independence of courts and shall allow the establishment and improvement of appropriate national institution entrusted with the promotion and protection of the above rights and freedoms.<sup>76</sup>

### **3.4.3 The African Commission on Human and Peoples' Rights**

The African Commission on Human and Peoples Rights was established within the framework of OAU as measure of ensuring promotion and protection of peoples' rights under the charter as provided under Article 30 of the Charter. The Commission has its headquarter in Gambia.

The Commission consists of eleven members Chosen from amongst African personalities of the highest reputation known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights, particularly consideration being given to persons having legal experience.<sup>77</sup> The members of the commission serve in their personal capacity and not as representatives of states<sup>78</sup>. In discharging their functions they are entitled to enjoy diplomatic privileges and immunities as stipulated in the General Convention on Privileges and Immunities of the Organization of African Unity. The members are elected by the Assembly of Heads of States from a list of persons nominated by the state parties. Each state party nominates not more than two candidates. The members are elected for a period of six years and are eligible for re-election<sup>79</sup>

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<sup>76</sup> Henry J. Steiner & Philip Alston, International Human Rights in Context(2ndEdition), Oxford

<sup>77</sup> Article 31(1)

<sup>78</sup> Article 31(2)

<sup>79</sup> Article 34

### **3.4.4 Mandate of the Commission**

Article 45 of the charter outlines the mandate of the Commission as follows

- i. Function to promote human and people's rights and in particular,
  - a) To collect documents, undertake studies, research on African problems in the field of human rights, organize seminars, symposia, and conferences, disseminate information, encourage national and local institutions concerned with human rights and if need arises give its views and recommendations to the Governments
  - b) Quasi-legislative functions whereby the Commission is required to formulate and lay down principles and rules aimed at solving legal problems relating to human rights upon which the African Governments may base their legislations
  - c) To co-operate with other African and international institutions concerned with promotion and protection of human and people's rights
- ii. Function to ensure the protection of human and people's rights. This includes examination of complaints of human rights violation either by State Parties or by private persons
- iii. Interpretations of all the provisions of the African Charter at the request of a State Party, an institution of the Organization of African Unity or the African Organisation recognized by the Organisation of African Unity
- iv. Performance of any other tasks which may be entrusted to it by the Assembly of Heads of State and Governments

### **3.4.5 Implementation Machinery**

The African Charter on Human and People's Rights has also provided implementation machinery under which the member States undertake to submit every two years, a report on the legislative and other measures they have taken to give effect to rights and freedoms recognized and guaranteed by the Charter. The State Parties or individuals can also bring

before the African Commission complaints regarding the violation of human and people's rights. This can be studied under the following heads.<sup>80</sup>

#### i. Inter-State Complaint Mechanisms

In Article 62 the African Charter on Human and Peoples' Right, The State Parties are empowered to bring before the African Commission complaints regarding the violation of human and people's rights. Two procedures have been prescribed for this purpose.

##### a) Bilateral Procedure

According to Article 47 of the Charter, if a State party to the Charter has good reasons to believe that another State Party to the Charter has violated the provisions of the Charter, it may draw the attention of that State to the matter in writing. The communication shall also be addressed to the Secretary-General of the OAU and to the Chairman of the Commission. The State to which the communication is addressed shall give the enquiring State, written explanation or statement elucidating the matter. This should include as much as possible relevant information relating to the laws and rules of procedure applied and applicable, and the redress already given or course of action available.<sup>81</sup> If within three months on the date which the original communication is received by the State to which it is addressed, the issue is not settled to the satisfaction of the two States involved through bilateral recognition or by any other peaceful procedure, either State shall have the right to submit the matter to the Commission through the Chairman and shall notify the other State involved

##### b) Direct Procedure

If a State party to the Charter considers that another State party has violated the provisions of the Charter, it may refer the matter directly to the Commission by addressing a

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<sup>80</sup> The African Charter on Human and Peoples' Rights, Article 62

<sup>81</sup> African Charter Article 47

communication to the Chairman, to the Secretary –General of the Organisation of African Unity and the State concerned. The African Commission can only deal with a matter submitted to it if all local remedies have been exhausted, unless it is obvious to the Commission that the procedure of achieving these remedies would be unduly prolonged<sup>82</sup>

Organisation of African Unity, the Universal Declaration of Human Rights, and other instruments adopted by the United Nations and by African countries in the field of human and people's rights as well as from the instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members. The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions laying down rules expressly recognized by member States of the Organisation of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrines<sup>83</sup>

All the measures taken by the African Commission remains confidential until such a time as the Assembly of Heads of State and Government so decides. The report on the activities of the Commission shall be published by its Chairman after it has been considered by the Assembly of Heads of State and Government.

### **3.4.6 The shortcomings of the African Commission in terms of the protection of Human rights**

According to International Federation for Human Rights reports the major weaknesses of the African commission in its role of protection of Human rights include: Few resolutions

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<sup>82</sup> The African Charter on Human and Peoples' Rights, Article 49

<sup>83</sup> The African Charter on Human and People's Rights, Article 61

condemning human rights violations by States, Insufficient number of field inquiries by the Commission due to the unwillingness of States. Average processing time too long to review individual communications by the Commission, even if this is being improved. A complex procedure to compel States to implement the recommendations of the Commission, which results most of the time in no enforcement or follow-up by States and lack of visibility of the Commission's work. The allocated budget by the AU is too low for the Commission.

The Commission is more and more inclined to condemn violations of human rights on the continent but still struggles to impose protection of Charter rights by States. The communications procedure is emblematic of the protection mandate of the Commission. It is through this semi legal method that the Commission should really uphold the appreciation of privileges of the Charter by State Parties. Be that as it may, this methodology is long and the choices taken in appreciation of correspondences are time after time not implemented by States.<sup>84</sup>

The review of communications is variable, but often too long, between two and eight years for instance the decision *Diakite v. Gabon* was rendered in 2000 but the communication was brought before the Commission in 1999. Commissioners are still trying to focus on settlements at the expense of efficiency, despite the urgency of the cases submitted to them. The reviews are prolonged because of the length of time allowed between receipt of the communication and the admissibility decision; the junction of communication on the same country; a lack of priority in dealing with communications; vague proceedings; the shortening of sessions by lack of funds; lack of personnel at the Secretariat of the Commission.<sup>85</sup>

While the decisions by the Commission on Communications are generally progressive in terms of protection of human rights, their effects are often invalid because they are generally not enforced by the States condemned. Not only are the decisions of the

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<sup>84</sup> International Federation of Human Rights "Practical Guide African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights" pg 27

<sup>85</sup> *ibid*



Commission purely recommendations, which are not legally binding, but until 2009 and the adoption of the new Interim Rules of Procedure for the Commission, there was no mechanism for monitoring their implementation by States. The slowness and lack of binding decisions, as well as the failure to understand the procedure by States, NGOs and individuals certainly explain the relative low number of communications to the Commission and accordingly low number of adjudicated decisions<sup>86</sup>

### **3.5 The 1998 Protocol on the African Court on Human and People's Rights**

The Assembly of Heads of State and Government of the OAU adopted a protocol to the African Charter on Human and Peoples Rights in that would provide for the creation of an African Human Rights Court to complement the jurisdiction of the commission in the African human rights regime. The protocol was adopted in 1998 and it became effective in 2004 when fifteen state parties to the charter ratified it.

The Protocol on the Court provides for the appointment of eleven judges, all of them part-time with the exception of the President of the Court. The Court will receive cases submitted by the Commission, individual states or where an additional declaration to that effect has been made by a ratifying state, cases Submitted 'directly' to the Court by individuals. The aim of the Court which is to be funded by the African Union, is to 'complement the protective mandate' of the Commission<sup>87</sup>

The Commission continues to play an important role under the Protocol. The provisions on admissibility provide that the Court 'may consider cases or transfer them to the Commission 'The Court's Rules of Procedure are to state the conditions under which the

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<sup>86</sup> *ibid*

<sup>87</sup> Protocol on African Court on Human and Peoples' Rights 1998, Article 2

Court shall consider cases, 'bearing in mind the complementarities between the Commission and the Court.'<sup>88</sup>

### **3.6 African Court on Humans' and Peoples' Rights**

The creation of the African Court began during the Summit of Heads of State and Government of the OAU in June 1964. A resolution was later on adopted requesting the Secretary General of the OAU to convene a meeting of government experts to examine ways of enhancing efficiency of the African Commission on Human Rights and to consider in particular. A resolution adopted therein requested the Secretary-General of the OAU to convene a meeting of government experts to examine ways of enhancing efficiency of the African Commission on Human Rights and to consider in particular the question of the establishment of an African Court. A draft of the Court was submitted by the OAU Secretariat to a meeting of Government

