5 Criminal jurisdiction in the African Court of Justice and Human and Peoples' Rights: Does the African mechanism have the prospect of fighting impunity?

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Abstract

The African Court of Justice and Human and Peoples' Rights (ACJHPR) is a regional court for Africa with a mandate, among other things, to adjudicate on human rights issues within the continent and to interpret the Constitutive Act of the African Union (AU). The Court is a result of a merger of the Court of Justice of the African Union and the African Court on Human and Peoples' Rights through the Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the AU Assembly on 1 July 2008. At the 23rd ordinary session of the AU Assembly held in Malabo-Equatorial Guinea, the AU heads of state and government adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights conferring jurisdiction upon the Court over a number of international and transnational crimes. This chapter thus endeavours to scrutinise the jurisdiction conferred upon the ACJHPR over these crimes. The authors are of the view that there are a number of challenges posing a threat to the effectiveness of the Court in exercising its jurisdiction. These challenges include: lack of political will to make the court operational; the immunity accorded to the heads of state and other senior state officials which shall render the fight against impunity futile; and the capacity of the Court to effectively perform its functions given the number and nature of crimes to be prosecuted and the financial position of the Court. The chapter notes that although these challenges exist, with a proper articulation of action and the necessary political will, Africa will be making its mark in the fight against impunity.

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1 Introduction

On 27 June 2014, the African Union (AU) heads of state and government sitting at the 23rd ordinary session of the Assembly in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol).[1] The Malabo Protocol extends the jurisdiction of the yet to be operational, African Court of Justice and Human and Peoples' Rights (ACJHPR) to try crimes under international law and transnational crimes in Africa.[2] The Malabo Protocol adds the International Criminal Law Section, to the ACJHPR originally planned two sections, being the General Affairs Section and Human Rights Section.[3] As per the Protocol, this third section shall have jurisdiction to try a total of 14 crimes being: genocide, crimes against humanity, war crimes, the crime of unconstitutional change of government, piracy, terrorism, mercernarism, corruption, money laundering, trafficking in person, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources, and the crime of aggression.[4] The move to establish this section within the ACJHPR is a positive step as it shall serve as a regional court addressing a number of crimes not within the jurisdiction of the International Criminal Court (ICC), to which most African states are a party.[5] Furthermore, it will enable African states to pool their resources and address crimes that states fail to prosecute due to a lack of capacity within their national jurisdictions.[6]

1 African Union, The Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 2014) (Malabo Protocol). See African Peacebuilding Network 'Article 46A bis: Implications for peace, justice, and reconciliation in Africa' *Kujenga-Amani* 21 October 2014 https://www.kujenga-amani.ssrc.org/2014/10/21/article-46a-bis-implications-peace-justice-and-reconciliation-in-africa/ (accessed 4 August 2021).

2 Articles 28A-28M, Malabo Protocol. See also Amnesty International 'Malabo Protocol: Legal and institutional implications of the merged and expanded African Court' (2016) https://www.amnesty.org (accessed 4 August 2021).

3 Articles 16(1)(2) and 19 of the Malabo Protocol

4 Article 28A of the Statute of the African Court of Justice and Human and Peoples' Rights, annexed to the Malabo Protocol.

5 ICC 'State parties to the Rome Statute' https://www.asp.icc-cpi.int/en_menus/asp/states/parties/pages/the/states/parties/to/the/rome/statute/aspx (accessed 5 August 2021).

6 DL Tehindrazanarivelo 'The fight against impunity and the arrest warrants' in M Kohen, R Kolb & DL Tehindrazanarivelo (eds) *Perspectives of international law in the 21st Century* (2012) 401.

Despite establishing this Court, the question asked in this chapter is: 'Does the African mechanism have the prospect of fighting impunity within the continent?' This chapter examines the question by addressing the positive aspects and challenges surrounding the establishment and operation of this International Criminal Law Section. These challenges include the lack of political will to operationalise the court as the pace of signature and ratification of the Malabo Protocol by member states is slow. Second, the immunity accorded to heads of state and other senior state officials renders the fight against impunity futile. Research shows that state officials, including heads of states, particularly in conflict zones commit international crimes.[7] Thus, granting immunity defeats the major purpose of an international criminal court, which is to prosecute those who cannot be easily prosecuted in national jurisdictions.[8] What's more, when such leaders remain in power for life their victims shall never have justice. Last, but not least, the Court's capacity to effectively perform its functions, given the number and nature of crimes to be prosecuted, requires a significant amount of funds. This is a burden to the member states rendering the functioning of the Court ineffective. This is largely because most of the member states are financially committed to other institutions in the AU and also the ICC.

2 The route to criminal jurisdiction in the African Court of Justice and Human and Peoples' Rights

In Africa, a number of judicial mechanisms at the international, regional and national level have dealt with international crimes committed under dictatorial regimes and during internal armed conflicts. Following the 1994 genocide in Rwanda, the UNSC honoured the request by the Rwandan Government and set up the International Criminal Tribunal for Rwanda (ICTR).[9] The ICTR had jurisdiction to try individual perpetrators for genocide and other violations of international humanitarian law committed in the territory of Rwanda and neighbouring states between 1 January 1994 and 31 December 1994.[10] Additionally, hybrid tribunals have been established and designed to combine both international and national features. These include the Specialised Court for Sierra Leone (SCSL) which was established under an agreement between the United Nations

7 R Pedretti *Immunity of heads of state and state officials for international crimes* (2015) 30-428; A Arieff et al *International Criminal Court cases in Africa: Status and policy issues* (2010) 1-30.

8 Pedretti (n 7) 30-428.

9 UN Security Council, Resolution 955: Establishment of the International Criminal Tribunal for Rwanda, 8 November 1994, UN Doc S/RES/955 (1994).

10 Article 1 of the UN Security Council, Statute of theInternational Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994.

and the Government of Sierra Leone[11] to try perpetrators of international crimes during the ten years of brutal civil war.[12] At the national level, some African states have tried perpetrators of international crimes in their national jurisdictions. A good example is Senegal which, together with the African Union, established the Extraordinary African Chambers in Senegal (EACS).[13] This Court was established within the local court system in Senegal and tried the former Chadian president Hissène Habré for crimes against humanity, torture and war crimes committed during his reign between 1982 and 1990.[14] Other states have included international crimes in their national penal laws.[15] Uganda for example, has even gone further to create an International Crimes Division within its High Court to adjudicate upon international crimes.[16] This was established particularly to deal with atrocities committed in the war in northern Uganda, especially by LRA fighters.[17] In furthering the same spirit of fighting impunity, African heads of state and government reached a unanimous decision to extend the jurisdiction of the African Court of Justice and Human and Peoples' Rights to entertain international and transnational crimes.[18]

2.1 The African Court of Justice and Human Rights

This regional judicial organ is an outcome of a merger of the Court of Justice of the African Union and the African Court on Human and Peoples' Rights by the Protocol on the Statute of the African Court of

11 UN Security Council, Resolution 1315: Establishment of a Special Court for Sierra Leone, 14 August 2000, UN Doc S/RES/1315 (2000).

12 Global Policy 'Special Court for Sierra-Leone' https://www.globalpolicy.org/international.justice/international-criminal-tribunals-and-special-courts/special-court-for-sierra-leone.html (accessed 2 June 2021).

13 'Statute of the Extraordinary African Chambers within the Courts of Senegal created to Prosecute International Crimes committed in Chad between 7 June 1982 and 1 December 1990' *Human Rights Watch* 2 September 2013 http://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers (accessed 27 May 2022).

14 Human Rights Watch 'Hissène Habré and the Senegalese courts: A memo for international donors' (December 2007) Vol 1 https://www.hrw.org/legacy/backgrounder/africa/habre1207/ (accessed 4 June 2021).

15 Central African Republic Hybrid Tribunal, the Special Court for Sierra-Leone, The Extraordinary Chambers in the Courts of Cambodia, the Extraordinary African Chambers in Senegal, Specialised Mixed Chamber in DRC, Specialist Chamber in Kosovo and the International Crimes Division in the High Court of Uganda.

16 SMH Nouwen, *Complementarity in the line of fire: The catalysing effect of the International Criminal Court in Uganda and Sudan* (2013) 179-190.

