The merged African Court of Justice and Human Rights (ACJ&HR) as a better criminal justice system than the ICC: Are we Finding African Solution to African problems or creating African problems without solutions?

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1. Introduction

A completely new creature unprecedented before in international law is emerging in Africa. The African Court of Justice and Human Rights (ACJHR) (herein after referred to as the Merged Court) will also have a criminal chamber to try international crimes. The mandate of the court will be tripartite and this article seeks to analyse this latest facet; the introduction of an international criminal chamber.

Expansion of the jurisdiction of the ACJHR will see the merger of state-level and individual-level criminal accountability mechanism for human rights violations on an international scale.[1] The infraction between the African Union (AU) and the International Criminal Court (ICC),[2] was arguably warranted by the latter's issuance of arrest warrants against sitting African heads of state and senior government officials.[3] These developments induced the AU to take 'retaliatory' measures which culminated in conferring international criminal jurisdiction on its court.[4]

This article seeks to answer three interrelated research questions: First, what effect will the extension of the jurisdiction of the Merged Court have on international criminal justice in Africa?, second, will the Merged Court with jurisdiction on international crimes offer an alternative to the already discredited International Criminal Court (ICC) in Africa? and lastly is

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[1] Kathryn Sikkink, 'From Sate Responsibility to Individual Criminal Accountability: A new Regulatory Model for Core Human Rights Violations' in Walter Mattli & Ngaire Woods, eds, *The Politics of Global Regulation* (Princeton University Press 2009).

[2] Claus Kreß, 'The Crime of Genocide and Contextual Elements: A Comment on the ICC Pre-Trial Chamber's Decision in the Al Bashir Case', (2009) 7 Journal of International Criminal Justice, 297; Paola Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', (2009) 7 Journal of International Criminal Justice, 312; Tom Ginsburg, 'The Clash of Commitments at the International Criminal Court', (2009) 9 Chicago Journal of International Law, 499; Andrew T. Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide', (2008) 6 Journal of International Criminal Justice, 829; Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities', (2009) 7 Journal of International Criminal Justice, 333.

[3] *The Prosecutor* v. *Saif Al-Islam Gaddafi* and *Abdullah Al- Senussi*, Case No. ICC-01/11-01/11; *The Prosecutor* v. *William Samoei Ruto* and *Joshua Arap Sang*, Case No. ICC-01/09-01/11; *The Prosecutor* v. *Francis Kirimi Muthaura* and *Uhuru Muigai Kenyatta*, Case No. ICC-01/09-02/11. On 22 November 2011, Pre-Trial Chamber I formally terminated the case against Muammar Gaddafi due to his death. Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, Gaddafi (ICC-01/09-01/11), Pre-Trial Chamber I, 22 November 2011, available at <www.icc-cpi.int/iccdocs/doc/doc1274559.pdf>.

[4] Ademola Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' (2013) Netherlands International Law Review, 28.

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the African Union capable of financing a court with a three pronged mandate that includes international crimes. This article makes a general contribution to the debate on whether Africa can offer African solutions to African problems. It specifically focuses on the international crimes mandate that has been introduced under the African Court of Justice and Human Rights. The first part of this article focuses on the origins of the idea on the African system having an international crimes court. The second part focuses on the international crimes chamber of the African court its jurisdiction, composition and structure. The third part of this article focuses on the Draft Merged court and its amendments and whether the protocol will be adopted ad ratified. The article then concludes that Africa might not be ready for this extension of jurisdiction of the Merged court to try international crimes as this stance will take away the gains already made in the African Human rights scene.

1.1 The origins of Extending the Jurisdiction of the African Court of Justice and Human Rights

The African Union (AU) is determined to establish a criminal chamber within the inactive structure of the African Court of Justice and Human Rights (hereinafter the merged court).[5] In its summit held in Addis Ababa in February 2009, the AU Assembly took decision Assembly/AU/Dec. 292 (XV).[6] It requested the African Union Commission (AU Commission), in consultation with the African Commission on Human and Peoples' Rights (the African Commission) to assess the implications of recognizing the jurisdiction of the African Court to try international crimes.

In its decision (Assembly/AU/Dec. 292 (XV))[7] of July 2010 the AU Assembly requested the African Union Commission (AU Commission) to finalize the study on the implications of extending the jurisdiction of the African Court to cover international crimes, and to submit, through the Executive Council, a report thereon to the regular session of the AU Assembly scheduled for January 2011. To implement the AU decisions stated above, the AU Commission engaged consultants to examine the implications of extending the jurisdiction of the African court to international crimes. The consultants were to draft a Protocol for the establishment of the Criminal Chamber within the African Court. The consultants led by Mr Donald Deya of the Pan African Lawyers Union (PALU) completed their study and submitted it to the AU Commission. Annexed to the study was the Draft Protocol on the Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.[8] In August 2010 and 8-12 November 2010,

[5] Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 Journal of International Criminal Justice, 1067; Frans Viljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (2012) AfricLaw at < http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/#more-213> (accessed 10 April 2014).
[6] Decision on the Abuse of the Principle of Universal Jurisdiction, Doc. EX.CL/606 (XVII).
[7] Ibid.
[8] Fifth Meeting of Government Experts on Legal Instruments on the Transformation of the AU Commission in AU Authority and on the Review of the Protocols relating to the Pan African Parliament and the African Court on Human and Peoples' Rights, ACJHR-PA/4(II) Rev.2.

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the AU Commission organized two workshops at Midrand, South Africa, to validate the findings of the study.[9]

In its summit of 30 June to 1 July 2011 held at Malabo, Equatorial Guinea, the AU Assembly adopted decision (Assembly/AU/Dec. 366 (XVII).[10] In this decision the Assembly requested the AU Commission to actively pursue the implementation of the AU Assembly decisions on the African Court being empowered to try serious international crimes committed on African soil and report to the AU Assembly.

