THE ROLE OF INTERNATIONAL LAW AND THE AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS IN THE DELEGITIMIZATION OF NUCLEAR WEAPONS IN AFRICA: A FEASIBILITY STUDY

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ABSTRACT

International law and African Court on Human and people's Rights are useful instruments in the delegitimisation of nuclear weapons in Africa. While the former lays down guidelines on the prevention and prohibition of nuclear weapons in the world in general and the continent of Africa in particular, the latter ensures the application of the law to the use of nuclear weapons on Africa continent. Though as the name stands is a human right court, its jurisdiction expressly or impliedly covers nuclear weapons use because the use of nuclear weapons grossly violates international human rights and international humanitarian law in all their interpretations. Also, the African Court on Human and People's Rights is the highest legal body on the continent and an arm of the African Union with an objective of maintaining peace and security through the court. Having seen the pronouncement of the court in diverse issues of the use of arms, for instance the provision of provisional measures in the case of Libya, in March 2011, it was an indication that the African court is not limited in legal matters that affect general interest which use nuclear weapons. This project seeks to unveil the role international law and African court will play when nuclear weapons are used in Africa.

CHAPTER 1 INTRODUCTION

1.1 Background to the study

The first detonation of the atomic bomb was on Hiroshima and Nagasaki in 1945 by the United States of America. It marked the end of the Second World War and the beginning of the Cold War between the United States of America and the former Union of Soviet Socialist Republics (USSR). Since then, the possession of nuclear weapons has been looked at as a source of power and prestige in international relations (IR) (O'Neill, 2002, p. 1; Bautista, 2010, p.108; Hafiz, June 11, 2013), though many nuclear weapons states (NWSs) continuously rely on the illusion-deterrence as a factor for nuclear arsenal (Berry, *et al*, 2010, p. 19; Harris, Hatang and Lieberman P., 2004, p. 459-450; Laursen, 2012, p., 14) As such, nuclear weapons States have become resistant to giving up their nuclear weapons, despite the danger or risk the use of nuclear weapons has to ecosystem such as land, terrestrial waters and aerospace, and all other creatures living in them. Notwithstanding, the prestige enjoyed by nuclear weapons states in international relations (IR) continues to attract new aspirant states who consider possessing nuclear weapons as a means to attaining international political status.

Whatever reason advanced by NWSs, the world is more vulnerable with nuclear weapons than without them. Worse still, nuclear weapons are highly controversial and remain the most destructive weapons whose repercussions mankind would not be able to measure (ICRC statement to the UN 2010). Not every state owns nuclear weapons. Such imbalance in ownership coupled with the harm nuclear weapons can cause let to the creation of the Nuclear Non-proliferation Treaty (NPT) in 1968 which entered into force in 1970. Nevertheless, such an umbrella law is highly controversial and ambiguous. It neither clearly prohibits nuclear weapons nor legalizes them. Anderson, 2011, p. 288). These laws are by way of international treaties entered by some states to prohibit the proliferation of nuclear weapons or as members of a particular region, declaring consensually the illegality of nuclear weapons in some areas, referred to as nuclear weapons free zones (NWFZ). For example, the Nuclear Non Proliferation Treaty (NPT), the Comprehensive Test Ban Treaty (CTBT) and the Treaty of Tlatelolco which covers Latin America and the Caribbean, Treaty of Rarotonga whose sphere of influence is South Pacific zone, Treaty of Bangkok which is responsible for Southeast Asian zone**,** Treaty of Pelindaba that takes care of the African continent and Treaty on a NWFZ in Central Asia (Paul J. Magnarella, 2008, p. 512).

There is a global debate on the delegitimisation of nuclear weapons with Africa actively involved. While the continent of Africa since the destruction of the South African nuclear weapons plant until now remains without nuclear weapons, nuclear weapons have been tested earlier on the African soil by foreign NWSs (Laursen, 2012, p. 2). However, there has been rarely a judgment by the African Court on Human and People's Rights (ACHPRs) on matters relating to nuclear weapons on the continent. Africa's role in the fight against nuclear weapons remains cardinal. Also known as resource cursed continent, the abundance of natural resources on the African continent and the increase in economic growth rate of late is incredibly encouraging to agencies, corporation, states who either come to extract the resources or invest their businesses. Amongst the resources are great quantities uranium in Democratic Republic of Congo and Namibia, Niger and South Africa. In addition, South Africa remains a civilian nuclear power with the presence of the Koeberg-Cape Town nuclear plant for peaceful use. With all these, logically, there is a need for Africa's involvement in the fight against nuclear weapons through the African Court because the court remains the highest judicial authority to handle cases of such a nature.

1.2 Problem statement

Power remains the central concern for states in international relations. It might be economic as well as military power. A state gets militarily power when it possesses nuclear weapons and can therefore be able to have a say in matters of international security. So therefore, acquiring nuclear weapons gives a state the political position that remains attractive to states. Although the NPT and Pelindaba Treaty abolish nuclear weapons, the future is not certain as to whether states will adhere to it or not. Therefore, it is necessary for the opinion of the ACHPRs to be established so as to encompass future conflicts of that magnitude. To achieve this, the research question asked is how does international law and African law influence the opinion of the African Court on Human and People's Right on the use of nuclear weapons? To answer the question, the following research questions need to be answered in the course of the dissertation:

-Who is qualified to bring a case on nuclear weapons before the ACHPRs?
-Has the ACHPRs jurisdiction to entertain matters of nuclear weapon use?

-Which law is applicable to the case of the use of nuclear weapons-international humanitarian law or international human rights law?

These questions will be explored on two levels. On the one hand will be the international level, where international treaty law was applied by the International Criminal Court (ICJ) when it judged on the legality of nuclear weapons. On the other hand, African law, especially the Pelindaba Treaty and its application, will be examined.

1.3 The Purpose

The dimension from which nuclear weapons will be tackled in Africa will be different from the way developed continents like Europe and North America would. Africa on this issue is built categorically on a general consensus of African states to oust such weapons. The urge and determination is a reflection of the African Union's (AU) direction against wars, economic and political underdevelopment plaguing the continent for centuries. That is why the ACHPRs was adopted in June 1998 but came into force on 25 January 2004 by the AU Constitutive Act (CA) to deal with cases of relevance. The court remains the highest adjudication institution on the continent. This project is out to give an African opinion through the African Court on Human and People's Rights (ACHPRS) on the use of nuclear weapons. Campaigns to delegitimize nuclear weapons use international law to pronounce that nuclear weapons use and therefore also their possession is illegal. The organisers of these campaigns thus bring cases to international courts to provide an opinion that can be used in their campaigns to mobilise public opinion and put pressure on governments to give up their nuclear weapons and/or not to acquire or develop nuclear weapons.

This thesis is part of a broader study that investigates whether bringing a case against nuclear weapons use to the ACHPRs for an advisory opinion is possible. As such it asks two research questions: 1. Does the Court have jurisdiction over the matter, i.e. will it hear a case on nuclear weapons. Given the fact that it is Court on human and people's rights and not international humanitarian law (law of armed conflict) the study thus has to examine the link between these bodies of law, including other African law related to nuclear weapons. 2. What is the procedure to bring a case before the ACHPRs for an advisory opinion? This includes the matter of who

can bring such a case to the court. This thesis contextualizes these two questions in broader international relations theory and then proceeds to answer these specific questions.

1.4 Project design and methodology

The design of this research is primarily qualitative. Qualitative research is defined as "the interpretative study of a special issue or problem in which the researcher is central to the sense that is made" (Parker, I. 1994, p.2; McQueen and Knussen, 2009, p.198). Qualitative approach is more valuable in this research because this topic involves "human actions which cannot be understood unless the meaning that humans assign to them is understood. This is owing to the fact that thoughts, feelings, beliefs, values and assumptive worlds are involved" (Marshall and Rossman, 2006, p. 52). That is to say that the African flavour by way of thinking, feeling, belief, values, attitude, behaviour and the procedure on the use of nuclear weapons will probably not receive the same attention like those of Western nations. Therefore undertaking a qualitative research demands for the mastery of variables and the interpretation of international law in the African context (Maxwell, 1992, p. 281). Such an approach is supported by Denscombe (2010, p. 104) who holds that qualitative research is concerned with obtaining deep meaning through analysing data using the interpretation of words and images. Qualitative research here is more appropriate, especially because it seeks to explore in depth the complexities and process where and why policy and local knowledge and practice need to be fused to give an opinion. (Lincoln and Guba, 1985, p..; Marshall, 1985a,p..,Marshall, 1987, p..; Marshall and Rossman,2006, p. 53) This type of research design is not without limitations. "There is no perfect research design. There are always trade-offs" (Patton, 2002, p.223).

The applicable research technique in this project is applied research in that the study aims to address a real-life problem. The use of nuclear weapons as earlier indicated with the case of Japan is a real life situation. The outcome of this research project intends to be applied to discourage ownership of nuclear weapons.

1.5 Sources of data and analysis

1.5.1 Primary sources

Policy documents represent the primary source of data in this research project. They include all the founding documents both in international law and to the ACHPRs relevant to nuclear weapons in general and specifically to answering the problem statement, research question and the sub questions. These include the NPT treaty which is the very first policy documents that initiated the limitation of nuclear weapons though known for its ambiguity in the abolishment of nuclear weapons; it still remains the main international nuclear weapons policy document. The IAEA on its part is a regulatory document to those who want nuclear plants for peaceful use. UNO Charter is very important in that it gives life to the courts and the establishments of international laws like the IHL, IHR and ICJ directly applicable in this research. The decisions or judgments of the ICJ as well sets precedent for other regional courts like the ACHPRs either to follow directly or to learn from the mistake by ensuring a better judgment. The Pelindaba Treaty, the Charter of the ACHPRs, and its protocols, the AU securitization are all very important documents in deciding the fate of nuclear weapons in Africa. The treaty completely prohibits nuclear weapons in all its forms in the continent, the Charter and the protocols of the ACHPRs give power to the court over cases of nuclear weapons while the AU mission of ensuring safety and peace in Africa are documented in the AU Charter. Speeches of presidents and head of states, policymakers and directors of internationally acclaimed NGO like the IRCS are also very important constituent portion of primary source.