Experts in Cape town in September 1995. Later, a number of meetings were held and the African Court on Human and People's Rights was established by adopting a Protocol to the African Charter on Human and People's Rights on June 9, 1998 at the Summit of the Heads of State and Government in Ouagadougou (Burkina Faso). The protocol came into force on January 24, 2004. In July 2006, the AU Executive Council, endorsed by the Assembly of Heads of state and Government elected the first judges of the Court at a meeting in Khartoum Sudan. The judges were later sworn in at the summit held in Banjul Gambia on July 2006. On June 2008 the interim Rules of Court were adopted

In July 2008, the African Union adopted a Protocol to merge the African Court on Human and Peoples Rights with the Court of Justice of the African Union. The Protocol which replaces the constitutive protocols creating these two courts, establishes a new African

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<sup>88</sup> Protocol on African Court on Human and Peoples' Rights 1998 Article 8

Court of Justice and Human Rights, with features of the ACHPR and the ACJ, all in a single judicial institution. This decision was motivated by economic reasons since AU lacks resources to operate two separate courts.<sup>89</sup>

### **3.6.1 Composition of the Court**

The Court shall consist of eleven judges elected by the Member States of the OAU for a six year term of office which is renewable once only. Only the States Parties to the Protocol may propose candidates. Each State may nominate three candidates, at least two of whom must be their nationals, but the Court may not compromise more than one national of the same State. Its membership is to include ‘representation of the main regions of Africa and of their principal legal traditions’, and in the election of judges the Assembly ‘shall ensure that there is adequate gender representation’. Judicial independence is to be fully ensured. The judges of the Court are elected by Secret Ballot by the Assembly of Heads of State and government of the OAU. The judges are elected in individual capacity from among jurists of high moral character and of recognized practical judicial or academic experience in the field of human rights. The judges are therefore not representatives of the States. They undertake to discharge their duties impartially and faithfully. The Court elects its President and Vice-President for a two-year period, renewable once only.<sup>90</sup>

### **3.6.2 Jurisdiction of the Court**

The Court is empowered to act both in a judicatory and an advisory capacity. The Court’s jurisdiction extends to cases and disputes ‘concerning the interpretation and

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<sup>89</sup> Article 1 of the new Protocol establishes the African Court of Justice and Human Rights

<sup>90</sup> Article 17

application’ of the Charter, Protocol, ‘and any other relevant human rights instrument ratified by the States concerned’<sup>91</sup>

Judiciary jurisdiction is compulsory as well as optional. As regards the Court’s compulsory jurisdiction, Article 5(1) states that the following are entitled to submit cases to the Court: (a) the African Commission on Human and People’s Rights; (b) the State Party which has filed a complaint to the Commission; (c) the State Party against which the complaint has been filed; (d) the State Party whose citizen is a victim of a human rights violation and (e) African Inter-Governmental Organisations for issues concerning them. Individual’s petition system is optional. Article 5(3) of the Protocol provides that the Court may receive individual petitions against a State which has recognized the competence of the Court to receive such communications. Thus, the individuals’ communication provisions of the Protocol are similar to that of the Optional Protocol on Civil and Political Rights.

The Court is empowered to render advisory opinion in accordance with Article 4 of the Protocol at the request of a Member State or of an organization recognized by the OAU, on any legal matter relating to the Charter or any other applicable African human rights instruments, provided that the matter is not being examined by the Commission. Advisory opinions of the Court could serve as a reference for a dynamic and progressive interpretation of the African Charter on Human Rights and other human rights conventions.<sup>92</sup>

### **3.6.3 Judgment of the Court**

The Court is required to render judgment within ninety days after it has ended its deliberations. The judgments of the Courts are decided by majority. Each judge is entitled to add his separate or dissenting opinion to the majority decision of the Court. The reasons for

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<sup>91</sup> Protocol on African Court on Human and Peoples’ Rights 1998, Article 3

<sup>92</sup> Protocol on African Court on Human and Peoples’ Rights 1998 Article 28 & 29

the judgment must be given and the judgment is read out in open Court after due notice have been given to the parties<sup>93</sup>

The judgment of the Court is final and not subject to appeal. The Court may however interpret its own decision and even review it, but only, 'in the light of new evidence' under conditions to be set out in Rules of Procedure. Execution of the Court's judgment is basically voluntary. In accordance with Article 30, the States Parties to the Protocol undertake to comply with the judgment in any case to which they are parties and to guarantee execution within the time stipulated by the Court. The Council of Ministers is responsible for monitoring the execution of the Court's judgments, in compliance with the provisions of Article 29(2) of the Protocol. Further, in a report submitted to each regular session of the Assembly of Heads of State and Government, the Court specifies, in particular, the cases in which a State has not complied with the Court's judgment.

The African system for the protection of human rights has been without a doubt strengthened by the adoption of the Protocol to the African Charter on Human and People's Rights on the establishment of the African Court on Human and People's Rights. However, the Court had not come into force for want of ratification. The African Court was the missing component of a compelling regional framework system for the protection of human rights and its establishment marked beyond any doubt the beginning of a new era in the promotion of the rule of law in Africa.

### **3.6.4 Critique of the African Judicial System**

The main challenge with expanding the jurisdiction of the African Court of Human Rights lies in its dismal performance and legitimacy since its establishment in 2008. It has been reported that out of fifty four African countries,

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<sup>93</sup> Article 46

only 26 have ratified the Protocol that creates the Court and only five of the twenty six countries have made the Special Declaration allowing individuals and NGOs to file cases at the Court. Furthermore, since its creation, the Court has only received twenty two applications for contentious matters and three applications for advisory opinions due to lack of public awareness. The Court has eleven judges recruited on part time basis for lack of funds and these meet in four annual sessions. The above facts show that to expand the jurisdiction of the Court to cover international crimes might place an unachievable amount of workload on a Court that has to date failed to make a milestone in the execution of its current mandate

### **3.7 The 2003 Protocol on the Rights of Women**

The African Charter on Human and Peoples' Rights recognises the importance of women's rights through three main provisions. Article 18(3), covering the protection of the family, promises to ensure the elimination of all discrimination against women and also ensure protection of the rights of women. Article 2, the non-discrimination clause, provides that the rights and freedoms enshrined in the charter shall be enjoyed by all irrespective of race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. And Article 3, the equal protection clause, states that every individual shall be equal before the law and shall be entitled to the equal protection of the law.<sup>94</sup>

Be that as it may, the above provisions are not satisfactory to address the rights of women. For instance, while Article 18 forbids discrimination against women, it does as such just in the family's setting. What's more, unequivocal provisions guaranteeing the right of consent to marriage and equality of spouses amid and after marriage are missing. These

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<sup>94</sup> Mary Wandia 'Not yet a force for freedom :the protocol on the Rights of Women in Africa 'Pambazuka News 162, 24 June 2004

exclusions are aggravated by the way that the charter accentuates conventional African qualities and traditions without tending to worries that numerous standard practices, for example, female genital mutilation, constrained marriage, and wife inheritance, can be unsafe or life debilitating to women. By overlooking critical issues, for example, custom and marriage, the charter deficiently protects womens' human rights.<sup>95</sup>

The process of developing the protocol on Womens Rights in Africa started when Women in Law and Development in Africa on the theme 'The African Charter on Human and Peoples' Rights and the Human Rights of Women in Africa' in March 1995 in Togo. The meeting called for the development of a protocol to the Charter on womens, rights. The meeting also called on the ACPHR to appoint a special Rapporteur on women's Rights in Africa. The assembly of heads of states and Government of the OAU at its 31<sup>st</sup> ordinary session in June 1995, in Addis Ababa, mandated the ACPHR to elaborate a protocol on the Rights of women in Africa.<sup>96</sup>

The first OAU Government Experts Meeting on the draft protocol was held in November 2001, in Addis Ababa, Ethiopia. The experts amended the draft protocol developed by the ACHPR and called on the OAU to schedule a second AU experts meeting in 2002 to consider the draft again before the hosting of an OAU ministerial meeting on the same issue. African women's organizations' participated in the meeting as observers. The OAU scheduled the second experts meeting and ministerial meeting twice in 2002 but had to postpone them due to the lack of a quorum. Thus the draft was not presented for adoption by the inaugural summit of the African Union (AU) held in Durban, South Africa in July 2002 and it seemed that there was little political will among African governments to move this process forward. The adoption of the Protocol to the African Charter on Human and People's Rights on the Rights of Women by the conference of the heads of state and government at the

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<sup>95</sup> ibid

<sup>96</sup> ibid

African Union meeting in Maputo in July 2003 was undeniably an important event in the history of African women's struggle for the recognition of their rights.<sup>97</sup>

This Protocol has elaborated and extended the rights of women under the Charter. It guarantees a wide range of women's civil and political rights as well as economic, social and cultural rights, thus reaffirming the universality, indivisibility and interdependency of all internationally recognized human rights of women. These rights include the right to life, integrity and security of person; protection from harmful traditional practices; prohibition of discrimination and the protection of women in armed conflict. Moreover, the Protocol guarantees the right to health and reproductive rights of women; access to justice; equal protection before the law and prohibits exploitation or degradation of women.<sup>98</sup>

### **3.8 African Charter on Democracy, Elections and Governance**

The ADC was adopted on January 30 2007 by member states of the African Union. It however entered into force on February 15, 2012. Its main aim is to encourage and promote democracy and human rights in Africa.