In May 2012, the African Union 'Government Experts and Ministers of Justice/Attorneys General on Legal Matters' adopted the AU- Final Court Protocol- As adopted by the ministers 17 May 2012.[11]In January 2013, the Summit of the Assembly of African Heads of State did not adopt the Draft protocol. It made recommendations that the AU Commission should further consider the meaning of 'popular uprisings', which was excluded from the jurisdiction of the court. The Assembly also asked the Commission to report on the financial and structural implication of extending the court's jurisdiction to international crimes.[12]

The consultants from PALU in collaboration with the African Commission have organized a number of meetings with stakeholders, including the existing African Court on Human and Peoples' Rights to consider the Draft protocol. In December 2013, the African Commission organized a brainstorming meeting of experts in Arusha, Tanzania, to discuss the pending issues which includes the definition of the crime of "unconstitutional change of government" (UCG), and the financial implication of extending the jurisdiction of the court.[13]

The AU Assembly will be bent towards adopting the Draft protocol due to the recent developments in the continent. The trials of the Kenyan head of state Hon Uhuru Kenyatta and his deputy Hon William Samoei Ruto will have a strong bearing on this question. It is therefore plausible to speculate that the Assembly will adopt the Draft Protocol.

1.2 Prelude to the Criminal Chamber in the African Court

Arguably, there is one major factor that led to the establishment of the Criminal Chamber within the African Court. This is the flimsy reason that Africans were being tried in foreign imperialistic

[9] Chacha Bhoke Murungu (n 1), 1068.
[10] Decision on the Implementation of the Assembly Decision on the International Criminal Court (Doc. EX.CL/670 (XIX).
[11] Amending Merged Court Protocol, Exp/Min/IV/Rev. 7, 15 May 2012.
[12] Ademola Abass (n 4), 29.
[13] Journalist for Justice, 'Briefing note on the Extension of the Jurisdiction of the African Court on Human Rights and People's Rights to deal with criminal matters' (2014) at <http://www.jfjustice.net/briefing-note-on-the-extension-of-the-jurisdiction-of-the-african-court-on-human-and-peoples-rights-to-deal-with-criminal-matters/> (accessed 10 April 2014).

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courts. This was being done either by domestic courts of some European states, especially France, the UK, Spain and Belgium, or the International Criminal Court (ICC).[14]

1.2.1 Long Term and Immediate Factors for the Establishment of the Criminal Chamber

The long term factors include the indictment of African state officials before the domestic courts of Europe, the ICC and the International Court of Justice (ICJ) which all involve African state officials.

Former Libyan president, Muammar Qaddafi was indicted in France for torture and conspiracy to commit torture and terrorist acts. The court of Cessation of France ironically rendered its judgement in favour of Qaddafi.[15] The former Mauritenian President Maaouya Ould Sid'Ahmed Taya was also indicted in France in 2005.[16] Rwandan state officials have also indictments in relation to international crimes committed in Rwanda in 1994. In 2007, a French judge, Jean-Louis Bruguie're, indicted Rwandan state and military officials for their alleged roles in the 1994 Rwandan genocide.[17] In early 2009, a court in Paris issued indictments against five serving heads African presidents alleging corruption. The five included: Denis Sassou Nguesso of Congo Obiang Nguema of Equatorial Guinea; Omar Bongo of Gabon; Blaise Compaore of Burkina Faso and Eduardo Dos Santos of Angola.[18]

The immediate cause is arguably relates to criminal proceedings against the sitting head of Sudan, Omar Al-Bashir, the sitting head of state in Kenya Uhuru Kenyatta and his deputy William Samoei Ruto. Following these indictments the AU reacted and decided, first, not to co-perate with the ICC, second to initiate steps towards establishment of a criminal chamber in the African Court and lastly petition the Security Council (SC) for deferral of the cases against the Kenyan officials.

1.3 The International Criminal Law Chamber of the African Court

The African Court of Justice and Human Rights will have an international crimes chamber. This chamber will be specifically dedicated to the prosecution of individuals with the highest criminal responsibility on international crimes committed on African soil. This part considers the Draft Protocol on the merged court as amended to introduce a criminal chamber.

1.3.1 General Matters

Article 1 of the Draft Protocol on the African Court of Justice and Human and Peoples' Rights[19] refers to the Court, which is conferred with international criminal jurisdiction, as 'the African

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[14] Chacha Bhoke Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 Journal of International Criminal Justice, 1068.

[15] SOS Attentats et Beatrice Castelnau d'Esnault c. Gadafy, 125 International Law Reports 490, 508, 13 March 2001

[16] *International Federation of Human Rights Defenders (FIDH) and Other*s v. *Ould Dah*, 8 July 2002, Court of Appeal of Nimes, 1 July 2005 (Nimes Assize Court, France).

[17] Chacha Bhoke Murungu, (n 14), 1069.

[18] Ibid.

[19] Draft Protocol on the African Court of Justice and Human and Peoples' Rights, (Tuesday 15 May 2012) Exp/Min/IV/Rev.7, art 8.

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Court of Justice and Human and *Peoples'* Rights. The word peoples' has been introduced on the previous name African Court of Justice and Human Rights. This inclusion is important. Art 2 of the 'Merger Protocol' applied to the court a nomenclature that dispensed with the word 'people' giving the impression that the merged court would only deal with 'human' rights. The inclusion of "peoples'" was an ingenious feature of the African Charter on Human and Peoples' Rights, which forms the basis of the human rights jurisdiction of the court.