17 As above.

18 AU Assembly, Decision on the implementation of the Assembly decision on the abuse of the principle of universal jurisdiction DOC Assembly/AU/3(XII), AU Doc Assembly/AU/Dec.213(XII) (2008).

Justice and Human Rights,[19] adopted on 1 July 2008 at the 11th Ordinary Session of the Assembly of the Union in Sharm El-Sheikh, Egypt.[20] The idea to establish the ACJHPR was introduced by Olusegun Obasanjo, then President of the Federal Republic of Nigeria and AU Assembly Chairperson, to reduce costs and duplication of institutions within the AU given the growing number of institutions and associated financial burdens.[21]

The Protocol and Statute requires a deposit of 15 instruments of ratification and shall enter into force 30 days after the last deposit.[22] As of 9 June 2021 there were 33 signatures, eight ratifications and eight deposits out of the 55 member states.[23]

2.2 Criminal jurisdiction within the African Court of Justice and Human Rights: Process and motivation

2.2.1 The process

The idea to have an African Court with the mandate to prosecute international crimes is traced back to the apartheid regime in South Africa whereby some of the African states sought to prosecute the atrocities committed in this era.[24] During the drafting of the African Charter on Human and Peoples' Rights, a proposal to have an African court with mandate to prosecute gross violations of human rights constituting international crimes, particularly crimes against humanity was submitted by the Republic of Guinea.[25] The Guinean proposal seemed to have been motivated by a desire to condemn the gross human rights violations taking

19 Chapter I of the African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.

20 Protocol on the Statute of the African Court of Justice and Human Rights.

21 African Court Coalition http://www.africancourtcoalition.org (accessed 12 June 2021).

22 Article 9 of the ACJHR Protocol.

23 States that have ratified and deposited their instruments of ratification are: Angola, Benin, Burkina Faso, Congo, Gambia, Libya, Liberia, and Mali https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights.pdf (accessed 18 June 2020).

24 *The Minister of Justice and Constitutional Development v The Southern African Litigation Centre* 2016 (3) SA 317 (SCA) paras 60, 76-82, 85 and 102. See also A Abass, 'Prosecuting international crimes in Africa: Rationale, prospects and challenges' (2013) 24 *European Journal of International Law* 933 at 937.

25 C Jalloh, KM Clarke & VO Nmehielle 'Introduction: Origins and issues of the African Court of Justice and Human and Peoples' Rights' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in context: Developments and challenges* (2019) 4-5.

place in South Africa under a ruthless apartheid regime at the time.[26] The proposal was not successful and the experts were also not convinced that African states were ready for a human rights court.[27] They therefore recommended the establishment of the human rights commission, while urging the return to the idea of a court capable of issuing binding decisions in the future.[28] This idea of having a court that would issue binding decisions was revived at the time Africans were waiting for the required signatures for the ACJHR.[29] During this period, the AU heads of state and government came up with a decision to extend the jurisdiction of the ACJHR to adjudicate upon international crimes.[30]

> In February 2009 in Addis Ababa, the Assembly of the Heads of State and Government requested the AU Commission, in consultation with the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, 'to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes'.[31]

This decision was commended and adopted as a recommendation by the AU-EU Technical Ad Hoc Expert Group on the Principle of Universal Jurisdiction in its report of 15 April 2009.[32] In January 2010 the AU Assembly gave directions requiring a report and draft protocol to be prepared.[33]

To comply with the Assembly directions, the AU Commission in February 2010 appointed the Pan African Lawyers Union (PALU) as its consultant to undertake this task. It took PALU four months to complete the task and come up with a draft report and protocol where after it was submitted to the AU Commission in June 2010.[34] The Office of the Legal Counsel of the AU Commission reviewed the report and the draft protocol

26 As above.

27 As above.

28 Jalloh, Clarke & Nmehielle (n 25). See Abass (n 24). See also UN General Assembly, The policies of apartheid of the Government of the Republic of South Africa, 16 December 1966, UN Doc A/RES/2202 (1966).

29 Jalloh, Clarke & Nmehielle (n 25) 4.

30 Jalloh, Clarke & Nmehielle (n 25) 8

31 AU (n 18).

32 AU 'AU-EU technical ad hoc expert group on the principle of universal jurisdiction: Report' (15 April 2009) 11https://reliefweb.int/sites/reliefweb.int/files/resources/3D8556E1F0245F524925762C00229665-Full_Report.pdf (accessed 20 July 2020).

33 Abass (n 24) 934.

34 D Deya 'The future of African court: Progress, prospects, challenges – So what are you going to do?' https://www.lawyersofafrica.org (accessed 19 July 2020).

and issued directives to PALU.[35] PALU worked on the directives and submitted a reviewed report and draft protocol in July 2010.[36] Between August and November 2010 two validation meetings were organised by the AU Commission in Midrand South Africa and various AU organs and institutions and Regional Economic Communities discussed the report and draft protocol, making recommendations.[37] During a summit meeting held in Malabo, Equatorial Guinea between 30 June and 1 July 2011, the AU Assembly requested the AU Commission to speed up the implementation of its previous decision to extend criminal jurisdiction to the ACJHR.[38] This request was made following concerns by the AU Assembly on the indictments and prosecution of African leaders by the ICC.[39] In this meeting the AU Assembly expressed deep concerns on the dishonouring of its requests to the United Nations Security Council (UNSC) to defer the ICC indictment on Sudanese President Al Bashir and the investigation and prosecution of Kenyan leaders following the 2008 post-election violence.[40] The Assembly was also concerned about the ICC indictment against Colonel Qadhafi and the manner in which the prosecution was handling the Libya situation which complicated the efforts of finding a negotiated political solution to the crisis in the country.[41] In January 2012, the AU Assembly sitting in its 18th ordinary session called upon the AU Commission to slot on the agenda of the forthcoming meeting of Ministers of Justice and Attorneys General on Legal Matters, the Progress Report of the Commission on the Implementation of the Assembly Decision on the International Criminal Court for further inputs.[42] The Ministers of Justice and Attorneys General endorsed the draft Protocol extending jurisdiction to the ACJHR in May 2012.[43]

Despite the expectation of the Protocol being adopted by the AU Assembly in July 2012,[44] it was not. Instead, the AU Commission in

35 As above.

36 As above.

37 As above.

38 AU Assembly, Decision on the implementation of the Assembly decisions on the International Criminal Court Doc.EX.CL1670 (XIX), AU Doc Assembly/AU/Dec.366 (XVII).

39 AU (n 38) para 2.

40 AU (n 38) para 3.

41 As above.

42 AU Assembly, Decision on the progress report of the commission on the implementation of the Assembly decisions on the international criminal court (ICC) Doc.EX.CL/710 (XX), AU Doc Assembly/AU/Dec.397(XVIII).

43 Min/Legal/ACJHR-PAP/3(II) Rev.1.5. Extracted from Abass (n 24) 934.

44 Abass (n 24).

collaboration with the African Court of Human and Peoples' Rights were requested to prepare a study on the financial and structural implications resulting from the expansion of the jurisdiction of the African Court on Human and Peoples' Rights.[45]

The Assembly also stressed the 'need for the AU to adopt a definition of the crime of unconstitutional change of government'.[46] It thus requested the AU Commission in collaboration with the AU Commission on International Law and the African Court on Human and Peoples' Rights, to submit the definition for consideration by the policy organs at the next summit scheduled in January 2013.[47] Accordingly, the AU Commission convened an experts' meeting on 19 and 20 December 2012 in Arusha, Tanzania.[48] Among the issues hotly debated was 'whether popular uprising would constitute a crime of unconstitutional change of government'.[49] After a long debate the experts did not materially amend article 28E of the draft Protocol providing for unconstitutional change of government, but resolved to revise the contents of the definition by adding a subparagraph reading:

> Where the Peace and Security Council of the African Union determines that the change of government through popular uprising is not an unconstitutional change of government, the Court shall not be seized of the matter.[50]

On the financial and structural implications the experts simply concluded that the expenses would not be too high: there would only be additional expenses in the expanded structure and operation of the Court.[51]

However, the AU Executive Council were not satisfied with these recommendations and in January 2013 the Council requested the Commission in collaboration with the AU Peace and Security Council,

45 AU Assembly, Decision on the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights Doc Assembly/AU/13(XIX)a, AU Doc Assembly/AU/Dec.427(XIX).