The ADC contains a number of provisions on unconstitutional changes of the government. For instance, the ADC is the first regional instrument adopted by the member states of the AU that acknowledges that an unconstitutional change of government includes any amendments or legal instruments of a member state that infringe on the principles of democratic change of government.<sup>99</sup> It is clear that many African heads of State have amended the constitution of their respective countries to keep themselves in power with the latest examples being Pierre Nkurunziza the president of Burundi and Paul Kagame of Rwanda also planning to do the same.

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<sup>97</sup> *ibid*

<sup>98</sup> *ibid*

<sup>99</sup> ADC, *supra* note 1



The ADC also aims toward establishing liberal democracies with a representative form of government in the AU member States. To attain liberal democratic society free and fair elections, respect for the rule of law, respect for human rights, political participation by citizens are key elements that must be adhered to. The ADC facilitates the promotion of liberal ideals since one of its major objectives is to promote the universal values and principles of democracy and respect for human rights. It also promotes the holding of free and fair elections to institutionalize legitimate authority of representative governments as well as democratic change of governments. It also recognizes equal protection as a fundamental precondition for a just and democratic society as well as obligating member states to guarantee the separation of powers among different branches of government and protect the independence of the judiciary.<sup>100</sup>

Prior to the adoption of the ADC, AU member states adopted a series of instruments to facilitate the implementation of democratic norms in African states. For instance, both the Constitutive Act of the AU (“Constitutive Act”) and the African Charter on Human and Peoples’ Rights (“African Charter”) contain provisions aimed at promoting good governance and respect for human rights. The Declaration on the Principles Governing Democratic Elections in Africa (“Elections Declaration”) and the AU Convention on Preventing and Combating Corruption (“Corruption Convention”) aimed to promote free and fair democratic elections and eliminate corruption. All of these instruments eventually failed to lead to widespread democracy in Africa.<sup>101</sup>

The African Charter alone was incapable of achieving widespread democracy in Africa due to the number of reasons. To begin with the African Charter focuses mainly on the promotion of fundamental human rights and duty of an individual to the society. Secondly,

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<sup>104</sup> John G. Matsusaka, *Direct Democracy Works*, 19 J.ECON.PERSP. 185, 187 (2005)

<sup>101</sup> Stacy Ann Elvy *Towards a new democratic Africa: The African Charter on Democracy, Elections and Governance* Emory International Law Review vol 27 pg 6

the African Charter does not create a detailed mechanism that facilitates good governance and free and fair election. To add on this the Charter does not expressly recognize other rights that are essential to the formation of democracy. For instance it does not state that every individual has the right to vote in free and fair elections. The charter is not clear on ‘one person vote’ principle which is so critical in any liberal democracy.<sup>102</sup>

On the other hand the Constitutive Act expressly affirms the AU’s commitment to democracy in Africa and condemns unconstitutional changes of government. However, the Constitutive Act contains only the general terms reaffirming and encouraging democracy in African states. The Act does not specifically provide a mechanism through which the AU will promote free and fair elections and good democratic governance in the continent. The AU’s failure to include such a mechanism in the Constitutive Act may have contributed to the current dearth of liberal democracies in Africa. The main purpose of the Constitutive Act was basically to establish the AU to replace the OAU. It is however surprising that the Constitutive Act did not adequately address the issue of promoting democracy in Africa bearing in mind that the continent grapples with effects of lack of democracy.<sup>103</sup>

### **3.9 NEPAD Democratic Declaration**

The New Partnership for African Development Democratic Declaration was established in 2001 with the support of the European Union. Its major mandates included promotion of peace, security, and human rights, and to foster the creation of democratic institutions throughout the African Continent. AU member states adopted the NEPAD Democracy Declaration in an effort to foster economic development and eliminate poverty via promotion of democracy. The NEPAD Democracy Declaration is a non-binding legal

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<sup>103</sup> *ibid*

instrument and therefore member states are not legally obligated to comply with its provisions.

The NEPAD Democracy Declaration is in line with the AU'S commitment to the promotion of democracy and protection of human rights associated with democracy. It establishes an action plan that would among other things review the national Constitutions of African countries to reflect democratic principles and accountable governance, promote free and fair political representation, ensure adherence by African countries to the AU'S position on unconstitutional changes of government and decisions by the AU aimed at promoting democracy, peace and security, create oversight bodies in each African country that would ensure free and fair elections, and increase public awareness of the human rights and democratic principles contained in the African Charter.<sup>104</sup>

### **3.9.1 African Peer Review Mechanism**

The African Peer Review Mechanism was launched in 2003 as one of the pillars of NEPAD. More than half of Africa's countries have joined the APRM. Of these, at least half have set about the process of studying and reforming their political, economic and corporate governance, and socio-economic development. The inclusion of the APRM in the NEPAD development process is notable however; the separate voluntary accession requirement of the APRM potentially hinders the ability of the APRM to promote good governance across the African continent. For example, as of January 29, 2011, only thirty of the fifty-four member states of the AU have voluntarily acceded to the APRM.<sup>105</sup>

The NEPAD Democracy Declaration acknowledges that the APRM seeks to promote compliance with the democratic principles and goals contained in the NEPAD Democracy Declaration. If the APRM is to be instrumental in promoting the democratic principles

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<sup>104</sup> NEPAD Democracy Declaration supra note 177, paras. 5–6

<sup>105</sup> APRM Declaration, supra note 183, para. 1

contained in the NEPAD Democracy Declaration, it is critical that all member states of the AU be required to accede to the APRM. However, both the APRM and the NEPAD Democratic Declaration are unclear on the issue of enforcement. They should include an enforcement mechanism. The mechanism should at the very least refer non-compliant countries to the Assembly of the AU which has power to issue sanctions or prevent a non-compliant state from participating in the AU pursuant to the terms of the Constitutive Act.<sup>106</sup>

Some observers have dismissed the APRM has faced a lot of criticism with some scholars arguing that it is wholly a creation of the developed countries or that it is an attempt by Africa to meet the demands of the Of the developed states and therefore by extension not an initiative that is driven by African concerns. Their judgment therefore is that even if it succeeds in being implemented across the continent in the manner envisaged, it will not succeed in addressing Africa's real problems because these problems and the solutions they require have been miss- specified in the first place. Others argue that irrespective of the origins of the APRM it presents an opportunity to improve governance in Africa, if it is implemented inclusively and transparently. The APRM is therefore a hotly contested phenomenon within the African political space.

## **Conclusion**

The main challenge with expanding the jurisdiction of the African Court of Human Rights lies in its dismal performance and legitimacy since its establishment in 2008. It has been reported that out of 54 African countries, only 26 have ratified the Protocol that creates the Court and only 5 of the 26 countries have made the Special Declaration allowing individuals and NGOs to file cases at the Court. Furthermore, since its creation, the Court has only received 22 applications for

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<sup>106</sup> NEPAD Democracy Declaration, supra note 177, para. 28

contentious matters and three applications for advisory opinions because the African Continent “does not know it”. The Court has 11 judges recruited on part time basis for lack of funds and these meet in four annual sessions. The above facts show that to expand the jurisdiction of the Court to cover international crimes might place an unachievable amount of workload on a Court that has to date failed to make a milestone in the execution of its current mandate

**CHAPTER FOUR**  
**EXAMINING THE ADVANCEMENT OF INTERNATIONAL CRIMINAL JUSTICE**  
**IN AFRICA**

**4.0 Introduction**

This chapter analyses and critiques the data collected in the field of study. The study aimed at examining the potential and pitfalls of promoting International criminal Justice in Africa with a special focus on the role played by the ICC and the AU. It will outline the role of ICC and AU as emerging anchor of the advancement of the International criminal justice system in Africa. The chapter will more importantly rely on the interviews, official ICC and AU reports and questionnaire responses from the ground.

It is a fact that Africa has one of the worst peace security environments in the globe. This is due to constant civil wars, inter and intra state conflicts that constantly threaten peace security in the region. To this end, this chapter explores the experiences regarding the enforcement of the international criminal justice in Africa as instituted by the International Criminal Court and the challenges the AU and ICC faces.

**4.1 Institutional and Functional Partnership of AU-ICC in Promoting ICJ in Africa**

Africa has had its share of being a vast testing ground for new policies to address impunity, seek truth and justice and enable reconciliation in fractured societies. The results of these efforts have been mixed and uneven however the continent experiences have contributed to advancing the International justice. The Constitutive Act of AU establishes seventeen institutions to address peace, security and development in the continent. The African Peace and Security Architecture is in charge with all bodies dedicated to peace and security in the region. The bodies have been given the authority to approve armed

intervention in cases of gross violations of human rights and unconstitutional changes of the government. To add on this the APSA has a peace building framework that includes a panel of eminent personality to promote mediation efforts, a rapid reaction standby force which has five pillars namely regional brigades, a military staff committee, a peace fund and a continental early warning system.