This anomaly dealt with, the next problem is on whether the court's international crimes jurisdiction should be captured in its name to give a real picture of its character. In describing the court as a 'Court of justice and Human and Peoples' Rights' the provision obviates the international criminal jurisdiction of the court.[20] Ademola suggests that the name of the court should ideally be 'the African Court of Justice, Human and Peoples' Rights and International Crimes.'[21] This name is obviously something of a mouthful and shortening risks denying it its real character. A shorter version would be the African Criminal, Justice, Human and Peoples' Rights Court.

1.3.2 Jurisdiction

Article 3 of the Draft Protocol confers the African Court;

> "with original and appellate jurisdiction, including international criminal jurisdiction, which it shall exercise in accordance with the provisions of the statute annexed hereto.

Judicial jurisdiction refers to the legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.[22] The International Criminal Court (ICC) has jurisdiction over the most serious crimes of concern to the international community as a whole.[23] These crimes are genocide, war crimes, crimes against humanity and the crime of aggression.[24] The African Court will have jurisdiction over similar crimes but some other crimes have also been introduced. Article 28A of the Draft Protocol provides that the International Criminal Law Section of the Court shall have power to try persons for the following crimes: Genocide, Crimes against Humanity, War Crimes, The Crime of Unconstitutional Change of Government, Piracy, Terrorism, Mercenarism, Corruption, Money Laundering, Trafficking in Persons, Trafficking in Drugs, Trafficking in Hazardous Wastes, Illicit Exploitation of Natural Resources and the Crime of Aggression.[25] These crimes are further elucidated under the draft protocol.[26]

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[20] Ademola Abass (n 4), 32.
[21] Ibid.
[22] Bryn A. Garner (ed), *The Black's Law Dictionary* (9th ed, West Publishing Co, 2009), 929.
[23] The Rome Statute of the International Criminal Court, 1 July 2002, A/CONF.183/9 (1998). Art 13 (b), art 5.
[24] ibid.
[25] Draft Protocol on the African Court of Justice and Human and Peoples' Rights, (n 14), art 28A.
[26] Draft Protocol on the African Court of Justice and Human and Peoples' Rights, (n 14), art 28B, 28C ,28D, 28F, 28G, 28H, 28I, 28I *Bis*, 28K, 28L, 28L *Bis*, 28M and 28N.

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The ICC has jurisdiction over individual natural persons. These individuals are individually responsible and liable for punishment under the statute. These includes those directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime so long as they bear the highest responsibility in the commission of the said crimes. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute.[27] The Draft African Court Protocol in art 28N also provides that offences are committed by any person who in relation to any of the crimes or offences provided incites, instigates, organizes, directs, facilitates, finances, counsels or participates as a principal, co-principal, agent or accomplice in any of the offences set forth in the statute. Paragraph II and III of article 28N provides aiders, abetters and accessors are to be held culpable under the protocol.

Article 46B of the Draft Protocol provides for individual criminal responsibility. Interestingly paragraph 2 of this article provides that the official position of any accused person, whether as Head of State or Government, Minister or as a responsible government official shall not relieve them of criminal responsibility nor mitigate punishment. The move by President Uhuru Kenyatta and his deputy William Samoei Ruto to petition for immunity as sitting heads of state and government official throws cold water on this provision.

The ICC was created with the consent of the states who themselves will be subject to its jurisdiction. The African Court of Justice and Human Rights is also being created by willing African states with a strong leaning towards ensuring African solutions to African problems. The states will have agreed that it is crimes committed on their territory, or by their nationals, that may be prosecuted.[28]

The ICC just like other international tribunals has power to determine its own jurisdiction (its *compétence de la compétence*).[29] Art 19 (1) of the statute provides that "the court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with art 17." It is a well-established principle that the International Court of Justice (ICJ) for instance has the right to determine its own jurisdiction. The ICC has in principle applied this principle on satisfying or justifying? its jurisdiction in the Decision on the Prosecutor's application for summones to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussiein Ali[30] and in the Decision

[27] The Rome Statute, art 25, 26, 27 & 28.

[28] Williams A Schabas, *An Introduction to the International Criminal Court* (2nd ed, Cambridge: Cambridge University Press, 2004), 67; Draft Protocol on the African Court of Justice and Human and Peoples' Rights, (n 14), art 46E.

[29] Mohamed Sameh, *The Role of the International Court of Justice as the Principle Judicial Organ of the United Nations* (The Hague: Kluwer Law International, 2003), 103.

[30] Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis KirimiMuthaura, UhuruMuigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-1, para. 9.

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pursuant to article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo.[31]

1.3.3 Admissibility: A court of "last resort" or a "court of first recourse?"

The Rome statute distinguishes matters of jurisdiction and admissibility. Jurisdiction as per the Rome statute refers to the legal parameters of the court's operation in terms of subject matter (jurisdiction *ratione materiae*), time (jurisdiction *ratione temporis*) and space (jurisdiction *ratione loci*) as well as over individuals (jurisdiction *ratione personae*).[32] The question of admissibility on the other hand arises on a later stage, and seeks to establish whether matters over which the court properly has jurisdiction should be litigated before it.[33] To a large extent matters of jurisdiction are questions of whether the court should consider a situation in which a crime has been committed, whereas admissibility is concerned with the process of identification of "case".[34] The Draft Protocol of African Court also captures issues of admissibility in art 46H. The jurisdiction of the court is stated to be complimentary to that of the National Courts and courts of the Regional Economic Communities (RECs) where specifically provided by the communities. The court adheres to the principle of inability and unwillingness at national level.