46 AU (n 45) para 3.

47 As above.

48 A Abass, 'The proposed international criminal jurisdiction for The African Court: Some problematical aspects', (2013) 60 *Netherlands International Law Review* 27 at 39-40.

49 Deya (n 34).

50 Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implications, AfCHPR/LEGAL/Doc.3. Extracted from Amnesty International (n 2). See also Abass (n 48).

51 Report on the Workshop on the Definition of Crimes of Unconstitutional Change of Government and Financial and Structural Implications (n 50).

to reflect further on the issue of 'popular uprisings in all its dimensions' and the appropriate mechanism for determining the legitimacy of such uprisings.[52] The AU Commission was also required to submit another report on the structural and financial implications on expansion of the jurisdiction of the Court to entertain international crimes.[53]

In October 2013 the AU Assembly requested the AU Commission in collaboration with all stakeholders to speed up the process of extending criminal jurisdiction of the ACJHR.[54] This decision appears to have been a result of the UN Security Council's refusal to consider the request made by Kenya, and supported by the AU, to defer the proceedings pending at the ICC against the Kenyan President and his Deputy.[55] In May 2014 the AU Specialised Technical Committee (STC) on Justice and Legal Affairs held a meeting in Addis Ababa, Ethiopia, to consider the 2012 Draft Protocol and deliberate on two major issues.[56] First, to resolve the definition of unconstitutional change of government pending since 2012 and second, to reflect on issues concerning immunities of heads of state from criminal prosecution.[57] The STC in fact inserted a new provision into the Protocol granting immunity to heads of state and government and senior state officials.[58]

After these developments, the Protocol was eventually adopted by the AU Assembly in June 2014 sitting at its 23rd Ordinary Session in Malabo, Equatorial Guinea. The Protocol awaits ratification by at least 15 member states to enter into force.[59]

2.2.2 Motivation

There are some factors that led to the expansion of the jurisdiction of the ACJHR. One being the fact that the urge to punish human rights violations and other atrocities falling under international crimes stayed

52 As above.

53 Decision on the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, EX.CL/Dec.766 (XXII). Extracted from, Amnesty International (n 2).

54 AU Assembly, Decision on the progress report of the Commission on the Implementation of the Decisions on the International Criminal Court Doc Assembly/AU/13(XXII), AU Doc Assembly/AU/Dec.493(XXII) para 13.

55 As above.

56 Amnesty International (n 2) 11.

57 As above.

58 As above.

59 Article 11 of the Malabo Protocol.

alive in African states. This is evidenced in article 4(h) of the African Union Constitutive Act whereby the Union is given the right to intervene in a member state in respect of grave circumstances, being war crimes, genocide and crimes against humanity.[60] The objectives of the African Peace and Security Architecture, which include conflict prevention, peace building and post conflict reconstruction and development, promotion of democratic practices, good governance and respect for human rights, also manifest the desire and readiness of African states to fight international crimes.[61]

Some scholars argue that the indictments issued by the national courts in some European states and the ICC against African state officials also fuelled the desire by the AU heads of state to put into action the idea they had for a long time to empower the African Court with criminal jurisdiction.[62] The courts in Belgium, France, Spain and the United Kingdom had issued a number of indictments for crimes against humanity, war crimes, genocide, corruption and torture. These include: an indictment against the former President of Mauritania, Maaouya Ould Sid'Ahmend Taya in France in 2005; an indictment against Rwandan state and military officials in 2007 by a French court for alleged roles in the 1994 genocide; an indictment against the Rwandan Chief of Protocol, Ms Rose Kabuye who was arrested during her visit in Germany in 2008 and extradited to France; and indictments issued in 2009 by a court in Paris against five sitting presidents – Denis Sasso Nguesso of Congo, Teodoro Obiang Nguema of Equatorial Guinea, Omar Bongo of Gabon, Blaise Compaoré of Burkina Faso, and Eduardo Dos Santos of Angola – on allegations of corruption.[63]

60 African Union, Constitutive Act of the African Union, Adopted by the Thirty-Sixth Ordinary Session of the Assembly of Heads of State and Government, 11 July 2000, Lome, Togo.

61 African Union: 'The Peace and Security Council', https://www.au.int/en/psc (accessed 5 August 2021).

62 CB Murungu, 'Towards a Criminal Chamber in the African Court of Justice and Human Rights' (2011) 9 *Journal of International Criminal Justice* 1068 https://doi.org/10.1093/jicj/mqr053 (accessed 9 July 2020). P Apiko & F Agga, 'The International Criminal Court, Africa and the African Union: The way forward', European Centre for Development Policy Management (ECDPM) Discussion Paper 201 (November 2016) https://www.ecdpm.org/dp201_the_international-criminal-court_africa_and_the_african-union-apiko-aggad(0).pdf (accessed 30 June 2020). See also D Deya 'Worth the Wait: Pushing for the African Court to exercise jurisdiction for international crimes' International Criminal Justice, Openspace Issue 2, February 2012 http://www.osisa.org/openspace/regional/african-court-worth-wait (accessed 6 July 2020).

63 CB Murungu (n 62) 1069-1071.

The indictment of Hissène Habré in Belgium also triggered the AU to consider an international criminal court in the region.[64] When Habré was indicted, he was living in Senegal and thus Senegal was required to extradite him to Belgium.[65] Senegal did not honour this request and instead turned to the AU.[66] The AU requested the Committee of Eminent African Jurists to study the extradition request by Belgium and give recommendations on how to handle Habré's case and how future international crimes can be dealt with in the continent.[67] The AU ruled that, as per article 3(h), 4(h) and 4(o) of the Constitutive Act of the Union the trial of Hissène Habré falls under its competence.[68] However, since the AU had no legal organ competent to try Hissène Habré, it mandated Senegal to try him in its competent national courts on behalf of Africa.[69]

The indictments by the ICC against sitting African heads of state, President Omar Al Bashir of Sudan,[70] and President Uhuru Kenyatta of Kenya together with his deputy William Rutto,[71] intensified the desire of extending criminal jurisdiction to the ACJHR. On several occasions the AU condemned the ICC on its indictments against these leaders and called upon the UN Security Council to defer such cases under article 16 of the Rome Statute.[72] Additionally, the AU has expressed its disappointment towards the UN Security Council's refusal to defer the cases.[73] Article 16 of the Rome statute mandates the UN Security Council to defer investigations or proceedings before the ICC for a renewable period of twelve months, through a resolution adopted under Chapter VII of the UN Charter. The

64 'Habré Case: Q & A on "Belgium v Senegal"' *Human Rights Watch News* 29 March 2012 https://www.hrw.org/news/2012/03/29/habre-case-qa-belgium (accessed 7 August 2021).

65 GA Knoops, *An Introduction to the law of international criminal tribunals: A comparative study* Second Revised Edition (2014) 73.

66 As above.

67 AU Assembly, Decision on the Hissène Habré case and the African Union (Doc. Assembly/AU/8(VI) Add.9, AU Doc Assembly/Au/Dec.103 (VI).

68 AU Assembly, Decision on the Hissène Habré case and the African Union, Doc Assembly/AU/3(VII), AU Doc Assembly/AU/Dec.127(VII).

69 As above.

70 Murungu (62). See KT Oropo 'From Kenyatta to Al-Bashir: Africa's Struggle with ICC' *The Guardian* 21 June 2015 https://guardian.ng/politics/from-kenyatta-to-al-bashir=africas-struggle-with-icc (accessed 7 August 2021).

71 Murungu (n 62); Oropo (n 70). See too A Uwazuruike, 'The AU's Journey to an African Criminal Court: A regional perspective', *Global Affairs* (2021) https://www.doi.org/10.1080/23340460.2021.1959375?src= (accessed 7 August 2021).