1.5.2 Secondary Sources

This involved books, journal articles, newspaper articles and internet sources. All these sources were valuable to this research project. The understanding of the legal operations and the debates on the topic of delegitimisation of nuclear weapons in other regions of the world as well as the ACHPRs procedure could be found. Also, the literature necessary for the understanding of how IHL and IHR work differently or as team during war or dispute which are all analogous to the time during the use of nuclear could be found in secondary data. The techniques the ACHPRs will employ faced with a case on the use of nuclear weapons in Africa, considering that its jurisdiction does not directly cover crimes was uncovered in this source. The ambiguity posed by NPT toward delegimisation of nuclear weapons and the subsequent creation of the Pelindaba are essential components secondary data provides.

1. 6 General limitations

Even though the research was by and large qualitative, reliant on secondary and desktop methods of data collection, some of the data such as documented speeches, treaty agreements, resolutions of conventions and conferences, policy documents and court cases all constituted primary sources. Such information could only be found under the safe keeping of institutions and organisations obtaining of which needed permission.

Generally, a lot of limitations were encountered during this research project. First, accessing information through 'gate-keepers' was not easy. The researcher had to wait for many weeks trying for acceptance to be granted. In some areas, access was denied and in others the information was biased. Those planned to see or ask for documents could not be met. A lot of scepticism and circumvention of information was experienced. To some areas, many fruitless promises were made. Second is the problem of time. The topic of the research was too demanding, yet for a very short space of time. Such a short time permitted the use of some documents because all could not be possibly got. For example, some documents from the headquarters of the ACHPRs in Banjul have not been received at this time. Third, the required number of words is a tied knot to untie. The data and information was too much so that it was unimaginable to limit to the number of words recommended by the programme. Fourth, the methodology in research was new and quite challenging to me. And Fifth, the lack of enough finance was a serious limitation. The topic deals with international law and international practice. The researcher need to travel to gather data from courts and other institutions, but was limited because of finances.

1.7 Contribution and justification of the study

There are currently nine states that have nuclear weapons (the US, UK, France, China, Russia, India, Pakistan, Israel and North Korea) otherwise known as nuclear weapons states (NWSs). The term nuclear weapons states are problematic. Usually, the NPT threshold definition of Nuclear Weapons State is its first nuclear weapon test. This criterion is dangerously unrealistic. It creates room for unidentified nuclear weapons states whose accumulation of fissile material otherwise known as significant quantity (SQ) enough to manufacture a nuclear bomb. For

example, in principle Japan is known to be a non-nuclear state by virtue of no nuclear bomb test, but in practice is a nuclear power with enormous quantity of plutonium in order to be near the nuclear weapons states (Joseph Cirincione, 2007, 105 and 128; Hymans, 2010, p.162-3).The attitude of states is impeding to the process of delegitimisation of nuclear weapons. The reason for nuclear weapons ownership may not be limited to deterrence, power and prestige. But the availability of nuclear weapons may lead to actual use of nuclear weapons consciously or unconsciously. For the experience of the atomic bomb on Japan's Hiroshima and Nagasaki brought about environmental effects, massive loss of human lives, pain, generational and genetic effects to survivors. The technology of nuclear weapons today is more advance making nuclear weapons more destructive than those of Hiroshima and Nagasaki. More dangerous and heart breaking is the fact that nuclear weapons are not meant to target only the military, their effect is widespread and indiscriminate. Nuclear weapons states' agreement under the NPT treaty to negotiate the non-proliferation, abolition and complete elimination of nuclear weapons has not been adhere to for since the coming into force of the NPT treaty in 1970. Conversely, nuclear upgrading, arsenals and stockpiling have predominantly replaced abolition. To this end, anti nuclear weapons protagonists have earmarked 2014 for states to congregate in a conference to put pressure on NWS to return to abolition as the only way out It During this time, NWSs need to be convinced, persuaded and proven beyond all reason and stakes, the need for a world without nuclear weapons-delegitimisation. It is going to be a daunting task. Nevertheless, the academia can be depended on for the supply of such knowledge required for this task.

1.8 Structure of research project

This research project is composed of five chapters. Chapter one labelled as introduction basically covers the methodology and general structure of the work. Chapter two is concerned with the concepts and theoretical framework that wield the project. Chapter three looks at the application of international laws and statutes in the deligitimisation of nuclear weapons in Africa. It focuses on the history of international statutes like the NPT, IAEA and the role they have played in delegitimizing nuclear weapons. It also covers the role IHL, IHR and International Customary Law (ICL) will play in the process of deligimisation of nuclear weapons in Africa. The limitations of international law are also discussed in chapter three. A brief history of the Pelindaba Treaty and the role of ACHPRs in prohibiting nuclear weapons

are examined in chapter three. Because the continent has not been faced with any case of this nature, the application of legal precedent is deployed here. Another challenge to overcome in chapter four is the ability of the court to have jurisdiction over such matters. The challenges of implementing legal decisions within the continent are dealt with also in this chapter. And finally, chapter five is the conclusion of the project. Here, the rationale and the whole affair of delegitimisation of nuclear weapons in Africa is summed up. It also extends to suggesting other methods of delegitimisation which are different but supportive to the legal pointer.

CHAPTER TWO: CONCEPTUAL AND THEORETICAL FRAMEWORK

2.1 Introduction

This chapter is about examining two broad topics. The first will be the examination of some useful concepts in the research and the second will be the application of international relations theories relevant to the role of international law and AFCHPRs on the delegitimisation of nuclear weapons in Africa. Both will help in answering the research question and the sub questions that make up this research. Mindful of the shortcomings of the core theories in international relations, the application of those theories may not necessarily take the same orthodox route to answering the questions in this research, but contextualising them to give an African answer in African context will be a point of concern here.

2.2 Conceptual framework

As concepts are concerned, delegitimisation of nuclear weapons; human rights; international law and African Court will all be examined.

2.2.1 The concept of delegitimisation of nuclear weapons

Since 1945, when nuclear weapons were first used by America on Japan, the fight to abolish nuclear weapons has been ongoing at international level. The effect nuclear weapons pose to humankind and the environment is immeasurable and uncontrollable and the only solution is

prevention, abolishment, elimination and making them illegal which otherwise is known as delegitimisation of nuclear weapons. Ken Berry et al (2010, p., v) holds that:

"A process of delegitimization requires revoking the legal or legitimate status of the weapons, through a process of devaluation; diminishing and destroying all claims to legitimacy, prestige and authority. Although there has been a significant reduction in the numbers of nuclear weapons, the nuclear weapons states will continue to fail in their disarmament obligations so long as governments continue to confer legitimacy on nuclear weapons".

From the above statement delegitimisation of nuclear weapons sets out to completely eliminate nuclear weapons in all its forms through the law. But nuclear weapons states have continuously been slow if not failed to adhere to heed this demand despite numerous promises (Acheson, 2012, p., 87). In addressing the Geneva Diplomatic Corps, the President of the ICRC, Jakob Kellenberger in April 20, 2010 stated that:

"The International Committee of the Red Cross firmly believes that the debate about nuclear weapons must be conducted not only on the basis of military doctrines and power politics. The existence of nuclear weapons poses some of the most profound questions about the point at which the rights of States must yield to the interests of humanity, the capacity of our species to master the technology it creates, the reach of international humanitarian law, and the extent of human suffering we are willing to inflict, or to permit, in warfare… The currency of this debate must ultimately be about human beings, about the fundamental rules of international humanitarian law, and about the collective future of humanity".

Nuclear weapons states are partly favoured by the atmosphere of legal leniency. They take advantage of the NPT ambiguous Article 6 on the delegitimisation of nuclear weapons and the ICJ opinion on the legality of nuclear weapons that in certain circumstances, nuclear weapons use will be inevitable. At the request of ICRC asking the court to opine on the legality of nuclear weapons, no certainty was made as to whether nuclear weapons were legal or not (Advisory Opinion of July 8, 1996; ICJ, para., 105(2) (E); Magnarella, 1999, p., 20-24; 2008, p., 508).

Nuclear weapons do not meet international humanitarian Law and customary law prescription. Amongst other rules, conventional weapons must meet certain requirements under the UN Charter and the Geneva Convention (ICJ decision on the Nicaragua case, 1986; Acheson, 2012, p., 30):

- must be proportional to the initial attack,
- must be necessary for effective self-defense,
- must not be directed at civilians or civilian objects,
- must be used in a manner that makes it possible to discriminate between military targets and civilian non-targets,
- must not cause unnecessary or aggravated suffering to combatants,
- must not affect states that are not parties to the conflict, and
- must not cause severe, widespread or long-term damage to the environment.

Looking at the slow response of NWS to give up nuclear weapons, it does not render delegitimisation unattainable. More promising are the achievements registered against the banning of certain weapons of mass destruction (WMD) at international level through certain conventions like the Mine Ban Convention (MBC), Convention on Certain Conventional Weapons (CCW) and the Convention on Cluster Munitions (CCM) **(**Berry, Lewis, Pélopidas, Sokov and Wilson, 2010, p., 38-39). Such an achievement may serve as a catalyst to the delegitimisation process through international law role and the application of such law by the ACHPRs.