The executive council of the AU which is composed of Ministers of Foreign Affairs or designated government officials plays a critical in the development of International law. In January 2009, the Executive Council in its 14th ordinary session approved the statute of the African Union Commission on International Law which was created under article 5(2) of the Constitutive Act. Article 4 of the Constitutive Act is enshrined with the revision of existing treaties, identification of areas where new treaties are required and the dissemination of literature on International Law with a view to promoting the fundamental principles of International law. Article 5 and 6 mainly deal with progressive Development of International law and the codification of International law.

Although the ICC is not referred in the AU constitutive Act, African states have committed to ratify the statute within the AU strategic plan and the NEPAD process. The AU has recognized the ICC as an important development in the struggle against impunity and has urged its members to ratify the statute promptly and adopt domestic measures that would allow for cooperation with the ICC.

The AU's Peace and Security Council plays a vital role in conflict management and resolution in Africa. It is also responsible for the promotion of peace, security and stability on the continent and has gone a step further to adopt a mandate for deployment of peacekeeping missions and quick intervention missions aimed at preventing crimes against humanity and war crimes. Article 3 of the protocol related to the establishment of the PSC mandates the PSC to promote and encourage democratic practices, good governance and the rule of law to

protect human rights and fundamental freedoms, respect for sanctity of human life and the humanitarian law, as part of efforts to prevent conflicts. The PSC also plays a critical role in the development of international law particularly the humanitarian law.<sup>107</sup>

The first Consultation of enhancing the role of Au in transitional Justice in Africa took place in Banjul during the 49<sup>th</sup> ordinary session of the African Commission on Human and Peoples' Rights. The meeting had representatives from the AU, UN and civil societies. At this meeting, the importance and relevance to the African Union of transitional justice as a concept containing issues related to dealing comprehensively with past human rights violations, repression and conflicts in order to attain sustainable peace, rule of law and good governance was affirmed. It was noted that transitional justice initiatives have included accountability measures; truth seeking measures; reparations to victims; memorialization processes; national reconciliation programmes; institutional and legal reforms and realization of socioeconomic rights and, gender justice. The meeting concluded with the following recommendations: AU needs to foster complementarity between national and international justice mechanisms, should include aspects of economic social and political justice, restorative justice and reconciliation, inclusion of mediation monitoring and evaluation as part of transitional justice process and finally the need of AU and sub-regional mechanisms to draw on the existing mutual reinforcing measures of justice and accountability.<sup>108</sup>The ICC mandate influences the broader framework of accountability and transitional Justice

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<sup>107</sup> African Union (Executive Council) 14th ordinary session (January 2009) EX.CL/478 (XIV)

<sup>108</sup> Center for study of violence and reconciliation Briefing note :enhancing the role of Au in Transitional justice in Africa



## **4.2 ICC limitations as an instrument of Justice in Africa**

The international Criminal Court has faced many challenges and criticism in The Sub Saharan region in its efforts to advance international justice mechanism in the region. African countries demonstrated full support of the Rome Statute during the negotiation process that led to the formation of the ICC. The issuance of arrest warrants against the Sudanese President Omar Al Bashir regardless of deferral request by the AU led to simmering tension between the African Union and the ICC. The tension between the AU and the ICC can be attributed to both political and legal factors. Political factors are majorly on the impact of ICC's interventions on the peace and stability of countries emerging from conflicts as it was the case with South Sudan. African leaders have also cited power relations and application of selective justice by the ICC. In the legal context their clauses in the Rome Statute that have been a bone of contention for instance Article 16 that allows the UNSC to refer cases to the ICC, principle of complementarity and most recently the use of Rule 68 that allows the OTP to use evidence from recanted witnesses and as well as views on immunity regarded to Heads of States that is practiced under the international customary laws but not within the Rome statute.

## **4.3 African States Cooperation with the ICC**

Article 87(7) of the Rome Statute provides that where a: “State Party fails to comply with a request to cooperate by the Court contrary to the provisions of this Statute, thereby preventing the Court from exercising its functions and powers under this Statute, the Court may make a finding to that effect and refer the matter to the Assembly of States Parties or, where the Security Council referred the matter to the Court, to the Security Council.

Many African leaders are discontented with how the ICC is function. In 2009, the AU construed the arrest warrant for Al Bashir as a serious threat to the ongoing peace efforts in Sudan and consequently directed all African states which are ICC member states to withhold

cooperation from the court in respect of the arrest and surrender of Al Bashir. In 2010 the AU at its summit in Kampala requested African states not to cooperate in the arrest of President Al Bashir, and rejected the opening of an ICC liaison office in Addis Ababa. The AU claimed that the court had interfered with the ongoing process in Darfur.

African States Parties to the Rome Statute have reacted differently to their obligation to Cooperate under the Rome Statute. For instance Chad, Malawi, Uganda, Rwanda have cited the AU decisions and the immunity of heads of states in their refusal to arrest and surrender President Bashir to the ICC.

**Table 1. Summary of Countries President Bashir has visited since being issued with a warrant of arrest by the ICC**

Country	Year	Reasons	Measures taken by the country	Measure taken by the ICC
<b>Malawi</b>	October 2011	Attending a summit of the Common Market for Eastern and Southern Africa	Not arrested by Malawian authorities	Referred to the UNSC and ASP For further political reactions
<b>Kenya</b>	August 2010	Promulgation of the Kenya new constitution	Not arrested	Referred to the ASP and UNSC
<b>Djibouti 2011</b>		To attend the inauguration of Ismail Omar Guelleh as its president.	No action taken	
<b>South Africa</b>	July 2015	Attending the AU summit	No action taken it has asked for more time to respond to the court	

**Source: Author's compilation based on literature review**

President Bashir attended the Common Market for Eastern and Southern Africa Summit on 14 October 2011. The PTC had requested Malawian government to arrest and surrender President Bashir to the ICC. The ICC registrar sent a note verbale to the Embassy of Malawi

in Brussels reminding Malawi of its obligation under the Rome Statute urging it to cooperate. The note further warned that if Malawi failed to cooperate, the Court may make a finding to that effect and refer the matter to the UNSC and the ASP. However, Malawi did not respond to this note neither did it hold any consultations with the ICC concerning the obstacles that may have hindered it from cooperating as required of states parties by the Rome Statute<sup>109</sup>

There are conflicting views on the question of privileges and immunities accorded to the head of State under the International Customary Law and the Rome Statute. Article 27(2) of the Rome Statute states: “Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” The difficulty comes in trying to reconcile article 27(2) with article 98(1), which states that “the Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”.<sup>110</sup> A number of approaches have been adopted in an attempt to reconcile this contradiction, with varying consequences for the integrity of the two provisions. While the Pre-Trial Chamber of the ICC finally pronounced on this question in its non-cooperation decision in respect of Chad finding that head of state immunity was not applicable in the case of Bashir its reasoning has been heavily criticized. Following the decision, the AU launched an initiative seeking an advisory opinion from the ICJ on this question. Needless to say, this uncertainty complicates the issue

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<sup>109</sup> Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir of 12 December 2011, ICC-02/05-01/09 para 5.

<sup>110</sup> Decision Pursuant to Article 27(2) of the Rome Statute

of Bashir’s apprehension, and African states continue to raise Bashir’s immunity as the basis for non-cooperation.

The researcher distributed questionnaire asking if African Member states of the ICC cooperate with the Court.

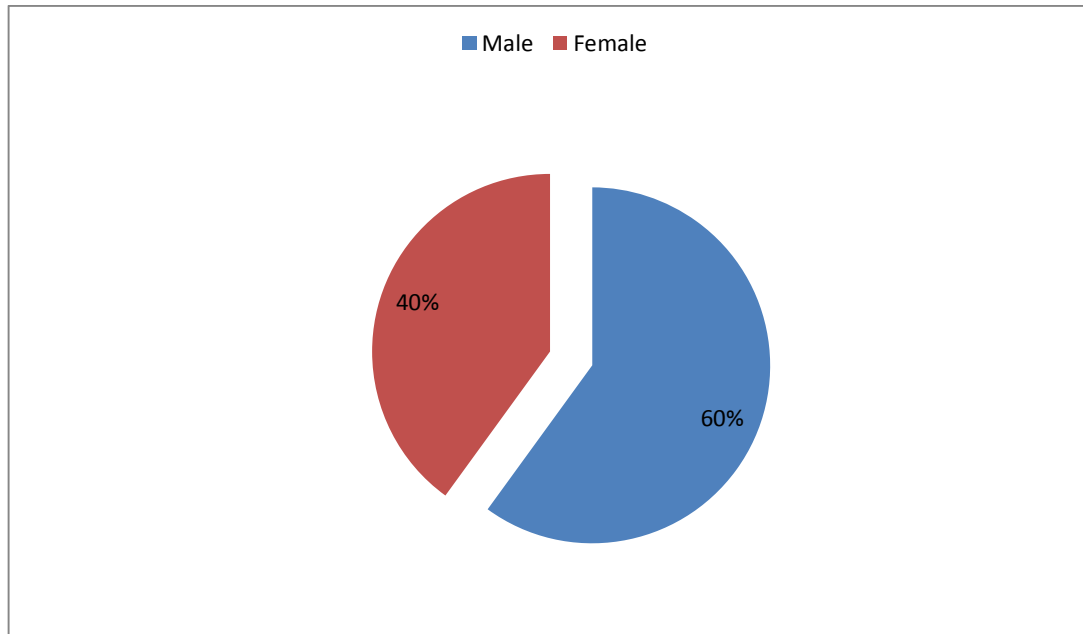
#### 4.4 General Information of Respondents