72 Assembly/AU/Dec.292(XV), Assembly/AU/Dec.397(XVIII), Assembly/AU/Dec.482(XXI).

73 As above.

AU's argument has always been that the indictments destabilise the peace processes in the respected states and, given the situation faced by citizens in conflict zones, peace should take precedence over prosecutions.[74] In its decisions regarding the situation of African leaders facing charges at the ICC, the AU Assembly considered it an abuse of the principle of universal jurisdiction and either insisted that the AU Commission completes the process of extending the criminal jurisdiction to the ACJHR[75] or find ways of strengthening African mechanisms to deal with African problems and challenges.[76] This in fact signifies that fighting back against the ICC was one of the major reasons behind the extended criminal jurisdiction. Other commentators argue that the extended jurisdiction is a mechanism to shield African leaders alleged of committing international crimes from facing prosecution.[77] The authors are of the view that such belief can be based on two main facts: the first is that African leaders have insisted on immunity of serving leaders while pressing on the deferrals from the ICC for the cases referred to it by the UNSC against indicted leaders;[78] and the fact that the Malabo Protocol accords immunity from prosecution to serving heads of state and government.[79]

2.3 Analysis of the Malabo Protocol and its annexed Statute

This section discusses the provisions of the Protocol that impact on the fight against impunity which are different from those of other international criminal statutes such as the ICC and ICTR. However, for a better appreciation of the discussion on the Malabo Protocol, one has to be conversant with other relevant and interrelated regional instruments: The Protocol to the ACHPR on the Establishment of the ACHPR; the Protocol of the Court of Justice of the African Union and the Protocol on the Statute of the ACJHPR. At some points in the discussions reference shall be made to these instruments.

74 As above.

75 Assembly/AU/Dec.292 (XV).

76 Assembly/AU/Dec.397(XVIII), Assembly/AU/Dec.482(XXI).

77 Murungu (n 62), see also CJ Mashamba 'Merging the African Human Rights Court with the African Court of Justice and extending its jurisdiction to try international crimes: Prospects and challenges' (2017) 1 *Journal of the Tanganyika Law Society* 55.

78 Assembly/AU/Dec.397(XVIII), Assembly/AU/Dec.482(XXI).

79 Article 46A bis of the Annexed Statute to the Malabo Protocol.

2.3.1 Structure of the Court

The Malabo Protocol has added a third section to the African Court being the International Criminal Law Section.[80] This Section shall be competent to adjudicate on all crimes enshrined in article 28A to 28M of the Statute annexed to the Malabo Protocol. The addition of this section would have an impact on the budget of the Court as more funds have to be allocated to the Court to cater for the additional expenses related to the activities of the International Criminal Law Section and the added organs. The Section is designed to have three Chambers: the Pre-Trial Chamber constituted by a quorum of one judge, the Trial Chamber constituted by a quorum of three judges and the Appellate Chamber constituted by a quorum of five judges.[81] The Statute of the African Court of Justice and Human Rights changed the composition of judges to 16 judges,[82] from 11 judges initially provided under the Protocol to the ACHPR on the Establishment of an ACJHPR.[83] The Malabo Protocol did not increase the number of judges even with the expanded jurisdiction.[84] The retention of the same number of judges and the addition of a new section of the Court entails that the same judges shall have more work to do.[85] This shall necessitate an increase in the budget of the Court as the sessions of the court shall also increase.

The Malabo Protocol has also increased the organs of the Court and modified the composition of the Office of the Registrar.[86] Apart from the Presidency, Vice-Presidency and the Registry established under the Statute of the ACJHR,[87] there is an addition of two more organs: the Office of the Prosecutor[88] and the Defence Office headed by a Principal Defender.[89] The Office of the Prosecutor comprises the Prosecutor and two Deputy

80 Article 6 of the Annexed Statute to the Malabo Protocol.

81 Articles 10 and 16(2) of the Annexed Statute to the Malabo Protocol.

82 Article 3(1).

83 Article 11.

84 Malabo Protocol, arts 21 and 16 of the Amended Statute of the African Court of Justice and Human and Peoples' Rights.

85 The ACJHR has a total of 16 Judges, and it seems that five out of this number will be assigned to the General Affairs Section and five to the Human and Peoples' Rights Section. The remaining six judges will be assigned to the Criminal Law Section. The six judges who must be competent in international criminal law will have real challenges in carrying out their task because it would almost be impossible to find a blend of judges with experience and competence in all the fourteen crimes covered under the criminal jurisdiction of the court.

86 Article 22B of the Malabo Protocol.

87 Article 22.

88 Article 22A.

89 Article 22C.

Prosecutors and the Prosecutor is empowered to appoint other officers to assist in the functions of the Office.[90] The Registry comprises the Registrar and three Assistant Registrars.[91] In addition, two units: a Victim and Witness Unit and a Detention Management Unit shall be set up by the Registrar within the Registry.[92] The personnel needed and the activities to be carried out in all these organs, ranging from investigations, prosecution, handling of witnesses, and detaining the accused, shall increase the financial burden of the Court.

2.3.2 Sources of law

Article 31(1)(a)-(f) of the Malabo Protocol articulates the sources of law thus: the Constitutive Act; international treaties, of general or particular content, which have been ratified by the contesting states; international custom, as evidence of a general practice accepted as law; general principles of law recognised either universally or by African states; as subsidiary means for the determination of the rules of law, judicial decisions, the writings of the most highly qualified publicists but also the regulations, directives and decisions of the AU; and any other law relevant to the case under consideration. Furthermore, article 31(2) provides that the sources above will not prejudice the power of the court to decide a case *ex aequo et bono* if the parties agree to it. A careful examination of article 31(1)-(2) would reveal that it is very similar to that of the ICJ in article 38(1)-(2) of the ICJ statute.[93]

The Malabo Protocol provides that the ACJHPR must have regard to the Constitutive Act.[94] This is rational as the Constitutive Act is the constituent instrument of the AU. It is observed that the Constitutive Act must not be applied in disregard of article 103 of the UN Charter which recognises the primacy of the Charter over other international legal instruments. Consequently, in the face of conflict between the AU Protocol and the UN Charter, the UN Charter would prevail.[95] The international

90 Article 22A(1, 8 & 9).

91 Article 22B(1).

92 Article 22B(9).

93 United Nations, Statute of the International Court of Justice, 18 April 1946, http://www.icj_statute_e.pdf (accessed 15 June 2020).

94 Article 31(a).

95 See *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] UKHL 58, where the UK House of Lords held that an incompatible provision of the ECHR had to give way to mandatory UN Security Council resolutions in accordance with the UN Charter's primacy. See also GJ Naldi & KD Magliveras 'The African Court of Justice and human rights: A judicial curate's egg' (2012) 9 *International Organization Law Review* 383 at 425.

treaties referred to in article 31 of the Protocol must of necessity include all treaties ratified and adopted under the umbrella of the OAU/AU, other UN treaties that have been ratified and other treaties in addition to the multilateral human rights instruments.[96] Article 31 also includes customary laws that relate to human rights[97] which accommodate the relevant rules of j*us cogens,*[98] judicial decisions,[99] general principles of law and any other law that may be relevant to the case.

It is observed that the ACJHPR will have an unlimited discretion to determine the source(s) of law it would refer to and this should be put to good use although this may have its challenges especially where the ACJHPR fails to properly apply these laws in settling disputes brought before it. It is trite to note that the Court is directed to take cognisance of the general principles of law accepted in Africa. This, however, does not suggest that regional customary laws should be excluded; these principles could include a right to development and second and third generation human rights.[100] It appears that the ACJHPR would not have any valid reason not to rely on the general principles of law that are recognised and accepted by only certain member states, but not by the entire African Continent, if the circumstances permit.[101]

2.3.3 Jurisdiction of the Court

The Malabo Protocol grants the African Court original and appellate jurisdiction and extends the jurisdiction to entertain international and transnational crimes.[102] The jurisdiction is however complementary to: the African Commission on Human and Peoples' Rights (African Commission) protection mandate;[103] and national courts; and, where

96 *Purohit and Moore v The Gambia*, African Commission on Human and Peoples' Rights, (Communication No 241/2001), 16th Activity Report 2002/2003, Annex VII, para 76

97 See *Zimbabwe Human Rights NGO Forum v Zimbabwe, African Commission on Human and Peoples' Rights* (Communication 245/2002) 21st Activity Report 2005-2006, para 180. Customs should be as expressed by the Universal Declaration of Human Rights (UDHR) 1948.