2.2.2 Human and People's Rights

The Vienna Convention and Program of Action, 1993 defines Human Rights in this way: "Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governance"
These rights are inherently inalienable. They include the right to life, good health, property and movements(United Nations Universal Declaration of Human Rights (1948, p.1-7) form the

basis for human existence. So therefore, any attempt by anyone through any means to violate these rights must be dissuaded.

Human rights center on the moral value of equality of humans in relation to one another. States also acquire moral personality under international law and political relations, which gives them moral obligations to respect the sovereignty of other states in their actions. However, man does not seem to always adhere to this equality. He was right to an extent in that the manufacturing of dangerous nuclear weapons and subsequent uses violate human rights. They destroy the right to life, property, good health and movement mentioned above.

The African Human Rights Court sets out to join the world in protecting and promoting international human rights and especially in the African continent where gross violations have been experienced, caused by non-Africans from the era of slavery to the testing of nuclear weapons. Founded on the principles of 'sovereignty and non-interference', the African Charter on Human Rights mainly focused on eradicating African colonialist and neo-colonialist tendencies meant to harm the continent morally, economically, politically and militarily (Banjul Charter, p.,7& 8; Gawanas, B., 2009, p., 135). Moreover, it set out to defend African culture in relation to human rights. Alibadawi El Sheikh in his presentation supports this view in the following statement:

"This is so because human rights have been linked to the history and development of man and society. As such the concept of human rights finds its roots in different civilizations, religious, philosophies, writing and beliefs and, as such, the evolution of the concept has been tied to the history of mankind, society and international relations"(1993, p., 23).

In the same way, it is presumed that the lens with which the African Court responds to legality of the use of nuclear weapons will reflect Africa's position in the fight, not necessarily the position of international law, but as a complement.

2.2.3 International Law

International law is a generic phrase whose meaning will always require contextualisation. First used by Jeremy Bentham (1780; p. 10; Shaw, 2008, p. 2), it encompasses many branches of law at the same time. However, many attempts have been put forward in defining the subject matter. Shearer in quoting John Austin remarked Austin's definition of international law as "a positive international morality [code of] opinions or sentiments current among nations generally' (Shearer I., A. 2nd ed., 1994, p.17) limited to moral requirements of a particular group of people.

International law can be defined as "the rules and principles of general application dealing with the conduct of States and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies" (Beckman and Butte, n/d). The conduct of transnational actors would be during war as well during peaceful times. The concern under this heading will be how the rules and principles dealing with the conduct of international moral persons (States and of international organizations) will influence the decision of the ACHPRs when a case on the legality of nuclear weapons' use is brought before it.

International Humanitarian Law (IHL) is the law directly applicable during war or conflict (the *lex specialise*). The fundamental principles guiding this law is that it lays down guidelines on weapons to be used during war/conflict, the conduct of the war by the combatants and also renders assistance to victims or casualties be they civilians or combatants.

Nuclear weapons are in no way approved by the *lex specialise*. Confessed in a joint statement in 1998, sixty-three ex-military officials of both India and Pakistan had this to say concerning nuclear weapons:

"By virtue of our experience and the positions we have held, we have a fair understanding of the destructive parameters of conventional and nuclear weapons. We are of the considered view that nuclear weapons should be banished from the South Asian region, and indeed from the entire globe" (Berry, Lewis, Pélopidas, Sokov and Wilson, 2010, p. 47).

2.3 Theoretical framework

There exists a variety of theories in International Relations. Some of these theories are realism, institutionalism, constructivism, international cooperation and liberalism. Some originated from international relations (IR) while others are borrowed in whole or in part from other social science fields like Economics, Sociology and Anthropology. This variety however, creates avenues for debate and contestation in this area of study. (Elman and Elan, 2003, p. 1-3).

To be able to formulate the role international law and the ACHPRs will play to delegitimize nuclear weapons, theoretical explanations are inevitable. Power is central to the ownership and use of nuclear weapons (Slaughter, 2011, p. 2-3; Eriksson, & Giacomello, 2006, p., 228). Realism is one of the bedrock theories of international relations. It is focused on power and security of the state within international relations (Stefano Recchia, 2007, p. 533).

2.3.1 Realism

Developed during the birth of the Cold War, the realist theory has the same age as the existence of nuclear weapons. Eriksson, J. & Giacomello, G. (2006, p., 228) state some assumptions about the realist theory on how the international system works. To them, realist theory is about the state as the primary unit of analysis; the state acts in rational ways to satisfy its national interest; power and security constitute the core values of the state. According to Mearsheimer (1994) this theory holds four assumptions. The first one rests on the fact that the international system is anarchical hence, power is vital to every state to survive foreign attacks, invasions and occupation by another state. Second is the belief that states act rationally under conviction and determination to ensure their continuous existence and this could mean oppression when necessary. This means that states will violate international law, conventions, agreement or treaties ratified in order to use nuclear weapons. The third is that all States have some hidden military capabilities otherwise called secrecy capable of destroying the neighbour. Therefore, the intension of the neighbouring states toward the other is unknown and threatening. And fourth, the will of international relations, lies in the hands of economic giant and militarily mighty States. To sum it up, the focus of the realist family is on power and security. This directly relates and holds true to the reason why powerful nations have being possessing nuclear weapons and also why some non-nuclear States wish to acquire nuclear weapons.

Waltz (1993, p., 59) shares the same view with Mearsheimer. He holds that the international state system's structure is anarchical; states are therefore ready "to fend for itself" whether or not with "the cooperation of others", because there is no international super state power to defend states' interests. Such a view can be said to mean that states can do anything to suppress others for their existence. This explains the *raison d'être* behind the resistance of Nuclear Weapons States (NWS) not to delegitimize nuclear weapons. Another interpretation here might be that States are under no obligation to cooperate with others, but do that at will when their national interest is safeguarded. It holds the same with the attitude of NWS who through the NPT continuously preach for non proliferation of nuclear weapons, instead of delegitimisation of nuclear weapons. This was evident in the 1996 opinion of the ICJ when the ICRC requested the court's opinion on the legality of nuclear weapons.

Looking at the role of international organisations or structures, Waltz (2000, p., 18) declares that international organisations are designed and controlled by states for their interest, leaving them with little or no independence in international relations. Many theorists respond to this point Waltz raises in the affirmative. For instance, Koremenos, Lipson and Snidal (2001, p., 762) agree that international institutions are structures created by states to further national objectives internationally. On the same wavelength is the Huntungton (1973, p., 338-340) who argues the non-relevance of international organisations because they fall back under the control of national principles not necessarily international principles.

2.3.2 Cooperation theory

In spite of all the criticisms and views that point toward international structures/organisation as being less useful in achieving international goals, some of the theorists agree that international organisations are important in international relations - through which international cooperation and goals will be achieved. Waltz again, justifies qualifies that that international organisations however, depends on the structures and not necessarily the states creating them. The ability to be influential in international politics will depend on the changing nature of the structures supporting international organisations (2000, p., 18). Similarly, Koremenos, Lipson and Snidal (2001, p., 762) agree that international institutions/organisations are born out of express concerns, negotiated by international actors to achieve cooperation and subsequent

integration. This is the same perception constructivists have about international institutions/organisations. It is the possibility that gives rise to the platform on which international institutions are welded. For instance, generally, the transition from the League of Nations to the United Nations (UN) was possible through cooperation and integration. The UN has further realised international specialised agencies the IAEA which monitors the non proliferation of nuclear weapons. The existence of treaties such as the NPT and Comprehensive Test Ban Treat (CTBT) are also as a result of negotiations and states' cooperation.

In Africa as well, the success of the journey from the OAU to the AU, the formation of an African Court on Human and Peoples' Rights (ACHPRs) and the Pelindaba Treaty came through negotiations, cooperation and integration. These resultant instruments here mentioned are vital in this research. Their role in the delegitimnisation of nuclear weapons in Africa will be discussed in greater detail as the work progresses.

2.3.3 Constructivism

In examining constructivism, it is discovered that regionalism is compounded as well. Despite our intension not to dwell much on regionalism because of limited time and space, it is worth mentioning the two for the sake of clarity. The Africa nuclear weapons free-zone (NWFZ) was built on constructivist principles. With the help of an international organisation like the OAU/AU, which represents the decision of African states, the zone/region is void of nuclear weapons. Constructivism emphasises the role of legal instruments, such as the Pelindaba Treaty, the CTBT and NPT to affect the world's perception about nuclear weapons (Frederking 2003, p., 364; Farrell 2002, p.,52).). Constructivism is based on subjectivism and not objectivism. The ACHPR, when it examines the legality of nuclear weapons, will make use of these treaties to interpret both international and regional norms on issues of nuclear weapons. This will be examined in chapters three and four of this research.

Regions are constructed out of negotiations and agreements beyond states' interests. The African Nuclear Weapons Free-Zone Treaty (2009) (the Pelindaba Treaty) and the ACHPRs are respectively regional legal instrument and institution serving regional interest. In examining Waltz's (2000, p.18) argument that international institutions/organisations depend on the

structures supporting them, Frederking (2003, p., 364) looks at the relationship between agents of international relations and international structures. To him, the relationship is complementary whereby each constructs the other. The African Commission cooperates with the ACHPRs during the examination of cases. Constant referral of cases; information sharing and consultation between the ACHPRs and the African Commission on Human and People's Rights are practical demonstrations of cooperation and integration between international institutions/organisations to achieve a common goal (Juma, 2011, p., 348-357). Cooperation among states and institutions also occurs in other areas, e.g.as Amelia Broodryk and Shaun Edge (2013, p., 3 quoting the 2012 Seoul Nuclear Security Summit, Overview) state:

> "To their credit, African states have responded to these calls and have made significant improvements and commitments to nuclear safety and security since the 2010 Nuclear Security Summit. The 2012 summit identified three main issues to be discussed, namely 'cooperative measures to combat the threat of nuclear terrorism', the 'protection of nuclear materials and related facilities' and the 'prevention of illicit trafficking of nuclear materials".