**Table 4.2 Ages of Respondents**

<b>Age</b>	<b>Frequency</b>	<b>Percentage</b>
<b>24-29</b>	<b>5</b>	<b>16.6</b>
<b>30-36</b>	<b>8</b>	<b>26.6</b>
<b>37-42</b>	<b>9</b>	<b>30</b>
<b>Over 42</b>	<b>8</b>	<b>26.6</b>
<b>Total</b>	<b>30</b>	<b>100</b>

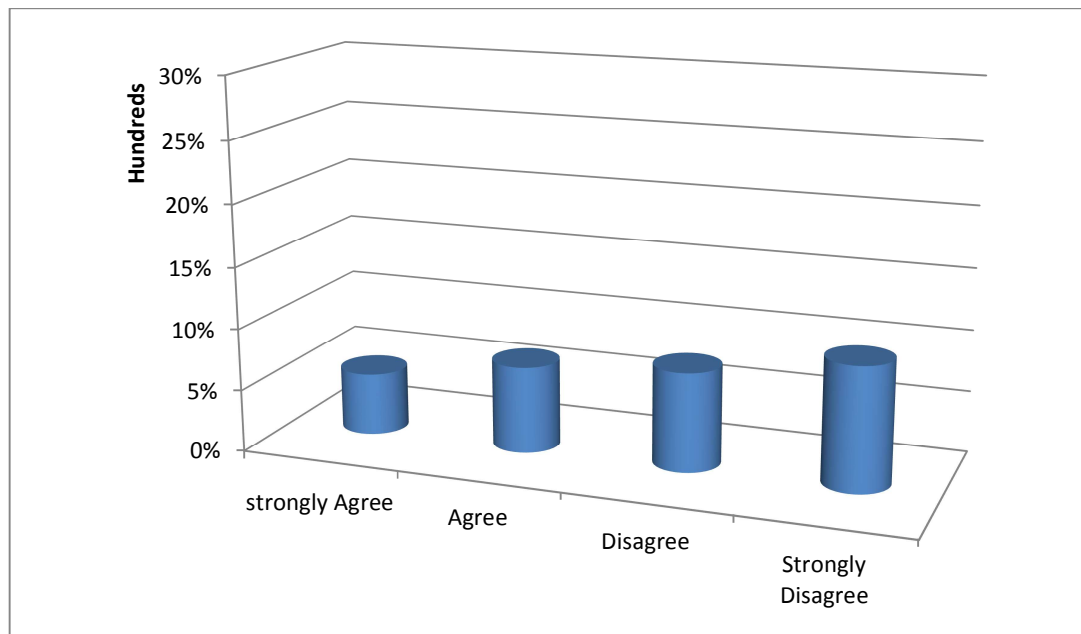
In the Table 4.2 the researcher wanted to know the age of the respondents, 16.6% said they were between 24 and 29 years, 26.6% were between 30 and 36 years, 36.7% said they were between 37 and 42 and 26.6% were over 42 years. The majority of respondents were between 37 and 42 meaning that it is the age cohort that is much aware of the events surrounding the ICC intervention in Africa

**Figure 4.2: Gender of Respondents**



The gender distribution of the participants was fair

**Figure 4.2 Whether African states that ratified the Rome Statute Cooperate with ICC**



The response of whether African States parties to ICC are cooperative to the Court. The data indicates that 37% strongly disagree which are the majority. 30% disagree while 20% Agree and 13% which is the least strongly agree. It is evident that African states which signed and ratified the Rome Statute do not oblige with it.

#### **4.5 Witness Protection**

The Rome Statute, the Rules of Procedure and Evidence and the Regulations of the Court and of the Registry contain important provisions for the protection and support of victims and witnesses. These provisions are key for the successful functioning of the Court, aiming to ensure that victims can participate in proceedings and witnesses testify freely and truthfully without fear of retribution or suffering of further harm. Article 68(1) of the Rome Statute provides that the Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. To this end, pursuant to Article 43(6), the Registrar has set up a Victims and Witnesses Unit within the Registry to provide protective measures and security arrangements, counseling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony.<sup>111</sup>

In the ICC Statute, the Office of the Prosecutor has specific obligation for witness protection and take such measures particularly during the investigation and prosecution. These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In Article 54 “Duties and powers of the Prosecutor with respect to investigations”, the Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age,

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<sup>111</sup> Colin T. McLaughlin: “Victim and Witness Measures of the International Criminal Court: A Comparative Analysis”*The Law and Practice of International Courts and Tribunals* 6 (2007)

gender as defined in article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children”. Also the Prosecutor may collect and examine evidence and request the presence of and question persons being investigated, victims and witnesses. In addition, the OTP must take measures during investigations and at trial to provide for victim and witness well-being in consultation with the VWU on protective measures and making referrals for protection and support<sup>112</sup>

In the DRC ICC Katanga and Ngudjolo case the Pre- Trial Chamber faced a lot of setbacks in securing the testimony of a large number of witnesses. Many witnesses cited fear as a prominent reason for not wishing to appear before the Trial Chamber to give evidence. The Trial Chamber gained a strong impression that the trial was being held in an atmosphere where witnesses felt unsafe. This was due to a number of factors specific to Kosovo, for example small communities and tight family and community networks which made guaranteeing anonymity difficult. The parties themselves agreed that an unstable security situation existed in Kosovo that was particularly unfavorable to witnesses<sup>113</sup>

On September 29, the trial of former Congolese opposition leader Jean-Pierre Bemba Gombo and his four associates over witness tampering opened at the International Criminal Court (ICC). The prosecution gave opening statements detailing accusations of witness tampering during Bemba's other trial at the ICC for war crimes and crimes against humanity. They allegedly illegally influenced witnesses by giving them money and instructions to provide false testimony, all perpetrated in various ways including by committing, soliciting, inducing, aiding, abetting, or otherwise assisting in their commission.<sup>114</sup>

In the Kenyan ICC case prosecutor vs Uhuru Kenyatta the judges of Trial Chamber V (B) terminate charges against Mr. Kenyatta on 13 March 2015. The prosecutor stated that the

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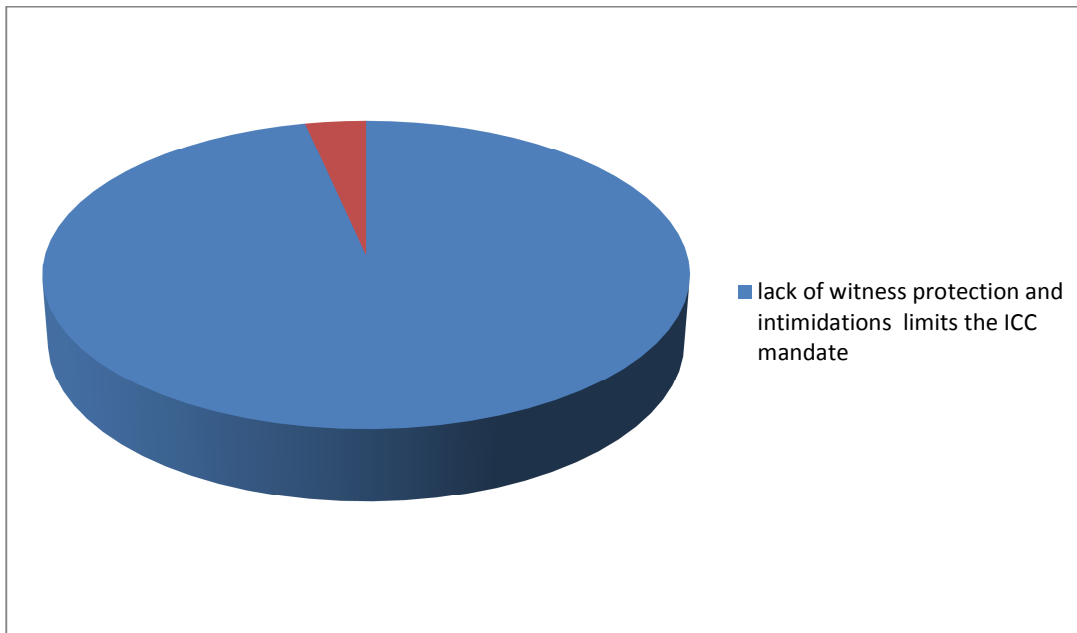
<sup>112</sup> Article 43(6) of the Rome Statute

<sup>113</sup> Prosecutor v. Katanga and Ngudjolo, ICC, Case No. ICC-01/04-01/0

<sup>114</sup> <http://www.ijmonitor.org/2015/09/witness-tampering-case-opens-at-the-icc>

reasons she chose to terminate the case were as follows: several people who may have provided important evidence regarding Mr. Kenyatta's actions, have died, while others were too terrified to testify for the Prosecution; key witnesses who provided evidence in this case later withdrew or changed their accounts, in particular, witnesses who subsequently alleged that they had lied to my Office about having been personally present at crucial meetings; and the Kenyan Government's non-compliance compromised the Prosecution's ability to thoroughly investigate the charges, as confirmed by the Trial Chamber<sup>115</sup>

In January 2015, Meshak Yebei who was alleged to be a witness in the ongoing Deputy President and radio journalist Arap Sang was found dead after his family reported him missing. The prosecution stated that it had initially contacted Yebei for assistance with its case, but he was never included on its list of witnesses because it had information that implicated him in a scheme to corrupt prosecution witnesses.