98 For example, the prohibition on Torture. See *Prosecutor v Furundzija* (1999) *International Legal Materials* 317 para 153.

99 Article 46(1) of Malabo Protocol does not recognise the principle of judicial precedent as judicial decisions have no binding force except as between the parties to the case. But to maintain certainty in the law, the Court may have to make reference to its earlier decisions.

100 Naldi & Magliveras (n 95) 426.

101 As above.

102 Article 3 of the Malabo Protocol.

103 Article 4 of the Malabo Protocol.

specifically provided for, Regional Economic Communities' courts for international and transnational crimes.[104] As for the African Human Rights Commission the African Court shall admit cases referred to it by this institution.[105] With respect to the Regional Economic Communities' courts, the African Court can admit a case where the REC has failed to prosecute.[106] Regarding national courts, article 46H(2) provides conditions for determining whether a case is admissible,:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable to carry out the investigation or prosecution;
(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to prosecute;
(c) The person concerned has already been tried for conduct which is the subject of the complaint; and
(d) The case is not of sufficient gravity to justify further action by the Court.

Article 46H(3) provides for the criteria to be used to determine whether a state is unwilling to investigate or prosecute. The Court, having regard to the principles of due process recognised under international law, is required to consider whether one or more of the following exists:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court;
(b) There has been unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;
(c) The proceedings were not or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

In case of inability to investigate or prosecute the Court is required to consider whether

104 Article 46H(1) of the Annexed Statute to the Malabo Protocol.

105 Article 30(b) of the Malabo Protocol.

106 Article 46H(1).

> due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[107]

The Court shall only exercise jurisdiction with respect to crimes committed after the entry into force of the Protocol and Statute.[108] Where a state accedes to the Protocol and Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of the Protocol and Statute for that particular state.[109]

Just like the Rome Statute of the ICC, the Malabo Protocol does not oust the jurisdiction of national legal systems in entertaining crimes enshrined in the Protocol where they have the ability and willingness to do so.[110] This is in fact the essence of having an international criminal court whereby the international community assists incapable individual states in bringing offenders of serious crimes to justice and hence accords justice to the victims of such crimes.

The provision of article 46H of the Malabo Protocol sets out the complementary relationship in a fashion that is similar to what is obtained in the ICC Statute.[111] The intendment of article 46H is that the African Court can accept a case, not only after the national court of an indicted party has proved 'unwilling' or 'unable' to prosecute, but also after a REC court that had jurisdiction has also failed to prosecute that person.[112] Under the complementarity rule of the ICC, once a national court has failed the twin criteria, the case becomes admissible but a 'double failure' must be achieved before a case will be admissible in the African Court. Not only will the national court fail, the REC must also fail for the twin standard to be achieved.[113] Adding the REC's under the article 46H provision is confusing as most African states are members of more than one REC. The problem of which REC should be considered for purpose of the complementarity rule when a dispute is to be submitted remains in cases of multiple memberships by the state of the accused person. It is also important to note that where national courts may be accessible

107 Aticle 46H(4) of the Annexed Statute to the Malabo Protocol.

108 Article 46E(1).

109 Article 46E of the Annexed Statute to the Malabo Protocol.

110 Article 46H(2)(a)-(d) of the Malabo Protocol.

111 Article 17 of the Rome Statute of the ICC.

112 Abass (n 48) 944.

113 As above.

to individuals, regional mechanisms are not automatically accessible to individuals and this has further worsened the situation.[114]

The interpretation of the Malabo Protocol in this regard is that regional courts should have jurisdiction but this is not the case. Regional courts have received backlash for exercising jurisdiction over human rights cases brought before it. In 2009, the ECOWAS Court was portrayed in a bad light for exercising its human rights jurisdiction in a case involving the government of Gambia.[115] The 2005 Supplementary Protocol gave the ECOWAS Court jurisdiction to entertain human rights cases.[116] Article 9 specifically provides for individuals to approach the court when their rights have been infringed and this applies to all private individuals in the 15 West African countries.[117] This they can do without exhausting local remedies.

Alter et al noted that the first human rights suit was filed in 2007 by an NGO, the Media Foundation for West Africa, on behalf of a Gambian journalist who had been detained and allegedly tortured for publishing articles that were critical of the government.[118] The suit generated negative reactions.[119] The Gambian government did not file documents and did not appear in court despite several requests.[120] In 2008 the ECOWAS Court reached a decision in the case and ordered the Gambian government to release the journalist from detention and to pay him $100 000.[121] Although this was a landmark judgment, for exposing cases of repression of journalists it received unprecedented negative publicity, nevertheless the Gambia was requested to comply fully with the decision of the ECOWAS Court's judgment.[122]

114 As above.

115 KJ Alter, JT Gathii & LR Helfer 'Backlash against International Courts in West, East and Southern Africa: Causes and consequences'(2016) 27 *The European Journal of International Law* 393.

116 As above.

117 See Supplementary Protocol A/SP.1/01/05 amending the Preamble and Articles 1, 2, 9, and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Protocol (2005 Supplementary Protocol) (2005) https://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf (accessed 13 June 2021).

118 As above.

119 Alter, Gathii & Hefer (n 115).

120 As above.

121 *Manneh v The Gambia* (2008) AHRLR 171 (ECOWAS 2008).

122 T Rhodes 'Six senators call for Ebrima Manneh's immediate release'Committee to Protect Journalists (23 April 2009) https://www.cpj.org/2009/04/six-senators-call-for-ebrima-mannehs-immediate-rel/amp/ (accessed 8 August 2021).

The second case before the ECOWAS Court concerned the detention and torture of Musa Saidykhan, another journalist who pursued his case from the safety of exile.[123] In this case the Gambian government responded to the suit with both legal and political arguments in addition to the claim that the suit was 'an affront to the Gambian sovereignty'.[124] The Court was not moved by the government's claim and went ahead to publish an interim ruling in 2009 rejecting the government's objections.[125] The resultant effect of the failure to defeat the suit, was the Gambian President Jammeh re-strategising by working with ECOWAS to challenge the jurisdiction of the Court to entertain human rights cases. In 2009 September, the Gambia submitted an official request to the ECOWAS Commission, the sub-regional Secretariat, asking that the 2005 Supplementary Protocol be revised.[126]

The East African Community (EAC) was re-established in 1999 with renewed commitment on sub regional integration and cooperation of states, the private sector and the East African people.[127] The judicial arm of the EAC has a similar history. The EACJ replaced the East African Court of Appeal which ceased to be operational in 1977. The EACJ, which launched in 2001, has the responsibility of interpreting and applying EAC treaties and other community texts.[128] The EAC's jurisdiction over human rights has been very controversial. This is because the EAC's treaty expressly provides that the EACJ shall have a human rights jurisdiction 'as will be determined by the [EAC] Council at a suitable subsequent date' once member states 'conclude a protocol to operationalize the extended jurisdiction'.[129]

This means that the EACJ unlike its ECOWAS counterpart does not have jurisdiction to hear cases involving human rights abuses without the adoption of the Protocol by member states. Unfortunately, the EACJ cases are mostly human rights based in addition to cases involving violations of the rule of law and social justice, despite the non-adoption

123 *Saidykhan v The Gambia* ECW/CCJ/RUL/05/09 (30 June 2009). See 'ECOWAS torture case against the Gambia nears end' *Afrol News* http://www.afrol.com/articles/36623 (accessed 8 August 2021).

124 *Saidykhan* (n 123) para 11.

125 *Saidykhan* (n123) para 17.

126 Alter, Gathii & Helfer (n 115) 297.

127 Alter, Gathii & Helfer (n 115) 300.

128 Treaty for the Establishment of the East African Community (EAC Treaty) 1999. 2144 UNTS 255, art 27(1).

129 Decisions of the East African Court of Justice (EACJ) https://www.eacj.org/?page_Ibid=2414 (accessed 13 June 2021).

of the Protocol.[130] This has been a source of concern to member states of the EAC. The EACJ recognises that it is not a human rights tribunal but has always asserted its power to interpret EAC legal instruments relating to human rights.[131] The Attorney General of Kenya on 7 December 2006 chaired the meeting of the Attorney-Generals of the EAC to finalise the draft amendment to the EAC treaty.[132] On the 8 December 2006, the draft amendment was approved by the Council of Ministers.[133] Uganda, Tanzania and Kenya adopted the amendment and in May 2007, it came into force. This amendment changed the structure, jurisdiction and access rules of the EACJ.[134]

The South African Development Community (SADC) was established in the early 1990's.[135] After the SADC Tribunal ruled in favour of white farmers in dispute over land seizures, Zimbabwe prevailed upon SADC member states to suspend the tribunal and strip its power to entertain complaints from private litigants and this to a reasonable extent was successful.[136] Following the trend in the REC's discussed above, one wonders how effective the complementarity principle of the ACJHRs as enshrined in article 46H would be. With the hurdles already put in place in the REC's, it can be concluded that Africa is not ready to fight impunity in the region.