Even though ownership of nuclear weapons is based on power and security perceived by NWSs and supported by the realist theory, such a time when power and security by virtue of ownership of nuclear is long over with the collapse of the Cold War. The nuclear arms race that the Cold War induced between the two superpowers is over and nuclear deterrence no longer makes sense, especially not with additional nuclear states like Britain, China, France, India, Iran, North Korea, Pakistan and Israel having nuclear weapons. Hence, states now own nuclear weapons not for security per se, but for fear of loss of prestige.

Nuclear weapons actually pose more insecurity than security they are perceived to provide. So in effect, the realist theory has not successfully described the trend in international relations with the behaviour of states vis-a-vis nuclear weapons. Alternatively, constructivist theory accommodates and explains that states are not always in conflict and competition. On the contrary, states to the constructivist are out for cooperation and integration in order to achieve certain goals that will influence international politics. As already indicated above

constructivism is very useful to this project as it deals with the role of international law and courts in constructing expectations, norms and practices in matters of nuclear weapons use.

CHAPTER THREE: THE INFLUENCE OF INTERNATIONAL LAW ON THE ACHPRS IN THE DELEGITIMISATION OF NUCLEAR WEAPONS IN AFRICA

3.1 Introduction

International law has been of tremendous importance to the process of delegitimizing nuclear weapons in the world in general and Africa in particular. Since the first detonation of nuclear weapons by the USA against Japan's towns of Hiroshima and Nagasaki, there has been a general awareness of the inexplicable harm that nuclear weapons use will cause to mankind Kellenberger, ICRC Statement on 12 October 2010). To avoid the occurrence of a second disaster, the world has come together many times, in an endeavour, to set up what is known as international norms/laws against nuclear weapons. These laws are in form of conventions and treaties entered into by states under the auspices of the United Nations (UN). The Nuclear Non Proliferation Treaty (NPT) and the Comprehensive Nuclear Test Ban Treaty (CTBT), and other related instruments constitute international nuclear law.

Due to the many criticisms brought along by international nuclear law, other nuclear instruments have been further developed at regional levels. Of concern under this topic is Africa. Africa's anticipation in the nuclear non-proliferation and disarmament regime was orchestrated by the saga of 1960-1966, when France tested numerous nuclear weapons on the continent of Africa (Lausen, 2012, p. 4-5)**.** On 11 April, 1996, the Pelindaba was opened for signature. It also marked the former beginning of the new Africa nuclear free zone, though the continent in 1964 was declared denuclearized by the UN initiated by OAU/AU (UN. Resolution (3 December 1965).

The African Court on Human and People's Rights was set up to implement both the international laws and the African laws, like the Pelindaba Treaty, to defend human and people's rights on the continent.

In the case of nuclear weapons, this chapter seeks to understand the international law that will impact on the ACHPRs opinion about the legality on nuclear weapons use. The following paragraphs will look at the treaties in details, the applicability of the laws and the limitations.

3.2. International law of nuclear weapons and its effect on Africa

Combating nuclear weapons could only be possibly with the coming together of states to create international law in the form of treaties The NPT, the CTBT and the Pelindaba Treaty are some international law texts on nuclear weapons.

As defined earlier in chapter two, international law is "the rules and principles of general application dealing with the conduct of States and of international organizations in their international relations with one another and with private individuals, minority groups and transnational companies" (Beckman and Butte n/d).

3.2.1 International treaties

3.2.1.1 The Nuclear Non Proliferation Treaty (NPT)

Many treaties on nuclear weapons exist at different levels and regions. However, the NPT is the first and main treaty dealing with nuclear non-proliferation and disarmament. It was laid as a platform and a springboard for states to build their nuclear disarmaments strategies. Many scholars have attested that the NPT is the most applauded international relation treaty where nuclear weapons are concerned (Anderson, C., 2011, p. 288; Nye, 1980, p. 3, 7; 1981, p., 16, 18; Smith, 1987, p. 254; Van Ham, 1990, p. 38-40; Scheinman, 1995, p. 133; Xinjun, 2006, p. 647).

Signed in 1968, the treaty entered into enforce in 1970 with 185 states joining by the year 2000 (Sasikuma, 2004, p., 3)**.** It can confidently be said that the NPT has three principal objectives to achieve (Anderson *et al*., 2011, p. 282-283; McGoldrick, 2013, p. 1-22. The first is nonproliferation of nuclear weapons technology from NWSs to non-nuclear weapons states (NNWSs) stipulated in Article 1-3 as follows:

"Article I.Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

Article II. Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

Article III

1. *Each Non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency and the Agency's safeguards system, for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this Article shall be followed with respect to source or special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this Article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere...".*

The second objective is found in article 4 of NPT which stipulates that NNWS before 1967 will not acquire nuclear weapons either directly from the NWS or obtain the technology to

manufacture such weapons and also that NWS will eventually do away with their nuclear stockpiles. It writes thus:

"1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.

2. *All the Parties to the Treaty undertake to facilitate, and have the right to participate in. The fullest possible exchange of equipment, materials and scientific and technological information for the peaceful uses of nuclear energy. Parties to the Treaty in a position to do so shall also cooperate in contributing alone or together with other States or international organizations to the further development of the applications of nuclear energy for peaceful purposes, especially in the territories of non-nuclear-weapon States Party to the Treaty, with due consideration for the needs of the developing areas of the world".*

The third objective allows for NNWS to have access to nuclear technology for peaceful use only and for disarmament of nuclear weapons by NWS. These are found in Article read together with Article 6, of the NPT. Article 6 provides: "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control".

A lot of scientific innovation on nuclear weapons has been made over the years on the strength of nuclear weapons. It is discovered that the nuclear weapons manufactured now have the capacity to destroy far more than those of Hiroshima and Nagasaki.

Allowing for access to nuclear technology for sustainable energy is a welcome idea in that it shows how useful nuclear technology is to the development of all. But a strict supervision and collaboration should be put in place.

In which case states should generate it, but under the monitoring supervision of the International Atomic Energy Agency (IAEA) which will ensure that states do not enrich the Uranium to be became harmful. It is noted in NPT (para. 5) that:

"... the principle that the benefits of peaceful applications of nuclear technology, including any technological by-products which may be derived by nuclear-weapon States from the development of nuclear explosive devices, should be available for peaceful purposes to all Parties to the Treaty, whether nuclear-weapon or non-nuclear-weapon States"

3.2.1.1.1 Successes of the NPT

As indicated above, the NPT is the most welcomed international relation treaty. Such a positive acclamation comes from some achievements.

3.2.1.1.1.1 Creation of International Atomic Energy Agency (IAEA)

From the NPT IAEA was born as a monitoring body to prevent the further conversion of nuclear materials to weapons. The presence of IAEA has set a standard ensuring peaceful use of nuclear technology for peaceful use.

The NPT treaty is not only a treaty on its own, it is also a platform for treaty negotiations between sates and regions. By this standard, a bilateral treaty framing former Soviet states such as Belarus, Kazakhstan and Ukraine pushed surrender the nuclear stockpiles they acquired under the Soviet Union regime. In addition, the decision by Argentina, Australia, Brazil, Libya South Africa and Sweden to abandon their nuclear weapons programmes was influenced by the NPT. They did not only abandon but all joined the NPT till date (Anderson, C., 2011, p. 286).

Furthermore, since the coming into force of the NPT, a decrease of 22,400 nuclear weapons stockpiles has been recorded (Anderson, C., 2011, p. 286).

Also recorded is the creation of supporting organisation like Proliferation Security Initiative in (PSI) 2003 by some states, to avoid the illicit sale of nuclear and weapons of mass destruction. It has a membership of 90 countries who have successfully tackled the challenges of terrorist. (Scheinman and Potter, 2005, p. 24-27).

Another great achievement of the NPT was its influence on the creation of Nuclear Weapons-Free Zones (NWFZ) in 2005 and the subsequent indefinite extension of the treaty reviewed at the 2010 Review Conference, and the recommitment of NWS to Strategic Arms Reduction Treaty (START II) (Anderson, C., 2011, p. 288; Kerr, Nikitin, Woolf, and Medalia, May 3 2010, p. 7-8).

3.2.1.1.1.2 Challenges facing the NPT

Despite all the enthusiasm and warmth with which the NPT was received, it remains highly flawed with a lot of challenges and controversies. The interpretation of some of its articles has not been done since its inception. Unwillingness on the part of NWS to adhere to the treaty obligations kills confidence in the document (Anderson, C., 2011, p. 288).

Nuclear weapons states. This leaves the ban/prevention of non-nuclear proliferation near failure by international actors like the United Nations through its agents. Instead, nuclear weapons state membership has increased by four other countries in addition to the P5 (powerful nuclear weapons states), but the biggest challenge remains that of getting the P5 to give up their nuclear weapons according to article 6 of the NPT on disarmament.

In 1996, when the ICRC became so concerned about certain provisions of the NPT treaty having to do with the legality of nuclear weapons, it decided to request for interpretation by the International Court of Justice (I.C.J. Reports, 08 July 1996, p. 226). After a long debate, the result was unclear. On the one hand the ICJ concluded: 'The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all

civilization and the entire ecosystem of the planet. The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem and to cause generic defects and illness in future generations'...' Nuclear weapons are incompatible with 'elementary considerations of humanity', the Court concluded (ICJ 1996). On the other hand, the Court also ruled that: 'In view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake' (ICJ 1996). The Court's opinion left the world more confused about the legality of nuclear weapons use.