International criminal tribunal statutes usually perform a balancing act between such courts and national courts of State parties. The principle of complementarity, which usually embodies this relationship, is recognised in art 17 of the Rome Statute. The underlying policy reason is to ensure that international tribunals remain essentially courts of "last resort." Article 17 of the Rome Statute states that a case shall be inadmissible by the ICC except where, *inter alia* the decision of a state that has jurisdiction is based on a "unwillingness or inability… to genuinely prosecute." Article 46(2)(b) of the Draft Protocol reflects this sentiment by providing for inadmissibility except where "the decision resulted from the unwillingness or inability of the state to prosecute." The Draft protocol omits the word *genuinely*. This will have the effect of lowering the evidentiary standard of "inability to prosecute." This has the potential of opening floodgates for opportunistic states which will effectively turn the court to a court of "first recourse."[35]

1.3.4 Structure and Administration of the Court

The Draft Protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereinafter Draft Protocol) amends art 2 of the Protocol on the Statute of the

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[31] Pre-Trial Chamber II, "Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo", ICC-01/05-01/08-424, para. 24.

[32] *Prosecutor* v. *Thomas LubangaDyilo*, "Judgment on the Appeal of Mr. Thomas LubangaDyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006", 14 December 2006, ICC-01/04-01/06-772.

[33] Williams A Schabas (n 23), 68.

[34] Ruth B. Phillips. 'The International Criminal Court Statute: Jurisdiction and Admissibility', (1999) 10 Criminal Law Forum 61 at 71.

[35] Ademola Abass (n 4), 44.

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African Court of Justice and Human Rights (hereinafter African Court protocol) to include the following as the organs of the court:

(a). The Presidency
(b). The Office of the Prosecutor;
(c). The Registry

Article 16 of the Statute of the court, which previously referred to the 'Structure of the Court', has now been amended to read 'Section of the court', and provides that;

(1) The Court shall have three (3) Sections: A General Affairs Section. A Human and Peoples' Rights Section and an International Criminal Law Section;
(2) The International Criminal Law Section of the Court shall have three (3) Chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber.
(3) The allocation of judges to the respective Sections and Chambers shall be determined by the Court in its Rules.'

This inclusion is in tandem with the extension of the mandate of the court to include international criminal justice. The International Criminal Court (ICC) is composed of the following organs:

(a). The Presidency
(b). The Appeals Division, a Trial Division and a Pre-Trial Division
(c). The Office of the Prosecutor
(d). The registry[36]

There are striking similarities between the two entities. While the ICC has more organs than the African Court of Justice and Human Rights, this deficiency is covered in article 16 of the statute by the International Criminal Law section of the court having three (3) chambers: a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber. It almost feels as the drafters of the Draft Protocol were using the Rome Statute as a reference script.

1.3.5 The Composition of the Court

The Court will consist of sixteen (16) judges who are nationals of state parties.[37] The judges are appointed upon recommendation of the court and the Assembly may, review the number of judges.[38] The court shall not, at any one time, have more than one judge from a single member state. Just like in the former African Court of Justice, the court does not adhere to the principle of one member state, one judge. The International Criminal Court (ICC) applies the same principle by providing for eighteen (18) judges.[39] The eighteen judges of the court are elected by the

[36] The Rome Statute (n18), art 34.
[37] *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008, at: <http://www.refworld.org/docid/4937f0ac2.html> (accessed 14 April 2014), chapter II, article 3.
[38] Ibid.
[39] The Rome Statute (n18), art 34.

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Assembly of state Parties, whom three make up the Presidency.[40] The ICC Statute just like the African Court of Justice and Human Rights stipulates that there be only one judge of with one nationality at any given time. Art 34 (5) of the Rome Statute requires that the judges be of "high moral character, impartiality and integrity' a phraseology that is rather typical of international instruments.[41] Surprisingly the Protocol to the statute of the African Court of Justice and Human Rights does not have such phraseology. This anomaly is corrected by the Draft Protocol in article 3 on amendments requiring that the court be composed of impartial and independent judges elected from persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are juris-consults or recognized competence and experience in international law, international human rights law, international humanitarian law or international criminal law.

The ICC judges have to be qualified for appointment to the highest judicial offices in their respective states.[42] The judges are to have excellent knowledge of and be fluent in at last one of the working languages of the court, namely, English or French. Article 32 of the African Court protocol requires that the official languages of the court be the official languages of the African Union (AU). The official languages of the African Union and all its institutions shall be Arabic, English, French, Portuguese, Spanish, Kiswahili and any other African language.[43] The sheer number of the languages that can be used in the court is worrying. The issue of whether all these languages have to be represented is also not settled in the African Court statute. The Rome also stipulates the degree of expertise in the subject matter of the court. It creates two categories of candidates, those with criminal law experience and those with international law experience. Specific reference is made to international humanitarian law and the law of human rights.[44] This is similar to the provisions on the Draft Protocol of the African court that introduces amendments. The Protocol on the statute of the African Court of Justice just like the Rome statute require that state parties take into account the need to ensure representation of the principal legal systems of the world or in case of Africa equitable geographic representation.[45]

1.3.6 Procedure for election of Judges

Article 6 of the African Court Protocol provides that for the purpose of election, the chairperson of the African Commission shall establish two alphabetical lists of candidates. List A contains the names of candidates having recognized competence and experience in international law and List B contains the names of candidates possessing recognized competence and experience in Human Rights Law. At the first election eight (8) Judges shall be elected from amongst the

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[40] Williams A Schabas, *An Introduction to the International Criminal Court* (2nd ed, Cambridge: Cambridge University Press, 2004), 177.
[41] Statute of the International Court of Justice, art 2.
[42] Rome Statute, art 36 (3).
[43] African Union, *Protocol on Amendment to the Constitutive Act of the African Union*, 11 July 2003, at:<http://www.refworld.org/docid/493fe67d2.html> (accessed 14 April 2014), art 11.
[44] Ibid, art 35 (3) (b) (ii).
[45] Rome Statute, art 8 (a), (i), (ii) and (ii), Protocol on the Statute of the African Court of Justice and Human Rights, chapter II, art 4.