Again, Mystris noted that at present none of the REC have criminal jurisdiction.[137] There is no known REC which has successfully adopted international crimes into its court's jurisdiction.[138] The learned author noted that the EACJ was rumoured to be extending its jurisdiction to include individual criminal responsibility but that is yet to happen.[139] The author further proposes, and rightly so, that if the REC introduce criminal

130 EAC Treaty, arts 6(d) (fundamental principles) and 7(2) (operational principles).

131 Alter, Gathii & Helfer (n 115) 301.

132 Report of the Extraordinary Meeting of the Attorneys General on the Proposed Amendment of the Treaty for the Establishment of the East African Community, Reference EAC/AG/EX/2006, 7 December 2006, para 2.0. See Alter, Gathii & Helfer (n 115) 304.

133 Report of the Extraordinary Meeting of the Council of EAC Ministers, 7-8 December 2006.

134 Alter, Gathii & Helfer (n 115) 304.

135 Alter, Gathii & Helfer (n 115) 306.

136 Alter, Gathii & Helfer (n 115) 306-314.

137 D Mystris *An African Criminal Court: The AU's rethinking of international criminal justice* (2020) 223.

138 As above.

139 As above.

jurisdiction, there is a possibility of having a proliferation of courts to try international crimes with overlapping state membership as a result of the overlapping membership of states within the REC's.[140] This has the effect of negating the broadening of accountability thereby encouraging additional mechanisms to pursue prosecutions, opening the ICL mechanism up to delays and/or obstructing its ability to exercise jurisdiction.[141] The adoption of memorandums of understanding (MOUs) or formal policies on cooperation and the interpretation of the admissibility criteria can minimise the challenge of several courts having criminal jurisdiction. Again, if there are more courts working collaboratively, international criminal law (ICL) will be improved as prosecutions will increase. This will impact on retribution, deterrence, peace and security.[142]

2.3.4 Criminal responsibility and modes of responsibility

Criminal responsibility

The Protocol provides for two categories of criminal responsibility: individual responsibility and corporate responsibility. Article 46B provides for individual criminal responsibility. Just like the ICTR and ICTY, the Statute of the ACJHPR formulates this principle in line with the long established principle of the Nuremburg tribunal.[143] As such, a person guilty of committing a crime under the Statute shall be held individually responsible for the crime. Furthermore, an accused shall not be relieved of criminal responsibility, or his punishment mitigated, by virtue of his official position.[144] A superior shall be responsible for acts of their subordinate if they knew or had reason to know that the subordinate was about to or had committed such acts, and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the subordinate.[145] While an accused's criminal responsibility is not relieved due to acting pursuant to government or superior orders, the Court may consider the fact in mitigation of punishment if justice requires so.[146]

The Statute gives the Court jurisdiction over legal persons excluding states and provides for corporate responsibility under article 46C of the Statute. This is a new development and is a principle that has yet to find

140 Mystris (n 137) 224. See Abass (n48).

141 Mystris (n 137) 224.

142 As above.

143 Mashamba (n 77) 42.

144 Mashamba (n 77) 42. See also art 46B of the Statute Annexed to the Malabo Protocol.

145 Mashamba (n 77) 42.

146 As above.

its way to the international level.[147] The intention to commit an offence by a corporation may be established by proving that the act constituting the offence is within the policy of the corporation.[148] A policy may be attributed where it provides the most reasonable explanation of the conduct of that corporation.[149] The knowledge of the commission of an offence may be established by proving that the actual or constructive knowledge of the relevant information was possessed within the corporation.[150] Knowledge may be said to have been possessed within a corporation even where the relevant information is divided between corporate personnel.[151] Natural persons within a corporation who are perpetrators or accomplices in the same crimes shall as well be criminally responsible.[152]

The Malabo Protocol in fact is very progressive as it is the first instrument to bring corporate responsibility into an international criminal court. The trend of international courts, that is, the ICC, ICTR and ICTY has been to deal only with individual criminal responsibility.[153] During negotiations on the Rome Statute attempts to give a mandate to the ICC over corporations were made but this did not go through. This is because the criminal justice system regarding corporate criminal responsibility differs from one jurisdiction to another.[154] For example during the Kampala Review Conference in 2010, this was brought as an agenda item, but could not be thoroughly discussed as the debate on the crime of aggression preoccupied the sessions.[155]

Thus article 46C of the Statute annexed to the Malabo Protocol shall bring justice to the victims of international crimes committed by corporations, which cannot be taken to the ICC. Additionally, since the jurisdiction of the African Court is complementary to national jurisdictions it will assist national jurisdictions in establishing accountability mechanisms for corporations responsible for the commission of international crimes as

147 Mashamba (n 77) 43.

148 Art 46C(2) of the Malabo Protocol.

149 Art 46C(3) of the Malabo Protocol.

150 Article 46C(4) of the Malabo Protocol.

151 Article 46C(5) of the Malabo Protocol.

152 Article 46C(6) of the Malabo Protocol.

153 Article 25(1) of the Rome Statute, art 5 of the ICTR Statute and art 6 of the ICTY Statute.

154 KO Mrabure & A Abhulimhen-Iyoha 'A comparative analysis of corporate criminal liability in Nigeria and other jurisdictions' (2020)11 *Beijing Law Review* 429 https://www.scirp.org/pdf/blr_2020042114144981.pdf (accessed 18 June 2021).

155 Mashamba (n 77) 43-47.

most of the criminal justice systems at national level do not recognise corporate criminal responsibility.[156]

The Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Activities provides that:

> State parties shall ensure that their domestic law provides for a comprehensive and adequate system of legal liability of legal and natural persons conducting business activities, domiciled or operating within their territory or jurisdiction, or otherwise under their control, for human rights abuses that may arise from their own business activities, including those of transnational character, or from their business relationships.[157]

This is a solid foundation mandating the states to have in place 'a comprehensive and adequate system' of legal liability for 'human rights abuses'. The instrument further reveals that the states have the authority to provide measures under their domestic laws to establish the criminal or functionally equivalent legal liability for legal or natural persons conducting business activities including foreign corporations for acts of omission that constitute attempt, participation or complicity in a criminal offence as contained in this instrument and as defined in the domestic criminal code of a state.[158]

The lack of uniformity in the administration of criminal justice in various jurisdictions has its own challenges. The standard required in proving criminal cases is higher than that of civil cases as criminal cases are established on proof beyond reasonable doubt. Therefore, the authors are of the view that there will be challenges in conducting investigations in order to obtain evidence to prove the offences committed by companies outside the African territory if the Malabo Protocol does not apply extraterritorially or in the absence of 'universal jurisdiction'. Another challenge would be in situation where companies operate within African states which have not ratified the Malabo Protocol and do not have corporate criminal responsibility within their jurisdictions. In this case, African nations are advised to amend their criminal legislations in this regard or alternatively improve the torts laws operational in their

156 As above.

157 Article 8(1) of OEIGWG Chairmanship, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Activities, Second Revised Draft, 06 August 2020 (Draft Legally Binding Instrument).

158 Article 8(11) of the Draft Legally Binding Instrument.

territories in order to ensure accountability of corporations operating within their territories.