During the 2005 and 2010 NPT Review, President Dr. Kellenberger and President Obama have parallel views and visions about the interpretation of the NPT to them respectively. While Kellenberger sounds same on delegitimisation without any other option, Obama is mindful still to the importance of deterrence nuclear weapons play. However, the two of them share the same views that nuclear weapons are dangerous and need to be done away with the former supporting for an immediate action and the former advocating for reduction then destruction (The White House Office of the Press Secretary, 03 May 2010; Dhanapala, 2010, p. 3-5).

3.2.1.2 Pelindaba Treaty as an illustration of African Law on nuclear weapons

In addition to the NPT and the Pelindaba Treaty that make up international and African law, which is applicable in the ACHPRS, the other laws are international humanitarian law and international human rights.

3.2.2 The African Court on Human and People's Rights

In understanding which law will apply, we need to briefly look at the genesis of the ACHPRs. The ACHPRs was established on 25 January 2004 by the Protocol on the Establishment of an African Court on Human Peoples Rights after a series of conventions as far back as 1961. Negotiations for an ACHPRs began since 1961 during the formation of the OAU (German

translation of Europäische *Grundrechte-Zeitschrift* (1986, p., 677; 1990, 348) and at a time many African states became independent. It never gained momentum because of lack of political will and reliance on international courts like the Permanent Court of International Justice (PCIJ). As time went, dissatisfaction on the systematic representation at the PCIJ grew amongst non-represented states who believed that "European States had dominated the political and legal affairs of the international community" (ICJ History, n/p). When the continent was hit with a series of political atrocities, which amounted to gross violations of human rights, in the 80s and the 90s (Juma, 2011, p., 348; de Wet, 2001, p., 713 & 724; Baricako, 2008, p., 1 306), the importance of such a regional court protecting and promoting Africa's human rights became unavoidable (White & Claire, 2010, p., xix-xxi; Harris, O'Boyle. & Warbrick, 2009, p., 1-3; Baricako, 2008, p., 1;). Glaring examples are the numerous French nuclear tests in Western Sahara region between 1960 and1966 and the Rwanda genocide of 1994 which occurred at a time when there was no judicial body in Africa to prosecute the perpetrators. As a consequence, the continent was repeatedly criticised for nonchalant attitude. With this in mind, the ACHPRs was of great necessity to tackle all future happenings including any use of nuclear weapons. The court remains an effective institution to cater for African legal issues (Art 30 Protocol to the African Charter; Viljoen, 2012, p.,30-32) The ACHPRs has as complement the African Commission on Human Rights with each acting to ensure decisions are not duplicated.

However, the bone of contention will be to determine which international law will be applicable when the court rules on the legality of the use of nuclear weapons? There is a close range of determination and debate between International Humanitarian Law and International Human Rights Law.

3.3 Which law is applicable at the ACHPRs: International Humanitarian Law (IHL) or International Human Rights Law (IHR)?

International Humanitarian Law and International Human Rights Law are two international legal instruments whose relationship and application are highly contested and sometimes tricky to say where one ends and where the other takes effect. Due to their interrelatedness, there are

cases where the two laws may be separately applicable and also situations of simultaneous application.

3.3.1 Separate application of IHL and IHR

Many schools of thoughts have different views about the application of the two. The Israelis and Americans contain that both IHL and IHR cannot be simultaneously applicable in a case (Hampson, 2008, p., 550). To both countries still, international humanitarian law will not prevail over international human rights law in cases of conflicts, but international human rights law has a limited territorial applicability (Hampson, 2008, p., 550). However, the International Court of Justice (ICJ) since 8 July, 1996 has been dealing with the relationship between IHL and IHR vis-a-vis their application during conflicts.

The first case was in 1996 when the ICJ was giving legal opinion on the legality or threat of use of nuclear weapons. In this case, the ICJ upheld that the application of international human rights extends even to times of armed conflict (ICJ, 8 July 1996, para. 25). The second case came up in 2004 concerning the construction of the Wall in the Palestinian Territory and the third issue dealt with armed related activities in the Democratic Republic of Congo (DRC). In the former, the ICJ opined that international human rights law application during armed conflict is limited and in the latter, the court maintained that when the two meet, international humanitarian law will prevail (ICJ, 9 July 2004, para. 106; ICJ, 19 December 2005, para. 216-220).

Statutorily, Article 2 of the 1949 Geneva Conventions on Human Rights, holds that human rights both applies horizontally during time of peace and war while traditionally, international humanitarian law (also known the law or armed conflict) applies only during armed conflict. But where the a matter is raised before the ACHPRs concerning an act or omission, the court will neither be bound to looking at the definition of International Human Rights Law or International Humanitarian Law nor to determine which law is applicable. What will be of interest to the court is whether a treaty is violated or not. A pronouncement may be made at the court's discretion and not as a legal obligation. This is an old practice for treaty bodies with a responsibility to ensuring that human rights treaties are respected by states at international and

regional ranks. Examples of such bodies are the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, the African Commission on Human Rights and African Court on Human and People's Rights, and the European Court of Human Rights (Hampson, J.2008, p., 552).

The determination of the court here also is not limited by space or proximity. In Africa, the Pelindaba Treaty has additional protocols ratified by many Nuclear Weapons States (NWSs) not to test, threaten to use or use nuclear weapons on the African continent**.** Acting otherwise will mean a breach of international law obligation, which when established may lead to a fine and/or punishment depending whether guilt is proven beyond reasonable doubts.

3.3.2 Simultaneous application of IHL and IHR

As mentioned above that international human rights law applies at all times while international humanitarian law applies only during time of armed conflicts, the European Union Guidelines on promoting compliance with international humanitarian law holds that both IHL and IHR can be applicable at all times (2004, para. 12). Where there is conflict in interpreting general law, there will be a need to deepen the meaning and interpretation through expert information who specialises in that field. (Orakhelashvili, 2008, p. 162).

In the case of DRC v. Uganda and the Construction of the Wall in the Occupied Palestinian Territory, the interdependence of both laws was emphasised by the International Court of Justice (ICJ). In the Congo case allegations were made by Congo against Uganda of serious and widespread violations of human rights and humanitarian law. A similar situation was that of the Palestinian case. In a verdict, the court found that Ugandan forces were actually in violation of both instruments irrespective of whether one is less violated or more - the same protection was called for by the court. As Orakhelashvili puts it "[t]his confirms that the two bodies of law not only apply in the same situations, but can also outlaw the same conduct" (2008, p., 162).

The ACHPRs as a treaty body and an organ of the AU will have the same approach to a matter brought before it on the use of nuclear weapons, even though what might constitute a violation

may derogate from that of the European Court's interpretation, the application remains the same. For example, in the Palestinian Wall case, for the court to ascertain that human rights were violated, it had to interpret the Hague Regulations of 1907, on the conduct of hostilities. In this process, Article 23(g) which governs seizure of property was secluded for not falling within laws of the combatants. The ICJ, The European Court and the ACHPRs are like institutions whose decisions sharpen those of others in similar cases as precedent. In conformity, Article 60 and 61 of the Commission on Human and People's Rights state that:

Article 60

"The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

Article 61

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 recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine".

From the above, it can be seen that much is required of ACHPRs when an issue is tabled before it to judge. There are many international law instruments that the African Union and African states have adopted. Therefore a case on the use of nuclear weapons will not

be different or new to the African continent per se. If the ICJ had legislated on it, it will make it easier for the ACHPRs to hear such a case too.

To answer which law will be applicable will depend on the interpretation of the law and the facts of the case at hand. To what extend has the nuclear bomb killed, destroyed, wounded, harmed, assaulted, tortured, deprived the people of the present and of the future, etc. Due to the resemblances and complementarity of both the IHL and IHR, both bodies of law will be applicable in most cases.

3.4 Limitations of international law

The implementation of international law remains weak when compared to national laws. Its lack of enforcement facilities and dependence on the cooperation of states really make decisions toothless. The sovereignty of states is so fundamentally respected in international law above all that the refusal of a state to enforce a decision of an international or regional court contributes to the weakness of the law. International law and opinions from international courts nevertheless contribute to international norms. That is what is expected of state behavior and in that sense an opinion from the ACHPRs can contribute to strengthen the nuclear taboo and delegitimisation of nuclear weapons.

CHAPTER FOUR: ADJUDICATION: THE APPLICATION OF THE LAW BY ACHPRS ON THE USE OF NUCLEAR WEAPONS IN AFRICA

4.1 Introduction

The law applicable in the ACHPRs may be international or regional law. International law here could be a multilateral or bilateral treaty, a convention, customary law, General Principles of Law, Subsidiary rules of law, the hierarchy of norms, opinions of international law commissions (ILC) and/or precedent from the ICJ (Beckman and Butte , n/d).

Regional law will mean the court's procedure provided by the AU charter and African customary law. However, the court will likely combine both internal and international law

when dealing with cases of nuclear weapons. Before going into the how the ACHPRs will apply the law, the synopsis of nuclear weapons in Africa is important.