90 percent of the Respondents agreed that witness intimidation, coaching of witnesses, lack of witness protection by both the member state and the ICC hinders effective investigations.

<sup>115</sup> [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx)



#### **4.6 Participations of the Victims at the ICC proceedings**

The Rome Statute contains provisions which enable victims to participate in all stages of the proceedings before the Court. Article 68(3) of the Rome Statute, which states: “Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court Hence victims may file submissions before the Pre-Trial Chamber when the Prosecutor requests its authorization to investigate. They may also file submissions on all matters relating to the competence of the Court or the admissibility of cases. More generally, victims are entitled to file submissions before the Chambers of the Court at the pre-trial stage, at trial, and during the appeals process. The rules of procedure and evidence stipulate the appropriate time for victim participation in proceedings before the Court. They must send a written application to the Court Registrar and more precisely to the Victims Participation and Reparation Section, which must submit the application to the competent Chamber to decide on the logistics of victims' participation in the proceedings. The Chamber may reject the application if it considers that the person is not a victim whose crime falls within the jurisdiction of the Court. Individuals who wish to submit applications to participate in proceedings before the Court must demonstrate in the application that they are victims of crimes which come under the competence of the Court in the proceedings commenced before it. The Victims Participation and Reparations Section has prepared standard forms to make it easier for victims to file their application to participate in the proceedings. When submitting an application using the standard form it is possible for victims to request participation, or reparations, or both.<sup>116</sup>

According to the ICC report of 2012, the number of victims admitted in the first two trials in the Situation in the DRC did not exceed 129 persons in Lubanga case and 366

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<sup>116</sup> [http://www.icc-cpi.int/en\\_menus/icc/structure of the court/victims/participation](http://www.icc-cpi.int/en_menus/icc/structure_of_the_court/victims/participation)

persons in Katanga and Ngudjolo case. In the Situation Darfur 103 victims were admitted to participate in the case. In the Situation in Kenya, 628 persons were admitted to participate as victims in the Ruto and Sang trial and 725 in the Kenyatta post-confirmation proceedings In the Situation in the Côte D'Ivoire, the Pre-Trial Chamber granted 199 victims the right to participate in the pre- trial process.<sup>117</sup>

The complications that the Chambers have faced in the system of victim participation are attributable to the limitations of the ICC's legal framework itself. Despite being a comprehensive codification previously unseen in international criminal law, the ICC Statute, Rules, and Regulations of the Court do not provide 'thick' regulation because it was impossible for the drafters to anticipate all issues and secure consensus on every important detail. When drafting the procedural provisions, state delegations had recourse to the legal drafting technique that could accommodate uneasy diplomatic compromises and masked their inability to agree on more specific provisions.<sup>118</sup>

#### **4.7 Principle of complementarity and Admissibility**

Complementarity denotes the quality of complementing something or completing one another deficiencies. Complementarity in relation to the ICC refers to completing the national criminal jurisdiction where it does not carry out proceedings compatible with the standards of the Court and the international law. The preamble of the Rome Statute emphasizes that the ICC shall be a complementarity to national criminal jurisdictions. Article 1 of the Rome Statute states that the court shall be a permanent institution and shall have power to exercise its jurisdiction over the persons for the most serious crimes of the International Concern, and shall be complementary to national criminal jurisdictions. The basic idea of for the

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<sup>117</sup> Report of the Court on the review of the system for victims to apply to participate in proceedings, ICC ASP/11/22, 5 November 2012

<sup>118</sup> C Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise' (2003) 1Journal of International Criminal Justice603, 604-6.

complementarity is to maintain state sovereignty under which the state has a duty to exercise criminal jurisdiction over those responsible for the international crimes. The principle of complementarity enhances the national jurisdiction over the core crimes prohibited in the Statute, and to perfect a national legal system so as to meet the needs of investigating and prosecuting persons who committed the international crimes enlisted in the Statute.

The major role of the principle of complementarity is to encourage the state party to implement the provisions of the statute, strengthening the national jurisdiction over those serious crimes listed in the statute. If the legal system of the state can efficiently investigate the serious crimes prohibited in the statute, the sovereignty of the state will remain unaffected, free of any interference by the ICC. If the state is unable or unwilling to investigate or prosecute a case, the ICC will invoke the principle of complementarity to admit any case concerned and exercise jurisdiction over it

Article 5 of the Rome Statute pinpoints that crimes to be investigated by the ICC should be those that infringe the universal values. There has been a major concern by the African States over state sovereignty in relation to prosecution of international crimes. The principle of complementarity basically tries to strike a delicate balance between the state sovereignty to exercise jurisdiction and the role of the International Criminal Court. The Statute encourages the states to improve the effectiveness of their national justice system compatibility

This provision of self-referral has led intervention of the ICC in three African Situation countries Uganda, the DRC and the Central African Republic. The top leadership in these countries opted to refer the situations in their individual countries to the Court because of the absence of effective domestic institutions and adequate resources to pursue the investigation and prosecution of the perpetrators of grave crimes. Following the above referrals, the Prosecutor exercised his powers and issued arrest warrants for

specific individuals in these different situation countries. The usage of this self-referral mechanism by some of the African leaders is a demonstration of the fact that many of the African countries where the ICC has intervened have voluntarily submitted to the jurisdiction of the ICC with a belief in its ability to exercise its mandate to fight against impunity.<sup>119</sup>

A section of critics, however, have expressed doubt regarding the process leading up to the making of these self-referrals. There are arguments that these states have been manipulated into making state referrals so as to build the profile of the ICC. The Prosecutor of the Court has been accused of putting Uganda and DRC under considerable Pressure to refer cases to the ICC. Statements of this nature provide a glimpse into some of the opinions that have been put across over the years to distort the intentions and processes of the Court and further entrench the negative attitude towards the Court in Africa.<sup>120</sup>

The principle of complementarity has also become a contested issue in the Darfur situation. Since the UN Security Council referred the situation in Darfur in 2005, the Government of Sudan has repeatedly asserted that it is capable of conducting its own trials. In June 2005, days after the announcement by the Prosecutor that he would commence an investigation, the Sudanese Government established the Special Criminal Court for the Events in Darfur.<sup>121</sup>

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<sup>119</sup> The American Non-Governmental Organizations Coalition for the International Criminal Court “Africa and the International Criminal Court” Article found<<http://www.amicc.org/docs/Africa%20and%20the%20ICC.pdf>> (last accessed on 15 September 2015)

<sup>120</sup> *ibid*

<sup>121</sup> The Darfur Consortium, “Unwilling and Unable? The Special Criminal Court on the Events in Darfur,” available from the International Refugee Rights Initiative.

## **CHAPTER FIVE**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **5.0 Introduction**

This study sought to examine the advancement of International Criminal Justice in Africa. In order to achieve this broad objective the study aimed to achieve three main objectives. To start with the study explored the ICC intervention in Africa; this objective was tied up to the first hypothesis which expressly specified that ICC intervention in Africa increased the likelihood of achieving International Criminal Justice in the region. Secondly the study considered whether African major legal instruments contribute to advancing the international Criminal justice

The second objective was linked to the second hypothesis which stated that African legal instruments have increased the potential of attaining international criminal justice in Africa. The third objective was to examine the ICC case study in depth thereby extracted some of these objectives and hypotheses were examined through the theoretical framework of institutionalism. The theory assisted the study to seek understanding on the role of legal frame works that can be best understood through policy making and legal aspects of institutional structures.

#### **5.1 Chapter Summaries**

This section offers the individual chapters summaries and conclusions.

##### **5.1.1 Chapter One: Introduction and Background to the Study**

Chapter one provided the study layout starting with a background to the study which pointed out how African countries participated in the Rome Statute negotiations that led to

the ICC. This chapter also considered the statement of the study problem through which motivated the conduct of the study.