Fortunately, a major component of the Draft Legally Binding Instrument is the provision of legal liability under article 8. This provides a good foundation to effectively address the accountability and liability gaps that would arise from the complex structures of corporate organisations and their supply chains that are dominating the global economy.[159] Additionally, the instrument provides for the duty of due diligence for legal and natural persons conducting businesses and this entails the duty to prevent other legal and natural persons from causing or contributing to human rights abuses.[160] It went further to note that the

> human rights due diligence shall not automatically absolve a legal or natural person conducting business activities from liability for causing or contributing to human rights abuses or failing to prevent such abuses by a legal or natural person as laid down in Article 8.7.[161]

The Draft Legally Binding Instrument also ensures that the rights-holders have effective access to remedies. It provides that jurisdiction established under the article shall be 'obligatory' and that courts should not decline jurisdiction on the basis of *forum non conveniens*.[162] This provision is critical as it would prove extremely valuable in expanding access to justice for right-holders. Multinational corporations will no longer be able to raise this doctrine in order to evade prosecution and accountability, which in most cases has been a major set-back for those seeking remedies. Article 9(4) provides that courts have jurisdiction over non-domiciled legal or natural persons 'if the claim is closely connected with a claim against' a domiciled entity. This would enable joint litigation against parent and subsidiary companies. And where there is no other effective forum guaranteeing a fair trial and there is sufficiently close connection to the forum, the court of the state party concerned shall have jurisdiction over non-domiciled entities.[163] Article 10 is a very critical provision as it ensures that barriers to access to justice can be removed in practice. One major constraint to states will be the inability to rely on the instrument given the requirement

159 One important priority for trade unions is that the Draft Legally Binding Instrument ensures that transnational corporate entities are held accountable for violations of human rights occurring through their operations and activities irrespective of how they were created, owned or controlled.

160 Article 8(7) of the Draft Legally Binding Instrument.

161 Article 8(8) of the Draft Legally Binding Instrument.

162 Article 9(3) of the Draft Legally Binding Instrument.

163 Article 9(5) of the Draft Legally Binding Instrument.

that it can only be used by state parties. African states are encouraged to become parties to this instrument as it would help strengthen the legal capacity at the national level in this regard and also help to ensure that the complementarity principle is achieved.

Modes of responsibility

Article 28N provides for the ways in which a person can fall under criminal responsibility. The provision is more or less a replica of the ICTR[164] and ICTY[165] Statutes. It specifically enlists the actions that can amount to commission of crimes under the Statute which include: inciting, instigating, organising, directing, facilitating, financing, counselling, or participating as a principal, co-principal, agent or accomplice in commission of the offence; and aiding, abetting or attempting to commit an offence. Accessories before or after an offence, collaborators and conspirators to the commission of offences under the Statute are also included under the article. Although article 28N has provided modes of responsibility, this article lacks clarity and specificity required to keep the trials moving and provides workable platforms for the effective adjudication of the crimes within the jurisdiction of the Court.[166] If article 28N remains in its current form, the ACJHPR will face difficult challenges in respect of many of the proposed new modes of liability, including their application to a range of old crimes such as genocide, crimes against humanity or new ones such as corruption and piracy and new types of entities such as legal persons (corporations) and their impact on future trials.[167] The AU's approach to modes of liability in article 28N of the Malabo Protocol, is ambitious and innovative, especially with regards to the addition of new modes of liability that provide an expanded range of ways that crimes may be committed.[168] It is yet unknown whether these additions will produce sufficiently specific or certain modes of liability to facilitate effective or more efficient prosecutions.[169] Modes of liability are principles which are used to link the accused with particular actions, criminals with other criminals, past decisions with consequences, either foreseen or unforeseen

164 Article 6(1) of the ICTR Statute.

165 Article 7(1) of the ICTY Statute.

166 W Jordach QC & N Bracq 'Modes of liability and individual criminal responsibility' in CC Jalloh, KM Clarke & VO Nmehielle (eds) *The African Court of Justice and Human and Peoples' Rights in Context* (2019) https://www.cambridge.org/core/books/african-court-of-justice-and-human-and-peoples-rights-in-context/modes-of-liability-and-individual-criminal-responsibility/0457552E16ED54264A9B7CC84F1CC689/core-reader (accessed 17 June 2021).

167 As above.

168 As above.

169 As above.

and punishment with moral desert.[170] In essence the modes of liability listed under article 28N must be clearly and specifically defined if they would serve any purpose in the practical setting of a courtroom and if not the ACJHPR will face a lot of challenges in applying them. Some of the challenges with the provision may be as a result of drafting errors like the absence of a clear difference between principal and accessory liability, the other problem may originate from practical missteps that include the introduction of a range of new modes of liability such as organising, directing, facilitating, financing and counselling which appear to be duplicative or overlapping, with no apparent purpose other than to provide anxious prosecutors with the reassurance that every iota of conceivable misconduct is captured within its reach.[171]

2.3.5 Immunity from prosecution

Article 46A bis of the Statute annexed to the Malabo Protocol grants immunity from prosecution to heads of state and senior state officials:

> No charged shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other Senior State officials based on their functions, during their tenure of office.

The immunity as it stands in the provision is not absolute, that is, it only lasts for a period when the one is serving in office, the heads of state and government and the senior officials can be prosecuted when they get out of office.

This provision on functional immunity has raised a lot of concern since its adoption, not without cause.[172] The immunity clause of the ACJHR is at variance with international law jurisprudence as all the courts discussed

170 JD Ohlin 'Second-order linking principles: Combining vertical and horizontal modes of liability' (2012) 25 Leiden Journal of International Law 771 at 772.

171 Jordach & Bracq (n 166).

172 Apiko & Aggad (n 62)4; International Justice Resource Centre 'African Union approves immunity for government officials in amendment to African Court of Justice and Human Rights' (2 July 2014) http://www.ijrcenter.org/2014/07/02/African-union-approves-immunity-for-heads-of-state-in-amendment-to-african-court-of-justice-and-human-rights-statute/ (accessed 16 June 2021); Jalloh, Clarke & Nmehielle (n 25) 29-36; Pedretti (n 7) 30-428; Deya (n 34); Amnesty International (n 50) 26-27; Abass (n 48) 41-42; M du Plessis 'Implications of the AU's decision to give the African Court jurisdiction over international crimes' Institute for Security Studies (ISS), Paper 235 (June 2012) 9 https://www.issafrica.org/publications/papers/ (accessed 16 June 2020).

in this paper had jettisoned official immunity for international crimes. For instance, article 6(2) of the statute of the SCSL provides that:

> The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

In line with the above provision the SC-SL in *Prosecutor v Charles Taylor* held that 'the principle seems now established that sovereign equality of States does not prevent a Head of State from being prosecuted before an international criminal tribunal or court'.[173] International law does not recognise immunity enjoyed by individuals who have committed international crimes. They are made to face trials and if convicted serve the sentence. We noted earlier, that this principle could be traced to Nuremberg,[174] although it is believed it started before Nuremberg.[175]

Where does this leave the African Court on its quest to tackle impunity in the region? If serving heads of state in Africa who committed crimes cannot be tried on grounds of immunity, is there a possibility that they would ever be tried when article 46E(1) of the Malabo Protocol shows that the Court will not have retrospective jurisdiction. This is important because, crimes that were committed before the coming into force of the Rome Statute are inadmissible in the ICC because of the issue of retrospective jurisdiction.[176] In the situation at hand, the ICC is still relevant in Africa as the Rome Statute does not recognise immunity and the crimes are within the jurisdiction of the ICC. If the tenure of the present heads of states and government already indicted for international crimes end before the court becomes operational, they would not be held accountable for their crimes in Africa. While customary international law recognises that serving heads of state and government and senior state officials enjoy immunity from criminal jurisdiction of a third state, it admits no exception when the criminal proceeding is before an international criminal court.[177]

The position adopted by the African Union for its proposed Court is a clear shift from the established norms of other international courts and

173 Case SCSL-2003-01-1. Appeals Chamber, Decision on Immunity from Jurisdiction (31 May 2004) para 52

174 Article 6(a)(b)(c) of the United Nations, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement), 8 August 1945

175 Article 227-230 of the Versailles Peace Treaty of June 1919.

176 Article 24 of the Rome Statute of the ICC.

177 Amnesty International (n 50), 26-27.

tribunals as highlighted in this chapter. This is a clear indication that the legitimacy and credibility of the proposed Court is in doubt. This clause will hinder progress in respect of the investigations and prosecution of incumbent African heads of state and senior government officials who abuse their office by using same to plan, order, and instigate international crimes in Africa. If this clause becomes effective, then impunity will engulf the African continent and the efforts of other tribunals in Africa towards fighting impunity will be lost.