4.2 Synopsis of nuclear weapons in Africa

Africa's nuclear weapons story can be traced as far back as between 1960 and1966 when France conducted the several detonations (tests) of nuclear weapons - three atmospheric and thirteen underground, in the Sahara region of Africa in Algeria (Adeniji, Oluyemi, 2002, p. 37; Davis, 2007, p. 3). The tests brought about radioactive spills in many African countries hazardous both to human lives and the natural environment (Adeniji, Oluyemi, 2002, p. 35). Concerned about these acts and their consequences, some 14 African states reacted through a proposal to the UN General Assembly Resolution 1652 (XVI) in 1961, declaring Africa a nuclear free-zone (Lausen, 2012, p. 3). This submission was also in accordance with Article VII of the NPT Treaty authorising the formations of nuclear weapons regional treaties. Three years after the UNGA Resolution, a summit of the then Organisation of African Unity (OAU), the precursor to the now AU that was held in Cairo. This summit made the Declaration on the Denuclearization of Africa, which was adopted into Resolution 2033 of by the UN General Assembly (GA Resolution 2033 (XX), 3 December 1965). During this time, South Africa's nuclear weapons program and intention (Winge Laursen, 2012, p. 3), was threatening to the OAU's objectives of security - unity of Africa. So South Africa's agenda was seen as an enemy from within. Therefore denuclearising Africa was to be treated as a matter of importance and urgency. South Africa ended its programme in 1990 and dismantled its nuclear weapons by 1991 and joined the NPT soon thereafter. This was an opportune moment to ensure the realisation of the above Resolution of the UN, subsequently a joint accord was held in May 1991 in Addis Ababa-Ethiopia between the OAU and the UN to create a panel of experts whose duty was to establish a treaty road map for the denuclearisation of Africa (Adeniji, Oluyemi, 2002, p. 50). The meeting as stated by Hamal-Green (2011, p. 7) was: "for the preparation and implementation of a convention or treaty on the denuclearization of Africa".

The OAU-UN joint accord was composed of experts from Algeria, Nigeria, Tanzania, Zaire, and Zimbabwe, representatives from the OAU, International Atomic Energy Agency (IAEA), one from the UN, observers from the Treaty of Tlatelolco and Treaty of Rarotonga (Adeniji,

2002, 47-51; Winge Laursen, 2012, p.3). From 1991 to 1995, a series of meetings were held in several African countries by the joint OAU/UN group of experts in preparation for recommendations geared towards the establishment of the nuclear free-zone treaty. Such recommendations were sent to the UNO General Assembly for considerations. In addition to the 1991 group, some OAU intergovernmental experts came from Algeria, Cameroon,Egypt, Ethiopia, Mauritius, Namibia, Nigeria,Senegal, Sudan, Togo, Zaire and Zimbabwe. Thus in 1995, the Pelindaba Treaty text was finalised and opened for signature the following year of April 1996 in Cairo (Winge Laursen, 2012, p.3). On 15 July 2009, the treaty entered into force with 28 countries. By 1 March 2010, 29 countries had ratified the treaty by depositing their instruments at the AU Commission in accordance with the provisions of Article 18(2) of the Pelindaba Treaty which states as follows, "*the Treaty shall enter into force on the date of deposit of the twenty-eighth instrument of ratification"* The following countries have not yet ratified the treaty: Angola, Cameroon, Central African Republic, Cape Verde, Congo, Djibouti, Democratic Republic of Congo, Egypt, Eritrea, Ghana, Liberia, Niger, Seychelles, Sierra Leone, Somalia, Sao Tome & Principe, Sudan, Uganda and Zambia (The Nuclear Threat Initiative (NTI, n/d).

In September 2013, all the 54 African states were signatories to the treaty, including Morocco who is not a member of the OAU/AU (NTI, n/p). The treaty's sphere of influence is not limited to sovereign African states. It includes all terrestrial, oceanic and aerospace and Islands be there sovereign or not. For example, the treaty covers Islands such as Agalega Island, Bassas da India, Canary Islands, Cape Verde, Cardagos Carajos Shoals, Chagos Archipelago - Diego Garcia, Comoros, Europa, Juan de Nova, Madagascar, Mauritius, Mayotte, Prince Edward & Marion Islands, Sao Tome and Principe, Reunion, Rodrigues Island, Seychelles, Tromelin Island, and Zanzibar and Pemba Islands. Also included in the list of signatories is the Sahrawi Arab Democratic Republic, a territory otherwise known as the Western Sahara (Article 1(2) OAU Charter; Stott, du Rand & du Pre, 2010, p. 4; Stott, 2011, p.6; Laursen, 2012, p.3). The objectives of the treaty are very important to the understanding of project and will turn to now.

4.3 The prohibition of nuclear weapons in Africa through the treaty

Since the creation of the African nuclear weapon free-zone treaty in 1995 and subsequently entering into force on 15 July 2009, much has not been done in terms of creating awareness on the effect the use of nuclear weapons will bring to the continent of Africa. The AU looked upon as the depository of the treaty has on its part been slow in sensitizing the continent on nuclear weapons as part of the security measures to protect Africa. However, the launching of the Forum of Nuclear Regulatory Bodies in Africa (FNRBA), in December 2009 came as an initiative to guard and monitor the increasing availability of radioactive material brought about by used nuclear sources in the domain of agriculture, energy and health during peaceful time and to ensure "the exchange of regulatory experiences and practices among nuclear regulatory bodies in Africa" spelled out in Article 2 of FNRBA (Broodryk, 2011, p. 2-3).

It is an undeniable fact that the academia as well has not written much on this subject. However, the Pelindaba Treaty remains the *ground norm* as delegitimisation and denuclearnisation of nuclear weapons in Africa are concerned. A brief look at the treaty's objectives will broaden the understanding of this treaty's implications.

4.3.1 Examining the objectives of the African Nuclear Weapons Free Zone Treaty (also referred to as the Pelindaba Treaty)

The objectives of the Pelindaba Treaty are clearly a culmination of global effort to prevent the use of nuclear weapons and specifically Africa's unique role in the efforts against nuclear weapons. First, globally, the object is to achieve non-proliferation of nuclear weapons both horizontally and vertically agreed upon by states in resolution 3472 B (XXX) of the United Nations General Assembly of 11 December 1975, in which nuclear weapon-free-zones were considered as one of the most effective ways of preventing proliferation (Pelibdaba Treaty, para. 9; Adeneji, 2002, p.35-37).

The second objective originated from the experience of Hiroshima and Nagasaki during WWII when America used the atomic bombs**.** That singular act remained indelibly top of the agenda of international law, corporations, regions and states with a common objective of "considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard

the security of peoples" (NPT Treaty, para 1). Third, drawing from such a deadly experience, the anger expressed by many African countries as a response to France's nuclear tests in Africa in the 1960s transcended the OAU to the AU through the Pelindaba Treaty to ensure the "strengthening [of] the non-proliferation regime, promoting cooperation in the peaceful uses of nuclear energy, promoting general and complete disarmament and enhancing regional and international peace and security" (Pelindaba Treaty, para 5; Adeniji, Oluyemi, 2002, p. 35; Tabassi, 2011, p.39-40). The fourth objective is the protection of the African continent from possible nuclear attacks through a binding document legally consented to by states. That was timely and reasonable enough. The continent was feasibly affected by the bomb. And should Africa be silent over the nuclear tests conducted on the continent would have given the world the impression that African continent was a comfortable with such acts. As a result, the OAU *inter alia*, called on all member States of the United Nations to "refrain from carrying out any nuclear tests in Africa and from using the continent to test, store, or transport nuclear weapons". Fifth is to ensure that the African continent is environmentally safe, not a dumping ground for radioactive wastes and other radioactive matter. Sixth, to ensure and achieve regional economic cooperation and regulation in the use of nuclear energy for peaceful purposes and to ensure the implementation of all the provisions of the NPT Treaty (Pelindaba Treaty, para., 7-12), especially Article VII on the creation of nuclear weapons free zones to discourage nuclear weapons possession (NPT Article VII).

4.3.2 The place of Africa in the fight against nuclear weapons in international politics

There exists enough evidence to prove Africa as an important player in the delegitimisation of nuclear weapons in the world. These include its representative political role during the establishment of the NPT, the CTBT, the Non-Aligned Movement (NAM) and the New Agenda Coalition (NAC) and other bilateral and regional initiatives to form a treaty for the prevention of nuclear weapons (Federation of American Scientists, 2005, n/p).

4.3.2.1 Africa's participation in issues of nuclear weapons

Fifty four African countries (including Western Sahara and excluding Southern Sudan) are members of the NPT totaling about one third of the NPT membership (Kum, Broodryk, and

Stott, 2010, p., 1). Out of the 54 countries in Africa, only three have not signed the CTBT (Mauritius, Somalia and South Sudan) and the following eleven countries have not ratified the treaty namely Angola, Chad, Comoros, Republic of Congo, Egypt, Equatorial Guinea, the Gambia, Guinea Bissau, Sao Tome and Principe, Swaziland and Zimbabwe (CTBTO Preparatory Commission, 2013, n/d). In which case, a total of forty countries have ratified.

However, many African states played an active role during negotiations prior to the establishment of the NPT. They saw the NPT as a 'vote of confidence' in favour of the OAU Declaration on the Denuclearization of Africa, retaliation to France's demarcation of the continent as a nuclear testing ground (Adeniji, Oluyemi, 2002, p. 35) as well as preventing future tests by nuclear weapon states.

After the establishment of the NPT, African states became dormant till 2010. Critics have noted that despite the huge representation by African states during conferences and review meetings on nuclear weapons notably the consecutive five years attendance at the NPT Review Conferences (RevCons) (Stott., Broodryk , and Dye 2011, p. 2), such numbers only adds to the figure with no substantial contribution to policy making. Africa was highly concerned with continental nuclear weapons issues, establishing the Pelindaba Treaty. Nevertheless, this criticism was refuted from 2010 when the role of African states became influential in international nuclear weapons decision making, either as individual member states or as members of a group on nuclear weapons. For instance, Egypt was the chair of NAM and NAC in 2010 (Broodryk and Stott, 2012, p., 9-10; Winge Laursen, 2012, p., 12), a movement of states identifying themselves as a major international diplomatic bloc in the NPT review conferences (Winge Laursen, 2012, p., 14-15).