Chapter one also offered a glimpse on the case study of ICC by discussing a brief conflict history and previous interventions made in Africa. It also highlighted the study objectives, guiding questions and hypothesis through which the research was framed. Further, the section expounded on the theoretical framework by discussing in depth the institutionalism theory linking up the significance of these theories to the subject matter. The chapter offered academic and policy justification through highlighting the unique features of the study and its contribution to the academia. A comprehensive literature review related to the subject under research was also outlined in detailed. Finally, the chapter illuminated in detail the methodology used to attain the envisaged research goals and objectives

### **5.1.2 Chapter Two: An Overview of ICC Interventions in Africa**

Chapter two offered a detailed analysis on the ICC interventions in Africa. The chapter explored the ICC interventions in DRC (self-referral), Darfur (UNSC referral) and Kenya (prosecutor proprio motu). It began with analyzing history of governance in Africa, and then exploring on the overview the involvement of the ICC in these regions. Secondly the chapter will explore challenges of local legal sectors of the above countries factors that led to the ICC interventions

### **5.1.3 Chapter Three African Governance Structures and their roles in advancing international justice**

Chapter three presented the findings about the Africa governance structures. The chapter outlined the historical background on the formation of AU from OAU; the institutional of the African Union were highlighted as well. The chapter also discussed the

ACPHR and the challenges it faces in promoting human rights in the continent. Major legal instruments under African Union were discussed in order to establish their contributions to the Rule of Law in Africa.

The study noted that the mandate of AU as stipulated by the Constitutive Act contained all the pillars of security, development and rule of law components. The study established that The Constitutive Act of the African Union has adopted a more interventionist approach to end genocide, war crimes against humanity, human rights violations and unconstitutional changes of government through the mechanism of employing sanctions. The AU has also continued to develop legal frameworks and establishing relevant institutions. The Union is trying to create a culture of non- indifference towards war crimes and crimes against humanity in the continent.

The study established that Africa has made major strides in promoting International criminal law .This is on the grounds that the African Charter was drafted to make note of African society and legal philosophy, and is particularly coordinated towards African needs which can be effortlessly seen from the prelude. In this way, the first area in which the African Charter varies from others is that not just the Charter seeks to secure individual common and political rights, it additionally tries to advance and ensure inside of the single instrument, economic, social and cultural rights and a classification of certain third generation rights. Close examination of the African Charter demonstrates to us that both categories of rights are in dissociable from each other in both conception and universality.

#### **5.1.4 Chapter Four Examining the ICC limitations in the advancement of international criminal justice in Africa**

Chapter four presented the findings about the limitations of ICC in the advancement of the international Criminal justice in Africa. In order to provide the big picture of ICC interventions the chapter outlined its functional and institutional relationship with the AU, because both organizations play a big role in promote international justice in Africa. The section sought to clarify how the coordination, cooperation and synergies of both organizations were utilized to achieve the ICC mandate.

The focus of the chapter was on the ICC limitations. The study found out that the major limitation was the African state cooperation with the ICC. The study also noted that witness intimidation and lack of victim participation were major impediments of achieving international justice in Africa.

#### **5.2 Study Conclusions**

This chapter brings to an end of this study by revisiting the two main hypotheses that tied chapter two and three respectively. Chapter two examined the ICC interventions in Africa which was linked to the first hypothesis that stated that ICC intervention in Africa enhances the international criminal justice. Based on the recent trends, Kenya, South Africa and Gabon are among the countries that are on the process of domesticating the Rome statute. It was evident that national courts in Africa are reluctant to conduct investigations that are political in nature or relate with top government officials. In most cases domestic judges fear that their involvement in the prosecution of the top political officials can result in either political violence or them losing their lives. African national courts are also uncomfortable with prosecuting military commanders or rebel group leaders since it might hinder the ongoing peace negotiations.



The study also established that many African countries do not have resources or the capacity to punish the perpetrators of the war crimes, genocide and crimes against humanity. The domestic courts are incapacitated hence lack the expertise to deal with the crimes. The major problems outlined in the domestic courts include lack of personnel, lack of independent judiciary, lack of investigative capacity, and financial constraints.

The Constitutive Act lays a foundation of legal architecture that safeguards and promotes human rights as well combating immunity in the continent. The Constitutive Act highlights the protection of individuals from grave criminal harm as a collective responsibility for African states as a way of promoting international justice in the continent. Justice in Africa.

The study also expounded on the African Union development aimed at promoting the International justice in Africa. The decision of African Union to merge the African Court on Human and Peoples Rights with the new African Court was discussed. The shortcomings of the African Court which include lack of funds, lack of political will by the member states were demonstrated.

### **5.3 Recommendations**

Based on the findings of this study and the discourses of Governance in Africa and the role of international legal frameworks in promoting International Justice in Africa this section presents some recommendations that can enhance the international criminal justice in Africa.

### **5.3.1 Domesticating the Rome Statute**

African state parties to the Rome Statute have a duty to domesticate the statute.. State must adopt the legislation allowing them to prosecute genocide, war crimes and crimes against humanity at the national level. The domestication of the Statute can be accomplished either by creating offences based on the Rome Statute definitions or by incorporating Article 6,7, and 8 of the Rome Statute which define genocide, war crimes and crimes against humanity by reference. The states must adopt the national mechanisms to cooperate with the courts prosecution.

### **5.3.2 ICC Monitoring Mechanism**

The ICC should develop a monitoring mechanism of the countries that investigations are ongoing. These will help the office of the prosecutor to understand the emerging dynamics in the region. A framework for monitoring the impact of the cases across a set of core issues could be drawn up and regularly assessed. If appropriate in terms of advancing the interests of justice, a campaign could be launched for the ICC to exercise its facility to sit, or at least hear part of a case, in the region. In particular, understanding the impact of the Darfur referral to date, whether in terms of the prospects of achieving accountability or contributing towards creating a just peace, will be important in guiding how the Rome Statute's Article13(b) referral power might be used more effectively and appropriately by the UN Security Council in the future.

## BIBLIOGRAPHY

- Adedeji, Adebayo, ed. 1999. *Comprehending and mastering African conflicts* London: Zed Books
- African Charter Article 47
- African Union (Executive Council) 14th ordinary session (January 2009) EX.CL/478 (XIV)
- Akande, D. "The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC." *Journal of International Criminal Justice* 10, no. 2 (2012): 299-334. 324
- Anghie, Antony, and Buphinder S. Chimni. "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts." *Chinese J. int'l L.* 2 (2003): 77.
- Ankumah, E and Kwakwa E(eds) (2005) *African perspectives on international criminal justice* Africa Legal Aid: Accra/Pretoria
- APRM Declaration, supra note 183, para. 1
- Article 1 of the new Protocol establishes the African Court of Justice and Human Rights
- Assembly of the African Union, First Ordinary Session, 9-10 July 2002, Durban, South Africa
- Ayittey, George(1998),*Africa in Chaos* New York: St Martin"s Press
- Ayittey, George(1998),*Africa in Chaos*New York: St Martin"s Press.
- Baldo, Suliman. "The Impact of the ICC in Sudan and DR Congo." Paper, International Conference: Building a Future on Peace and Justice. Nuremburg, Germany. 25-27, June, 2007
- Barnett, Laura. "The International Criminal Court: History and Role." (2008).
- Bekou, Olympia, and Sangeeta Shah. "Realising the potential of the International Criminal Court: the African experience." *Human Rights Law Review* 6, no. 3 (2006): 499-544.
- Berkeley, Bill. 2001. *The Graves Are Not Yet Full: Race, Tribe and Power in the Heart of Africa*.New York: Basic Books.
- Boell. "Perspectives: Political Analysis and Commentary from Africa,"(2012) p. 21
- Brief on the situation in Kenya and the International Criminal Court", Permanent Mission of the Republic of Kenya to the United Nations, No. 167/13, 3 May 2013
- C Jalloh 'Regionalising international criminal law' (2009) 9 *International Criminal Law Review*445
- C Kress, 'The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique

- C, Leite, and Weideman J. "Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth." International Monetary Fund Working Paper, no. 99/85 (1999).
- C, Leite, and Weideman J. "Does Mother Nature Corrupt? Natural Resources, Corruption, and Economic Growth." International Monetary Fund Working Paper, no. 99/85 (1999).
- Calderisi, Robert. *The Trouble with Africa: Why Foreign Aid Isn't Working*. New York: Palgrave Macmillan, 2006.
- Center for study of violence and reconciliation Briefing note :enhancing the role of Au in Transitional justice in Africa
- Clark, Phil. "Law, politics and pragmatism: The ICC and case selection in the Democratic Republic of Congo and Uganda." *Courting Conflict* (2008): 37-44.
- Cole, Rowland JV. "Africa's relationship with the international criminal court: More political than legal." (*Melb. J. Int'l L.* 14 2013): 670.
- Colin T. McLaughlin: "Victim and Witness Measures of the International Criminal Court: A Comparative Analysis" *The Law and Practice of International Courts and Tribunals* 6 (2007)
- Collier, Paul, and Hans Binswanger. 1999. *Ethnic loyalties, state formation and conflict*. A background paper prepared for the Africa in the 21st Century Project. Washington, D.C., World Bank
- Compromise' (2003) *Journal of International Criminal Justice* 603, 604-6.
- Constitutive Act
- Constitutive Act (n 1) art 19
- Decision Pursuant to Article 27(2) of the Rome Statute
- Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir of 12 December 2011, ICC-02/05-01/09 para 5.
- Decisions and Declarations, Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia
- Economic, Social and Cultural Council of the African Union' (Addis Ababa 2004) AU/Dec.48 (III) arts 2 & art 3(2)