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candidates of list A and eight (8) from among the candidates of list B. The election shall be organized in a way as to maintain the same proportion of judges elected on the two lists. The Chairperson of the African Commission is charged with the mandate of communicating the two lists to member states, at least thirty (30) days before the ordinary Session of the Assembly or of the Council, during which elections shall take place. The ICC follows somewhat similar procedure in art 36 (5).

Article 7 of the Protocol provides that the judges shall be elected by the Executive Council, and appointed by the Assembly. The election is through secret ballot by two-thirds majority of the member state with voting rights, from among the candidate provided for in article 6. Candidates who obtain the two-thirds majority and the highest number of votes shall be elected. However, if several rounds of election are required, the candidates with the least number of votes shall withdraw. The Rome Statute requires that individual candidates gunner a two-thirds majority of States Parties present votes. In order to obtain an equitable geographic representation, it was agreed that each state would be required to vote for at least three candidates from five UN regions, namely Africa, Asia, Eastern Europe, Latin America and Caribbean and the 'Western Europe and other'. In the election of judges the Assembly is required to ensure equitable gender representation.

1.3.7 Eligibility to Submit cases to the AU Court-Competencies

Article 29 of the African Court Protocol provides for the entities that are entitled to submit case before the court. They include:

(a). State parties to the protocol
(b). The Assembly, the parliament and other organs of the Union authorized by the assembly
(c). A staff member of the African Union on appeal, in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and Regulations of the Union.

Article 30 provides for other entities may be able to submit cases before the court. These include entities whose rights have been guaranteed by the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relevant to human rights ratified by the state parties concerned. They include:

(a). State parties to the present Protocol;
(b). the African Commission on Human and Peoples; Rights;
(c). the African Committee of Experts on the Rights and welfare of the Child;
(d). African intergovernmental Organizations accredited to the Union or its organs;
(e). African National Human Rights Institutions;
(f). Individuals or relevant Non-Governmental Organizations accredited to the African Union or t pots organs, subject to the provisions of article 8 of the Protocol.

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The Draft Protocol amends article 29 by including "the Peace and Security Council" and includes paragraph (d) as the office of the Prosecutor. The Draft protocol replaces paragraph (f) of the African court statute with African individuals or African Non- Governmental Organizations with observer status with the African union or its organs or institutions, but only with regard to a state that has made a Declaration accepting the competence of the Court to receive cases or applications submitted to it directly. The Court shall not receive any case or application involving a State Party which has not made Declaration in accordance with article 8(3) of the Protocol. Article 8(3) requires that any member states that would allow NGOs and individuals should make a declaration and the said article.

1.3.8 Applicable Law

Article 31 of the African Court Protocol states that the applicable law before the court shall be:

(a). The Constitutive Act;
(b). International treaties, whether general or particular, ratified by the contesting States
(c). International custom, as evidence of general practice accepted as law
(d). The general principles of law recognized universally or by African States
(e). Subject to the provisions of paragraph 1, of Article 46 of the present Statute, judicial decisions and writings of the most highly qualified publicists of various nations well as the regulations, directives and decisions of the Union, as subsidiary means for the determination of the rules of law;
(f). Any other law relevant to the determination of the case.

Paragraph 2 of the same article provides that the article shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

The Draft Protocol does not introduce any changes to this article. The article has great similarities to article 38 of the ICJ Statute on sources of law.

4.1 Will the Draft Protocol be adopted and ratified?

African states are notoriously quick to adopt treaties, but excruciatingly slow to ratify them.[46] Two factors have influenced this situation. First the subject-matter of the treaty, second the, the perception that certain treaties threaten sovereignty. These factors will be considered in turn. The African Union Convention on Preventing and Combating Corruption (AUCPCC) was adopted in 2003 and entered into force on 5 August 2006.[47]

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[46] The AU has acknowledged this problem, see the Report of Meeting of Experts on the Review of the Organisation of African Unity/African Union (OAU/AU) Treaties held from 18 to 20 May 2004, in Addis Ababa, Ethiopia, OAU/AU Treaties/Exp-PRC/Rpt(I) Rev. 1.

[47] African Union, *African Union Convention on Preventing and Combating Corruption*, 11 July 2003, at: <http://www.refworld.org/docid/493fe36a2.html> (accessed 15 April 2014).

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2.1 Source of a treaty

Practice of African states over the past three decades reveals that treaties that emanate from the UN stand a better chance of ratification than those from Africa. This is so even when both treaties address the same issue and the African one is adopted first. African Union Convention on Preventing and Combating Corruption (AUCPCC) was adopted in 2003 and entered into force on 5 August 2006.[48] By 2013, the total number of ratifications stands at 33 or roughly 60% of the total AU membership, nine years after adoption of the Convention. In comparison, the United Nations Convention against Corruption (UNAC) was adopted on 31 October 2003, only three months after the adoption of the AUCPCC, and entered into force on 14 December 2005, eight months before the AU Convention entered into force. By 2013, 48 AU member states had ratified the UNCAC as opposed to 33 that have ratified the AUCPCC.[49] Even for countries that have ratified both conventions, the time lapse between the ratifications show that the UNAC was ratified more rapidly.

Another classic example is the United Nations Convention on the Rights of the Child, adopted on 20 November 1989 and entered into force on 2 September 1990. This was after ten (10) months of its adoption. It is regarded as one of the most successful treaties of all time.[50] All Africa states except Somalia and the Sahrawi Arab Republic are parties to the Convention. The African Charter on the Rights and Welfare of the Child was adopted on 11 July 1990.[51] It entered into force on 29 November 1999, more than nine years after its adoption.