4.3.2.2 Africa setting example for others to follow

Nuclear weapons treaties, conventions and conferences are a cry for the abolition of nuclear weapons in the world. Paradoxically, the nuclear weapons club has for close to five decades experienced an increase in membership. In all this 'cloud', Africa remains one of those few 'continent-silver-lining' with no nuclear weapons. Very important to mention is the example South Africa set for the whole world to follow. Having been in possession of six nuclear

weapons before 1993, the country willfully decided to denounce nuclear weapons, rewriting history as the only nuclear weapons capable State to have abandoned nuclear weapons (Aboul-Enein, 2009, p., 67). Since then, South Africa has remained one of most active players in the world, holding the position of "do-gooders' or 'helpful fixers" (Leith and Pretorius, 2009, p. 345, 351).

4.4 The jurisdiction of ACHPRs: what gives the court powers to entertain cases on the use of nuclear weapons?

As mentioned earlier in chapter three, the formation of the court was to create a structure which will be responsible for the implementation of international law bridged by the Pelindaba Treaty. However, such a mandate is guaranteed by the jurisdictional underpinnings such as the African Commission and the Protocol establishing the ACHPRs.

4.4.1 Jurisdictional underpinnings

For the ACHPRs, like any other court, be it international, regional or national to entertain any case, it must have jurisdiction to do so. The ACHPR's jurisdiction are defined by Article 3 and 4(1) of the Protocol to the African Charter on Human and Peoples` Rights on The Establishment of an African Court on Human and Peoples` Rights, which states as follows;

Article 3: "1. The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned [and]

2. In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide [and]

Article 4(1); "At the request of a Member State of the OAU, the OAU, any of its organs, or any African organization recognized by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the Commission".

From the Articles above, the expression 'all cases' is robust and can be interpreted to cover cases of nuclear weapons. As it stands, there is no interpretative verification on the limit of the type of jurisdiction.

The second jurisdiction type under the ACHPRs is legal opinion or advisory opinion jurisdiction of the court. Here, the court is engaged in a variety of interpretation of African human rights. As earlier mentioned, though the OAU/AU signed and ratified international human rights and related instruments, it remains that the African flavour needs to be protected and maintained.

The advisory opinion plays the role of a mediator between the person concerned and the actual court judgment. Many States will prefer advisory opinion to the contested or judicial jurisdiction because it is fast, easy to bear and meant to improve an issue.

4.4.2 The relationship between the ACHPRs and the AU

To understand how ACHPRs will obtain jurisdiction on other cases calls for the illustration of the link from international law to the AU, further to the African Charter on Human and Peoples Rights, African Commission and then the Protocol establishing the ACHPRs. Zimmermann and Bäumler in trying to understand this relationship, acknowledges that it was confusing. However they summarised the relationship by stating the commission was "the original supervisory body [to the ACHPRs] under the Banjul Charter" (2010, p., 48) of which both of them receive powers from the AU. The AU members have signed many international legal instruments. Specific to nuclear weapons include the NPT Treaty, the Comprehensive Nuclear-Test-Ban Treaty (CTBT), the International Atomic Energy Agency (IAEA) and Organisation for the Prohibition of Chemical Weapons. In a nutshell, all these are organizations put in place enforce treaties on nuclear weapons.

4.5 Who is qualified to lodge a complaint at the ACHPRs on the use of nuclear weapons?

The two types of jurisdiction describe who is qualified to bring a case before the ACHPRs. With contested jurisdiction, the court have powers to entertain matters brought before it by

OAU/AU member States or any other OAU/AU recognised organisation provided for in Article 4(1) of the Protocol above. More specifically, Article 5(1) of the Protocol spells out below the categories of those qualified:

a) The Commission on Human and People's Rights
b) The State Party which had lodged a complaint to the Commission
c) The State Party against which the complaint has been lodged at the Commission
d) The State Party whose citizen is a victim of human rights violation
e) African Intergovernmental Organizations

Conversely, under Article 5(3) advisory opinion of the African Court applies to individuals and Non Governmental Organisations (NGOs) with observable status-that is the state whom the individual or NGO operates must make declarations approving the competence of the court.

Some academics describe the qualification for advisory opinion as a pitfall (Juma, 2007, p., 8). Nevertheless, the New Protocol of the Combined African Court enlarges the scope of who will be qualified to bring a case before it for hearing (Article 29 and 30, June 30-July 1, 2008). It includes:

"...States Parties; the Assembly of Heads of Sates and Government of the African Union and other organs of the Union authorised by the Assembly; the African Union Parliament ; a staff member of the African Union; the African Commission on Human and People's Rights; the African Committee of Experts on the Rights and Welfare of the Child; African Intergovernmental Organisations accredited to the Union or its organs; African National Human Rights Institutions; and individuals or relevant Non-Governmental Organisations accredited o the African Union or to its organs, subject to a declaration by the responding State Party"

There is clear evidence that a case against nuclear weapons use will be entertained by the court. Thinking back on France's nuclear tests in the 1960s, the response of all African institutions, civil society, universities and people was unanimous. Today, all the above stakeholders including the court are more than prepared to take serious sanctions against nuclear weapons

detonation on the continent. For instance, in July 1, 2011, during the 17th African Union summit in Malabo, the African Union requested the African Commission:

"to reflect on how best Africa's interests can be fully defended and protected in the international judicial system and to actively pursue the implementation of the Assembly's Decisions on the African court of Justice and Human and People's Rights so that it is empowered to try serious international crimes committed on African soil".

As explained above in chapter three, even though International Humanitarian Law is the lex specialise applicable during armed conflict, International Law converge also as a matter of necessity and complementarity. The use of nuclear weapons is considered blatantly outrageous in the African context as coded in the Pelindaba Treaty.

4.5.1 The procedure and practice

The functioning of the ACHPRs is based on the application of statutes to give effect to a case before it. The rules of procedure of the court and the rules of procedure of the Commission are regulated by the protocol establishing the court. Bringing a case before the ACHPRs is in the form of communication via the Commission. The Commission first looks at the person/organisation submitting the case. If a case of human rights violation is brought by individuals or NGOs, the focal point will be whether the State where the violation was committed accepts the court's competence. In Africa as of now, only four countries have made unconditional declarations on the court's jurisdiction to try individuals and intergovernmental organization (NGO) with observer status. These countries are Burkina Faso, Ghana, Malawi, Mali **(**Stone, 2012; Juma, 2011, p. 349). Tanzania on its part have accepted the court's jurisdiction provided that "all domestic remedies have been exhausted and in adherence to the its constitution (Juma, 2011, p. 349). Where the complainant is justified**,** the Commission may either proceed to forward the case to the ACHPRs or where it is noticed that the case suffers non compliance by the state, the Commission may proceed to point out what the state may need to do in order to remedy such a situation (Viljoen, & Louw, 2004, p., 10). This may also be the case where provisional measures were first issued and the State failed to comply.

In cases demanding urgency resulting from serious or massive violations of Human Rights, the Commission may refer the case to the court for the issuance of provisional measures to remedy the situation required under Article 58 (African Charter, Art 58; Rule 84; Murray R., 1999). This was the case of Libya when the Commission issued provisional measures against the Libyan government in March 2011(ACHPRS and African Commission v Great Socialist People's Libyan Arab Jamahiriya; Juma, 2011, p. 363-366; Baker, 2011, p. 768).

According to Articles 5(3), 34(6) of the Protocol interpreted together Rules of the ACHPRs, of 2008, the court may in some circumstances as it may deem fit refer cases to the Commission for advisory opinion or jurisdictional definition. Such an inter-referral between the Court and the Commission is complementary, with each acting like checks and balances to another to avoid procedural flaws which might lead to errors in the opinion or judgments delivered. Though this kind of system might be seen as 'bottle-necked' and lack independence of the court, the complexity that nuclear weapons may cause or any other human rights cases would warrant such a mechanism for a sound judgment.

On 25 March 2011, a panel of 11 judges of the African court headed by Dr. Gérard Niyungeko unanimously took provisional measures against Libya (Gérard Niyungeko-President of the Court from Burundi, Sophia AB Akuffo-Vice President from Ghana, Jean Mutsinzi form Rwanda, Bernard Makgabo Ngoepe from South Africa, Modibo Tounty Guindo from Mali, Fatsah Ouguergouz from Algreia, Josepg Mulenga, Augustino Ramadhani from Tanzania, Ducan Tambala from Malawi, Elsie Thompson from Nigerian and Sylvain Oré from Ivory coast). The provisional measures relied on 9 different Articles of the African Charter namely articles 1, 2,4,5,9,11,12,13, 23 and 27, and article 51 of the Rules of the Court. In the decision, it was held that the court in matters of urgency and human rights violations does not need the request of the Commission for such measures; however, the court is *proprio motu* (self authorised) and that jurisdiction and the merit of case where not of prime importance ((Gérard Niyungeko-President of the Court from Burundi, Sophia AB Akuffo-Vice President from Ghana, Jean Mutsinzi form Rwanda, Bernard Makgabo Ngoepe from South Africa, Modibo Tounty Guindo from Mali, Fatsah Ouguergouz from Algeria, Joseph Mulenga, Augustino Ramadhani from Tanzania, Ducan Tambala from Malawi, Elsie Thompson from Nigerian and Sylvain Oré from Ivory coast (Barker, 2012, p.770). This however shows that in cases where

human rights are violated, other procedural steps are overlooked by the court. The use of nuclear weapons will immediately be entertained by the court because nuclear weapons grossly violate human rights including those enumerated in the case of Libya. In fact, the effect caused by the use of nuclear weapons can not be separated from the violations of human rights. And if the court has a tradition of entertaining issues of such a nature, there is no doubt whatsoever that the court will have jurisdiction over nuclear weapons.