- Elliesie, Hatem et al. (2009): Different Approaches to Genocide-Trials under National Jurisdiction on the African Continent - The Rwandan, Sudanese and Ethiopian Case, *Recht in Afrika*, Volume 12/1, Köln, pp. 21
- G. Naldi, 'The African Economic Community: Emancipation for African States or yet another Glorious Failure?' 24 *North Carolina Journal of International and Commercial Regulation* (1999) p. 601.
- H.W.O ogendo Human and peoples, rights;what point is Africa Trying to make in Human rights and Governace in Africa 74-77 Florida University Press 1993
- Henry J. Steiner & Philip Alston, *International Human Rights in Context*(2ndEdition), Oxford
- Human Rights Watch reports, "Ituri: Covered in Blood: Ethnically Targeted Violence In Northeastern DR Congo," July 2003
- International Federation of Human Rights "Practical Guide African Court on Human and Peoples' Rights towards the African Court of Justice and Human Rights" pg 27
- International legal consortium Rebuilding courts and trust: An assessment of the needs of the justice system in the Democratic Republic of Congo August 2009
- J.Struet(2008) The politics of Constructing the International Criminal court NewYork:palgrave macmillan pg 153-157
- John G. Matsusaka, *Direct Democracy Works*, 19 *J.ECON.PERSP.* 185, 187 (2005)
- Lawal, Gbenga (2007), "Corruption and Development in Africa: Challenges for Political and Economic Change," *Humanities and Social Sciences Journal*, 2(1):1-7.
- Lawal, Gbenga (2007), "Corruption and Development in Africa: Challenges for Political and Economic Change," *Humanities and Social Sciences Journal*, 2(1):1-7.
- M. Meredith, *The State of Africa – A History of Fifty Years of Independence* London, Free Press 2006 Chapter 26
- M.Brubacher,"TheICC,NationalGovernmentsandJudiciaries" inN.WaddellandP.Clark(eds.),*Peace, Justice and the ICC in Africa,MeetingSeriesReport*,London:RoyalAfricanSociety,March2007,pp.22-23
- Magnarella, Paul. "*Preventing Interethnic Conflict and Promoting Human Rights through More Effective Legal, Political, and Aid Structures: Focus on Africa.*" *Georgia Journal of International and Comparative Law* Vol 23 (1993): 327-45.
- Mangu, André Mbata. "The African Union and the promotion of democracy and good political governance under the African Peer-Review Mechanism: 10 years on." *Africa Review* 6, no. 1 (2014): 59-72.

Mark Ellis, Richard Goldstone, eds, *International Criminal Court: Challenges to Achieving Justice and Accountability in the 21st Century*, Idebate Press, 2010

Mary Wandia 'Not yet a force for freedom :the protocol on the Rights of Women in Africa' *Pambazuka News* 162, 24 June 2004

Max du Plessis, et al *Africa and the International Criminal Court International Law* 2013/01

Mohamed Abdelsalam Babiker, "The Prosecution of International Crimes under Sudan's Military and Criminal Laws:Development, Gaps and Limitations", in *Criminal Law Reform and Transitional Justice: Human rights Perspectives for Sudan*(Ed. Lutz Oette, Ashgate UK, 2011)

Munya, P. (1999): "The Organization of African Unity and Its Role in Regional Conflict Resolution and Dispute Settlement: A Critical Examination

Musila, Godfrey Mukhaya. "African Union and the Evolution of International Criminal Justice in Africa: Challenges, Controversies and Opportunities." *Controversies and Opportunities*.(June 5, 2013) (2013).

Muthoni Wanyeki "The International Criminal Court's cases in Kenya: origin and impact" *Institute for Security Studies* 237(2012):9

NEPAD Democracy Declaration *supra* note 177, paras. 5–6

NEPAD Democracy Declaration, *supra* note 177, para. 28

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

Organisation of African Unity (Assembly of Heads of State and Government) 'Sirte Declaration' (Sirte 1999) EAHG/Draft/Decl. (IV) Rev.1

Organization of African Unity (Council of Ministers) 'Report of the Seventy-Second Ordinary Session of the Council of Ministers' (Lome 2000) CM/Rpt (LXXII)

Ottilia Anna Maunganidze & Antoinette Louw, *Transnational Threats and International Crimes Division*, ISS Pretoria

Peace and Security Council Protocol (n 109) art 8(1)

Phakiso Mochochoko et al " Africa and the International Criminal Court ", *African perspectives on international criminal justice*, Ghana: Africa Legal Aid, 2005, pg 246

Phakiso Mochochoko, *Africa and the International Criminal Court*, in E Ankumah and EKwakwa (eds), *African perspectives on international criminal justice*, Ghana: Africa Legal Aid, 2005, pg 246

PRC Rules of Procedure (n 95) Rules 2, 4(1) (a)

Prosecutor v. Katanga and Ngudjolo, ICC, Case No. ICC-01/04-01/0

Report of the Court on the review of the system for victims to apply to participate in proceedings, ICC ASP/11/22, 5 November 2012

Report of the UN Special Rapporteur on the Independence of Judges and Lawyers, *supra* n 18 at para. 53

Resolution 1856 of the UN Security Council extended MONUC's mandate until 31 December 2009. Doc S/RES/1856

Resolution 1970 (2011). (2011, February 26). United Nations Security Council

Richard Dicker. (2013, August 29). It's Time for Saif al-Islam Gaddafi to Go to The Hague. Think Africa

Robert Cryer (2005) *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* Cambridge: Cambridge University Press, 144

Rome Statute of the International Criminal Court, U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002, Article 17

S/RES/1564 (2004), September 18, 2004

Sarah Kendall "UhuRuto and other Lethivians: The International Criminal Court and Kenyan Political Order" *African Journal Of Legal Studies* 7(2014):399-427

Schirch, Lisa. 1995. *Keeping the Peace: Exploring the Civilian Alternatives in Conflict Resolution*. Uppsala: Life and Peace Institute.

Scott Davidson *The African system for protecting human and peoples' rights*, Open University Press, 1993.

Stacy Ann Elvy *Towards a new democratic Africa: The African Charter on Democracy , Elections and Governance* *Emory International Law Review* vol 27 pg 6

The American Non-Governmental Organizations Coalition for the International Criminal Court "Africa and the International Criminal Court" Article found<<http://www.amicc.org/docs/Africa%20and%20the%20ICC.pdf>> (last accessed on 15 September 2015)

The Darfur Consortium, "Unwilling and Unable? The Special Criminal Court on the Events in Darfur," available from the International RefugeeRights Initiative.

Thomas M. Franck (1990) *Power of Legitimacy Among Nations*. New York: Oxford University Press

Van Walraven 1999, *op. cit.* n. 40, at pp. 311-314

Vinck, Patrick et al. *Living With Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo*. The Berkeley-Tulane Initiative on Vulnerable Populations, August 2008

W E Burghardt Du Bois, 'The Pan-African movement' in G Padmore (ed) Colonial And Coloured Unity A Programme of Action (1963) Etext, World Bank, 1993, Can Africa Claim the 21st Century?

### **Documents**

The African Charter on Human and People's Rights, Article 61

The African Charter on Human and Peoples' Rights, Article 1

The African Charter on Human and Peoples' Rights, Article 49

The African Charter on Human and Peoples' Rights, Article 62

### **Newspaper reports**

Nation Reporter, VP vows to press on with Shuttle Diplomacy "Daily Nation march 28 2011  
[http://www.nation.co.ke/News/113488//accessed March 31 2014](http://www.nation.co.ke/News/113488//accessed%20March%2031%202014)

"Brief on the situation in Kenya and the International Criminal Court", Permanent Mission of the Republic of Kenya to the United Nations, No. 167/13, 3 May 2013

Menya, Walter. "Kenya: Fresh Shuttle Diplomacy on ICC Cases." The Star April 30, 2012.

### **Internet sources**

<http://www.ijmonitor.org/2015/09/witness-tampering-case-opens-at-the-icc>

[http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/otp-statement-05-12-2014-2.aspx)

[http://www.icc-cpi.int/en\\_menus/icc/structure of the court/victims/participation](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/participation)