Based on the above stated examples, the adoption ad ratification of the draft protocol will have some time lapse before adoption as it emanates for the AU. Subject-matter of a treaty

As a general rule, a state is more likely to ratify a treaty if the treaty embodies a positive norm or represents a value subscribed to by many states.[52] The near universal ratification of the UN Convention on the Rights of the Child show that issues concerning children resonate with a vast majority of states.[53] Prosecution of international crimes encapsulates the aspiration of many African states and should, as a matter of fact inspire quick and wide ratification. The Protocol however suffers the deficiency of criminalizing corruption and unconstitutional changes of government, offences whose prosecution African leaders are unlikely to enthusiastically embrace.[54]

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[48] Ademola Abass (n 4), 38.

[49] See List of Countries, which have signed, ratified/acceded to the AUCPCC, available at <www.au.int/en/sites/default/files/corruption.pdf> (accessed 15 April 2014.

[50] UN, *Convention on the Rights of the Child*, New York, 20 November 1989, 1577 UNTS, 3; (1989) 28 International Legal Materials, 1448, entered into force 2 September 1990

[51] *African Charter on the Rights and Welfare of the Child*, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999.

[52] Harold H. Koh, 'Internalization through Socialization', (2005) 54 Duke Law Journal, 975.

[53] Oona A. Hathaway, 'Between Power and Principles: An Integrated Theory of International Law', (2005) 72 University of Chicago Law Review, 469.

[54] Ademola Abass (n 4), 39.

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2.2 Treaties that 'threaten' the sovereignty of African states

Every treaty inevitably relinquishes a states' sovereignty for the collective good of the treaty. African states have claimed that the Rome Statute violates their sovereignty because it authorizes the prosecution of African leaders in The Hague. This claim flies on the face of voluntary signing and ratification of the treaty. The question that the UA??? has failed to consider is why African states will sign such a treaty only to have their leaders facing similar accusation at the regional court.

Ademola however argues that the Draft Protocol has a very low probability of ratification and if ratified, the court'' international criminal jurisdiction will be dead on arrival.[55] Despite African states' willingness to have the perpetrators of human rights violations held accountable, most heads of state are still not ready to be subjected to the same courts whose judges are appointed by those heads of state and who, in most cases are beneficiaries of the state.

4.2 Can an Unratified treaty be amended?

The Draft protocol which forms the bulk of this part, purports to amend the Protocol on the Statute of the African Court of Justice, Human and Peoples' Rights, that is the 2008 Protocol that merged the African Court of Human and Peoples' Rights (1998) and the African Court of Justice. The protocol had not yet entered into force at the time the Draft amendments were proposed. As of 31 January 2014, only five AU states had ratified the protocol.[56] The question then arises, 'Can a protocol which has not been ratified be amended?'

Amendments are permissible only to international legal instruments that have already entered into force.[57] The Vienna Convention on the law of treaties contemplates amendments for treaties that have already entered into force.[58] The rationale is that amendments are warranted by the operationalization of a treaty. Amendments serve to reduce, increase, expedite or slow down the obligations of its state parties. It is necessary that amendments to already ratified treaties be accepted or ratified by all State parties to a treaty.[59] There are many instances where states accept unratified amendments. These are referred to as "tacit amendments." These are however different from "amending unratified treaties."[60] Amending unratified treaties denotes the attempt to amend a treaty which in itself, has not entered into force.

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[55] Ibid, 42.

[56] List of Countries which have signed, Ratified/Acceded to the protocol on the Statute of the African Court of Justice and Human Rights <http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR_0.pdf> accessed on 17 February 2013).

[57] [57] Ademola Abass (n 4), 45.

[58] *Vienna Convention on the Law of Treaties*, adopted 23 May 1969, UNTS, vol. 1155, 331 (entry into force 27 January 1980), art 39, 40 & 41.

[59] Ibid, art 39.

[60] Oona A. Hathaway, *et al*., 'Tacit Amendments', 15 November 2011, at <www.law.yale.edu/documents/pdf/cglc/TacitAmendments.pdf> (accessed 12 February 2014).

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The danger of the AU undertaking such an endevour is that states that have already ratified that treaty may renege. In context the three states that had already the ratified the Merged Court Protocol before the amendments may withdraw from the treaty. This is more so since the AU did not consult its member states before proposing the amendments.

4.3 Recommendations on the formation of the Merged Court

There have been all kinds of suspicions on the motives behind the merger and extension of the jurisdiction of the African Court of Justice and Human Rights to cover international crimes. Proposals for the restructuring of the African disputes and human rights institution begun with proposals by former Nigerian president and chairperson of the Assembly of the AU Olusegun Obassanjo.[61] In 2004 Obasanjo urged the AU to guard against the "danger of proliferation of organs of the organization."[62]

The extension of the merged courts' jurisdiction has faced numerous obstacles, both legal and practical. The Coalition for the Effective African Court on Human and Peoples' Rights (CEAC) focuses on the obstacles the court will face.[63] The obstacles identified include the absence of:

(a). an instrument creating crimes within the jurisdiction of such a court, enumerating the elements of crimes within the scope of the court and punishment for them and establishing the procedure for proceedings with respect to such crimes. This however has been partly handled by the Draft Protocol;

(b). a regional system of enforcement and co-operation in criminal matters;

(c). a permanent continental court or tribunal;

(d). a clear regional norm of compliance with judicial decisions; and

(e). any assurance that there can be agreement on any or all of the issues above.