4.5.2 The ACHPRs tradition of provisional measures (interim measures)

The provision of provisional measures is not new to the ACHPRs, but what stands out recurrent is the non compliance by states. In 1998, in the case of *Kenule Beeson Saro-Wiwa Jr. V. Nigeria,* an order for death sentence for inciting violence and murder (International Pen et al., 2000); in 1999, a similar case of death sentence was implemented against a Botswana convict.

In 2001, the Botswana court went ahead and executed the convict. Presumed at first instance that Botswana had violated provisional measures issued by the African Commission, when such allegation was opposed by the Botswana government, it was proven that the fax had not gone to the president as intended by the court.

Other cases the ACHPRs has ordered for provisional measures were between *Amnesty International v Zambia* and *Liesbeth Zegveld v Ertrea.* The former *concerned* allegations of forceful deportation of a Malawian political big gun from Zambia to Malawi of grounds that his presence in Zambia posed a danger to peace and public order. In the latter, the ACHPRs issued provisional measures to the Eritrean government preceding from illegal detention of eleven former government officials of the Eritrea. The two cases were in breach of Articles 2,6, 7(1) and 9(2).

In addition to the list of cases the ACHPRs ordered provision measures was case no 276/2003, 27th between Centre for Minority Rights Development (Kenya) v. Kenya, Commc;n. The Endorois community in Kenya complaint of forceful displacement of about 60,000. In 2004 the ACHPRs court requested for the stay of proceedings by the court, but the government of

Kenya continued with the executions as previously planned, hence violation the court's provisional measures.

The example of cases above are those provisional measures have met with noncompliance. However, it does not distort the importance of provisional measures in decision making by the court in its binding power. The cases of Safia Yakubu Husaini v. Nigeria, Commc'n, case no. 269/2003; Constitutional Rights Project v. Nigeria, Commc'n, case no. 89/93, 87th Activity Report (Dan Juma, 2011, p.361). As noted by Juma Dan, provisional measures remain legally binding "inasmuch as the findings of the African Commission may be considered legally binding so should the provisional measures" (Dan Juma, 2011, p.363). There is no doubts that nuclear weapons are dangerous, hence the court urgent attention will be paid should there be used.

In actual facts, the ACHPRs is seen dynamic having the ability to entertain a variety of cases. It is also worth nothing that though the court leaves no case on human rights, its strength is measured around the issuing of provisional measures. This not to say that provisional measures are no binding, the speed with which provisional measures are issued and the nature are not based on merit. Perhaps, this could be attributed to the nature of the majority of events probing the court. Most of them are poetically related needing requiring urgent attention of which provisional measures are best suited.

From the creation of the court, only one successful judgment was delivered. That was the case of *Michelot Yogogombaye v the Republic of Senegal* whose judgment was delivered in December 2009(n0 001/2008, 15 December 2009).

4.6 Limitation of the ACHPRs

Despite the laudable nature of the ACHPRs outlined above, there are still many flaws that slow down the effectiveness of the court compared to other regional human rights courts like the American Human rights and the European Human Rights Court (Zimmermann and Bäumler, 2010, p., 52-53).

First, there are jurisdictional curtails whereby its name as the ACHPRs may invite debates when issues of nuclear weapons are brought before it. The court panel might not consensually understand that the detonation and subsequent consequences of nuclear weapons incorporate violations of Human Rights.

Second, resources are also a great limitation of the operations of the court. It demands a lot of money to carry out investigations on an issue like nuclear weapons. For now, Africa has limited experts on nuclear science; hence the use of a nuclear bomb will call for a high cost on experts from elsewhere. With no regular source of financial sponsorship, the court relies on the charges from cases and State's financial support through the OAU/AU (Article 32 of the Protocol) which evidently has experienced a low referral of cases.

Third, time taken by the court to pronounce an opinion is very long. The first case took approximately one year. Many criticisms were registered against that. However, as a beginner, it is normal, as Andreas Zimmermann and Bäumler (2010, p., 52-53) put it:

"The first steps are always the hardest, even when setting up a court. A glance at its sister courts shows that these encountered similar problems: the Inter-American Court of Human Rights heard its first case a whole six years after its establishment in 1980, with a further four years before the second... Ultimately, the future of the ACHPR is dependent on the will of the African states, the judges, as well as the NGOs and the Commission, not to allow themselves to be discouraged by initial difficulties. The suggestion that the court ought to try to learn more from the other two regional judicial bodies, the European Court of Human Rights and the Inter-American Court of Human Rights, seems reasonable. At the same time, however, the court must also find its own path and, if necessary, make its own mistakes. The establishment of a genuinely African Court on Human Rights will result only."

Therefore, though criticised by sceptics and pessimists, it should not be looked upon as a symptom of failure.

Fourth, the African nuclear weapons free-zone has not yet achieved universality. It will obtain universality when all states within a zone ratify the treaty. As of March 2013, the following states have not ratified the treaty: Angola, Central African Rep., Cape Verde, Congo, Djibouti, Democratic Rep. of Congo, Egypt, Equatorial Guinea, Eritrea, Liberia, Niger, Seychelles, Sierra Leone, Somalia, Sao Tome & Principe, Sudan, South Sudan and Uganda (AFRICAN UNION, 2013 March 28, p. 1&2). An individual or group from a non-signatory State might not have the right to lodge a case before the court on this matter. In fact, even if victims are from a State that has ratified the Nuclear Weapons Free Zone Treaty, refusal for endorsement by the State will handicap his/her right of a hearing before the court. This again is not an indication of failure. Most states on the African continent has adopted the NPT and CTBT treaty and its provisions and the Pelindaba Treaty additionally bars nuclear weapons on the African continent except for peaceful use under the super vision of the IAEA. International Humanitarian Law and the International Customary Law will overwrite and outweigh this limitation. To crown it all, the delegitmisation of the use of nuclear weapons calls for urgent intervention against all odds and protocols. Article 27(2) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights fills that gap in the words below: "In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court shall adopt such provisional measures as it deems necessary".

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5.1 Conclusion

This thesis aimed to investigate whether the ACHPRs has the jurisdiction to provide an advisory opinion on the matter of the legality of nuclear weapons use as well as what the procedure would be to bring such a case before the court (including who may bring such a case). These questions were posed against the background of campaigns to delegitimize nuclear weapons that uses international law, especially international humanitarian law, to show that nuclear weapons are inhumane weapons and should be banned. Organisers of these campaigns often ask international courts to pronounce on the legality of nuclear weapons use, e.g. the case

brought before the ICJ in 1996. The study is thus underpinned by the hypothesis that getting an advisory opinion from the ACHPRs may help to delegitimize nuclear weapons.

In conclusion the study found that international law plays an important role in delegitimizing the use of nuclear weapons in Africa specifically and more generally in the rest of the world. The NPT prohibits the spread of nuclear weapons to non nuclear weapons states and demands the complete banning of nuclear weapons in all its forms. This monopoly of ownership of nuclear weapons by some states to the exclusion of others is bias and controversial to the idea of nuclear weapons prohibition which the worlds in general and international organisations are out to achieve. The Pelindaba treaty and its protocols have come not only to adopt the NPT, but also fill the gaps that the NPT brought with it. It is a complete document which speaks in black and white against the testing, threat of use or use of nuclear weapons on the African soil. Though it may be criticised by some that it allows for ownership of nuclear plants for peaceful use, this ownership is supervised and monitored by the IAEA. Hence, there is no risk attached to that provision.

Furthermore, the Pelindaba Treaty was and is still warmly embraced by the AU whose predecessor (OAU) started the initiative. The treaty represents the interest of fifty three African states. Even Morocco the lone non member of the AU is a signatory to the treaty as well.

The question of which law will apply when a nuclear weapon a case about the legality of nuclear weapons is heard b used cannot be answered with precision. Though the use of a nuclear weapon brings about untold consequences violating both IHL and IHR, it is still uncertain which law will apply. However, there is likelihood that both laws will apply simultaneously as demonstrated above in the Congo and Palestinian Wall case.

After examining the question of whether the court will have jurisdiction, evidence was provided that the court would have jurisdiction. Articles 3 and 4(1) of the Protocol to the African Charter on Human and Peoples` Rights on the Establishment of an African Court on Human and Peoples` Rights is very clear on the question of jurisdiction. It entertains ‘all cases’ that relate to human rights violations. The issue of nuclear weapons falls within the main objectives of the organisation–that is securing the African continent and people’s human rights,

e.g. the right to live and a healthy environment – all of which nuclear weapons use will violate if used.

Who has the right to bring the case before the court for hearing also is variedly answered. Any AU member State, recognised organisation and individuals are eligible to bring a case on nuclear weapons. However, there is a complication here with regards to individuals' and NGOs' rights of bringing a case before the court. The state must have signed a declaration provided for in Article 29 and 30 to give them the competence to bring a case before the ACHPRs court. Many states have not made any declaration to admit this particular provision. Therefore, there is bound to be limitations in light of these. Nevertheless, the case of nuclear weapons is a concern to all on the continent and the world at large.

5.2 Recommendation

Despite concerted effort by international organisations, regional organisation and states in the prevention and prohibition of nuclear weapons, little is done at the level dissemination of information. It is mostly an elite issue where courts, politicians, international organisation and the academia are involved. Even within these actors, little is done. It is recommended that more should be done to prioritise the awareness and fight against nuclear weapons. This can be achieved through the formation of nuclear weapons clubs in primary, secondary schools and universities, prioritising over states, private and public media, political parties, churches and public shows. In such a way, more support necessary to persuade nuclear weapons states can be achieved. Delegitimisation of nuclear weapons is possible and faster when all is involved.

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