This part will offer recommendations on the Merged African Court of Justice and Human Rights and its extension of its jurisdiction to international crimes. The recommendation will be two pronged; firstly the establishment of two separate courts is suggested and secondly in case the AU has already kissed the horse and it cannot move back, recommendation will be made on how to improve the current system. Lastly the chapter will make a conclusion to the study.

[61] Coalition for and Effective African Court on Human and Peoples; Rights at http://www.africancourtcoalition.org/index.php?option=com_content&view=category&layout=blog&id=7&Itemid=26&limitstart=8 (accessed on 9 May 2014).

[62] Chidi Anselm Odinkalu, 'Concerning the Criminal Jurisdiction of the African Court: A response to Stephen Lamony' (2012) African Arguments at http://africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-%E2%80%93-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/ (accessed 9 May 2014).

[63] Coalition for the Effective African Court on Human and Peoples' Rights (CEAC), 'Implications of the African Court of Human and Peoples' Rights being empowered to try international crimes such as genocide, crimes against humanity, and war crimes-an opinion' (2009) CEAC, Darfur Consortium; EALS,ICLC, OSJI, PALU,SALC WABA

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4.1 A way out: A separate court for international criminal justice[64]

This article supports Prof Viljoen's suggestion that whatever the arguments for or against an African court with jurisdiction over international crimes, such jurisdiction should vest in a separate judicial entity, distinct from the two sections that are foreseen under the Merged Court Protocol. This suggests having two separate courts. The Draft Protocol with amendments has not yet entered into force and African states still have a chance to retrace their steps.

The establishment of an African Court with international crimes jurisdiction has the potential of being a setback to existing human rights protection.[65] The problems discussed in chapter four (4) can be avoided only if the African Human Rights Court, or the future African Court of Justice and Human Rights, is allowed to exist or be established independently from any judicial institution dedicated to criminal justice.

Such an approach would also avoid the legal hiccups on which the Amended Merged Court Protocol seems to be built.[66] The question may be posed how a Protocol that is not yet in force can be amended.[67] This technical complexity can be dodged if the merged Court (consisting of two sections) and the African Criminal Court are treated as separate structures, each with its own distinct legal basis. One of the main reasons why the Amending Merged Protocol is such a maze of complexity is the fact that it amends a treaty that is yet to come into legal being.[68]

4.1.1 African states should take lead in prosecuting international crimes rather than diluting the mandate of an over-stretched regional court[69]

Lamony argues that the problem of the AU when it comes to international criminal justice is its conflicting view on the interactions between peace and security.[70] While the AU sees international criminal justice as impediment to peace, and the two mutually exclusive, the ICC meanwhile stands for justice for victims irrespective of the situation.

The Rome Statute of the International Criminal Court was adopted at a diplomatic Conference in Rome on 17 July 1998 and came into 1 July 2002. On 14 January 1999 Senegal was the fisrst

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[64] FransViljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (2012) AfricLaw at <http://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/#more-213> (accessed 10 April 2014).

[65] Ibid.

[66] Amending Merged Court Protocol, Exp/Min/IV/Rev. 7, 15 May 2012.

[67] Ademola Abass, 'The Proposed International Criminal Jurisdiction for the African Court: Some Problematic Aspects' (2013) Netherlands International Law Review, 35.

[68] FransViljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (n 64).

[69] Stephen Lamony, 'African Court not ready for International Crimes' (2012) African Arguments at http://africanarguments.org/2012/12/19/concerning-the-criminal-jurisdiction-of-the-african-court-%E2%80%93-a-response-to-stephen-lamony-by-chidi-anselm-odinkalu/ (accessed 9 May 2014).

[70] Ibid.

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African state to ratify the Rome Statute.[71] As of 9 May 2014 122 countries were state parties to the Rome Statute of the International Criminal Court. Out of this thirty four (34) are African states.[72] Africa has the largest number of state parties to the Rome Statute. This number does not however reflect when it comes to support to the court.[73]

The turbulent relationship between the AU and the ICC started in July 2008 when prosecutor Luis Moreno Ocampo applied for a warrant of arrest for Omar Al-Bashir, the sitting president of the Republic of Sudan. Al-Bashir was charged with committing war crimes, crimes against humanity and the crime of genocide in the Darfur region of South Sudan. The ICC Pre-Trial Chamber I issued the arrest warrant against Al Bashir.[74] Meeting shortly after the decision, the AU Peace and Security Council (PSC) issued a communiqué which lamented against the implication of the decision for the peace process in Sudan.[75] In the same communiqué, the PSC requested the UN Security Council to exercise its powers under art 16 of the Rome Statute to defer the indictment and arrest of Al-Bashir. Consequently on 3 July 2009 at its 13th Annual Summit the Assembly of Heads of State and Government held in Sirte, Libya, the AU decided not to cooperate with the ICC in facilitating the arrest of Al-Bashir. This signified the first clash of wills between the AU and the ICC. The ICC is currently implicated in impacting upon the dynamics of peace–building in the countries in which prosecutions are pending or ongoing.[76] The argument has been that ICC would have the potential to disrupt in-country peace-building initiatives are not appropriately sequenced.

The AU maintained its position on non-cooperation on its 18th Ordinary Session of the Assembly of the Assembly of AU heads of State and Government held in Addis Ababa, Ethiopia on Kenya and Sudan.[77] Some African governments have raised the contention that the ICC does not apply the law universally yet it is a universal court.[78] This would be true particularly in situations where jurisdiction of the court does not apply to some countries that are actively engaged and

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[71] International Commission of Jurists, ‘Senegal: Senegal is the First State to Ratify the International Criminal Court´s Statute’ at <“http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=21822> (accessed 9 May 2014).

[72] The states parties to the Rome Statute (2014) at www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx (accessed 9 May 2014).

[73] Avocats Sans Frontières (ASF), ‘Africa and the International Criminal Court: Mending fences’ (2012), at <http://www.asf.be/wp-content/uploads/2012/08/ASF_UG_Africa-and-the-ICC.pdf> (accessed 9 May 2014).

[74] *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir* (Situation in Darfur, Sudan, 4 March 2009), No. ICC-02/05-01/09.

[75] African Union Peace and Security Council, *Statement on the ICC arrest warrant against the President of the Republic of Sudan, Omar Al Bashir*, (2009) PSC/PR/Comm.(CLXXV), Addis Ababa, Ethiopia

[76] Tim Murithi, ‘The African Union and the International criminal court: An embattled Relationship?’ Institute for Justice and Reconciliation (IRC) (2013) 8 Policy Brief, 4.

[77] AU. Decisions, resolutions and declarations of the Assembly of the Union. Eighteenth Ordinary Session of the Assembly of Heads of State and Government, Assembly/Au/Dec.397(XVIII), 29 to 30 January 2012, Addis Ababa, Ethiopia, para. 8.

[78] Adam Branch, *Displacing human rights: War and intervention in Northern Uganda*.(Oxford: Oxford University Press, 2011), 213.

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operating in African Conflict zones. What would be the recourse for such non-signatory states if individuals from the states were to commit war crimes in Africa? Who would administer justice in such cases? Certainly not the ICC or the UN. This discrepancy underlies the international justice regime and the power politics between Western powers like the USA and Africa.

The question in Africa has been why not Western states, Russia and Chinese leaders? This would essentially in instances where it is thought that such leaders have committed the most serious crimes of international concern.[79] The AU has relied on the immunity of state officials arguments in the Kenya, Libya and Sudan cases and there has been a strong perception among African leaders of being targeted.

All this arguments notwithstanding, African has been the leading front for most armed conflicts in the past decade. It would seem reasonable that most ICC cases would be handling situations in Africa. This argument is bolstered by the fact that Southern Sudan which seceded from Sudan on 9 July 2011 making it the newest state in the community of nations is by the time of writing this thesis sinking into what analysts have called genocide.[80]

It remains to be seen whether the relationship between the AU and ICC can be salvaged especially with Kenya taking a leading role in the anti-ICC anthem. Lamony's position that the African Court of Justice and Human rights even with an international crimes mandate "cannot, and will not offer relief to any of the people currently indicted or under investigation by the ICC" rings true.

4.2 Alternative: Human rights-enhancing changes to the Amending Merged Court Protocol

If it is so that the train has already left the station, in the sense that there is little political appetite and no space to engage critically with the notion of a tripartite court, a number of concrete suggestions are made as to the improvement, from a human rights point of view, of the Amending Merged Court Protocol.[81]

4.2.1 The composition of the Appellate chamber

The composition and role of the Appellate Chamber should be clarified.[82] Article 10 of the Amending Protocol states the General Affairs Section of the court shall be duly constituted by three (3) judges, the Human and Peoples Rights Section three (3) judges, the Pre-Trial Chamber of the International Criminal Law Section one (1), The Trial Chamber of the International Criminal Law Section one (1) judge and the Appellate Chamber five (5) judges. In providing this clarification, regard must be had to the fact that the human rights section alone should be

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[79] William Schabas, 'The International Criminal Court' in D. Black & P. Williams (eds) *The international politics of mass atrocities: The case of Darfur* (London: Routledge, 2010), 147.

[80] BBC News Africa, 'John Kerry visits South Sudan amid genocide fears' (2014) at <http://www.bbc.com/news/world-africa-27250056> (accessed 9 May 2014).

[81] FransViljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (n 64).

[82] Amending Merged Court Protocol (n 66), art 16.

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competent to hear cases related to human and peoples' rights as set out in article 7 in the current version of the Statute.[83] The appellate chamber, consisting of judges without competence in human rights matters specifically, should not be placed in a position in which they may affirm, reverse or revise the decision of the findings of the Human Rights Section of the Court.[84] As the Protocol stands, the decisions of the Human Rights Section may be overturned by the Appellate Chamber of the International Criminal Section. Such a state of affairs would seriously undermine the autonomy of both the human rights section and the General affairs section.

4.2.2 The Title to the Protocol[85]

The title of the Protocol should at the very least identify the exact, tri-functional nature of the court, and should not merely and deceptively be called 'African Court of Justice and Human and Peoples' Rights'.[86] This amendment to the title may be an appropriate to better represent the nature of the two-section Court (by adding 'and Peoples'' in line with the African Charter on Human and Peoples' Rights and the naming of the current Court, the African Court of Human and Peoples' Rights). However, the addition of a third section makes this name inappropriate, as it does not reflect the essence of the Amended Merged Court: The title should be 'African Court of Justice, Human and Peoples' Rights and International Criminal Justice/International Crimes'. An objection that this title is overly long or complicated merely underlines the true nature of the proposed court. A shorter version would be the African Criminal, Justice, Human and Peoples' Rights Court.

5. Conclusion

This article contends that the merger of the court and extension of the jurisdiction to cover international crimes is not an entire lose for Africa. It is suggested that the implications for this merger and extension have to be streamlined in order to serve the aspirations and needs of the African people not only its leaders. An Africa with African solutions is desirable rather than detestable. Africans have had this twisted mentality that everything western is civilized and everything African is crude and uncivilized. This mentality should be removed by Africans understanding that it is possible to foster an Africa which uphold and respects human rights

[83] Ibid.
[84] Amending Merged Court Protocol (n 66), art 17.
[85] cf chapter 3.
[86] Ademola Abass, (n 4), 32; FransViljoen, 'AU Assembly should consider human rights implications before adopting the Amended Merged African Court Protocol' (n 64).

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