It is trite to note that the immunity clause is also at variance with the objectives and organising principles of the African Union. A major objective of the Union is to protect and promote human rights as enshrined in the Charter of the Union.[178] The authors of this contribution have already noted the commitment of the Union in respect of article 4(h) of the Constitutive Act for war crimes, genocide and crimes against humanity. The Constitutive Act of the African Union mandates the AU to respect human rights[179] and sanctity of human life, condemn and reject impunity and political assassinations.[180] These laudable objectives and principles of the AU would be weakened by the immunity clause.

Article 46A bis grants immunity to serving heads of state/government and senior state officials based on their functions. An acceptable interpretation of this would be that no criminal proceeding can be commenced against a sitting head of state/government official until they leave office. This chapter is of the view that the immunity clause should also consider national legislations as some national laws do not recognise the immunity of heads of state and government officials.

What exactly is the purpose of immunity? It has been canvassed that removal of immunity will open doors for litigation which would distract the officials from carrying out their functions.[181] On the other hand, immunity shields government officials from prosecution and many in Africa perpetuate their terms in office and continue to commit heinous crimes using their offices. It is the view of the authors that the immunity clause in the Malabo Protocol should be looked at again as it is surrounded by controversy and the argument that impunity in Africa may never end

178 Article 4(m) of the Constitutive Act of the AU.

179 As above.

180 Article 4(o) of the Constitutive Act of the AU.

181 S Fabamise 'Constitutional immunity clause and the fight against corruption in Nigeria' (2017) 8 *The Journal of Sustainable Development Law and Policy* 155 https://www.ajol.info/index.php/jsdlp/article/view/163328 (accessed 19 June 2021).

may find justification on this ground. The Rome Statue does not recognise immunity based on officials capacity as noted above.[182]

2.3.6 Victim participation, compensation and reparations

Under article 45 victims of international crimes are given an opportunity to participate in the proceedings to obtain compensation or reparations. The Statute directs the Court to establish in the Rules of the Court principles relating to reparations to victims, including restitution, compensation and rehabilitation.[183] The Court is empowered to determine the scope and extent of any damage, loss or injury to or in respect of the victim in its decision, but it will have to state the principles on which it acts upon.[184] The Court can do so upon request by the victim or a representative of the victim or, under exceptional circumstances, on its own motion. With respect to its international criminal jurisdiction, the Court is empowered to make orders directly against a convicted person specifying appropriate reparations to, or in respect of victims including restitution, compensation and rehabilitation.[185] The Court may invite the convicted person or representative, the victim or representative, or other interested persons or states to make representations before it makes an order for reparations.[186]

This kind of development on reparations to victims of crimes under international criminal courts was brought by the Rome Statute of the ICC,[187] thus article 45 is in line with the ICC Statute. This is unlike the ICTR Statute where victims were required to resort to national courts for reparation claims,[188] something which has left victims of the Rwandan genocide without justice in terms of reparations against perpetrators tried in the Tribunal.[189] Reparations to victims are a very crucial part in the justice process. By making repairs victims see that their suffering has been acknowledged, therefore having such a justice process in the African Court is highly commendable.

182 Article 27 of the Rome Statute of the ICC, also art 7(2) of the ICTY.

183 Article 45 of the Malabo Protocol.

184 As above.

185 As above.

186 As above.

187 Article 75 of the Rome Statute.

188 Article 106 of the ICTR Rules of Procedure and Evidence.

189 LM Mongella *The right to compensation for victims of internal armed conflicts in East Africa: A case study of genocide victims in Rwanda* (2014) 155-175.

2.3.7 Rights of the accused person

Under article 46A(1-3), the Statute annexed to the Malabo Protocol clearly provides for the rights of the accused person. Under this provision, all accused persons are to be given equal treatment before the Court and are entitled to a fair and public hearing, subject to orders made by the Court in protecting victims and witnesses. The accused shall as well be presumed innocent until proven guilty whereby the standard of proof is beyond reasonable doubt.

In line with the above mentioned rights, article 46A(4) of the Statute provides for the minimum guarantees entitled to an accused person. These include: to be informed promptly and in detail of the nature and cause of the charge in the language he/she understands; to be accorded adequate time and facilities to prepare his/her defence and to have a legal representative; and to be tried without undue delay.

Article 46M of the Statute directs the AU Assembly to establish a 'Trust Fund' within the jurisdiction of the Court for the purposes of legal aid and assistance provision and also for the benefit of victims of crimes and human rights violations and their families. Apart from the contribution of member states in funding the Trust Fund, article 46M (2) of the Malabo Protocol empowers the Court to order money and other property collected through fines or forfeiture to be transferred to the Trust Fund. Amnesty International observes that:

> [A] Trust Fund which may be used for the benefit of the victims has a clear precursor in the case of the ICC's Trust Fund for Victims, which can be used principally to provide reparations to victims of international crimes.[190] The management and maintenance of such fund at the ICC has required a full time secretariat. In relation to the use of a trust fund for legal aid, whilst the use of a trust fund-presumably to be funded voluntarily – may serve to provide some resource for the benefit of the defence, it must be recalled that the right to a paid defence and equality of arms are fundamental aspects to a fair trial.[191]

It is not clear whether or not a trust fund for legal aid at the ACJHPR will be able to serve this purpose. Again, the use of the trust fund for legal aid and for the benefit of the victims raises questions of how the funds would be held and disbursed, since it would be serving different and presumably

190 Amnesty International (n 2) 22-23.

191 As above.

conflicting purposes.[192] The victim can also represent themselves in person or through an agent.[193] As much as an accused person is brought to court, he/she/they is innocent until proven guilty and convicted by the court as such. Thus, the provisions of article 46A and M safeguard this right of the accused which is also protected under various national and international instruments.

3 Does the African mechanism have the prospect of fighting impunity? Positive aspects and challenges

The extension of criminal jurisdiction to the African Court has been associated with a mixture of feelings from commentators regarding whether the fight against impunity can successfully be achieved on the continent.[194] The major concerns about the successful existence of the Court are the willingness of the political leaders, the immunity given to these leaders and the financial capacity to effectively run the Court.[195] Considering all these concerns, can Africans really hope for a brighter future in fighting impunity under the African Court? In striving to answer this question, this part analyses the positive aspects of the criminal jurisdiction and the challenges towards the effective operation of the Court.

3.1 Positive aspects of the extended criminal jurisdiction

There are a number of positive aspects in the extension of the criminal jurisdiction. These include: the AU exercising its right to fight impunity, prosecuting international crimes which occurred in Africa in an African setup and bringing the fight against impunity closer to the African people, which would accord them the opportunity to participate in the process, particularly the victims. It will encourage forum shopping, enabling the actors to select the forum that best suits their interest either the ICC or the regional court. This will affect cases referred to the ICC by the Security Council if the ACJHPR works successfully but if it fails for any reason to prosecute those that have committed human rights violations, the ICC would still have jurisdiction to try the cases. Where litigants are not

192 As above.

193 Article 36(6) as amended by art 18 of the Malabo Protocol.

194 Deya (n 34), Abass (n 48), Murungu (n 62) & Mashamba (n 77).

195 Amnesty International observed that most African States, 33, are members of the ICC and if they were also to sign up to the Malabo Protocol, they will have to contribute financially to both the ICC and the ACJHR and this may be a heavy financial burden for the states. The EU also expressed concerns on the effectiveness of the Court due to the inclusion of immunity clause for Heads of States and senior government officials.

satisfied with the proceedings at the ACJHPR, they can resort to the ICC. Domestic trials will be enhanced as the right of primacy will be exercised.

3.1.1 Exercising its right to fight impunity under the Constitutive Act

Among the principles governing the functions of the AU is the fight against impunity. Categorically, under article 4(h) of the AU Constitutive Act, the AU is given the right to fight impunity, particularly over international crimes. Article 4(h) specifically lists one of the principles being:

> [T]he right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

Likewise, under article 4(o) the AU condemns and rejects impunity. In all its decisions regarding the ICC or the extension of criminal jurisdiction to the African Court, the AU has reiterated its commitment to fight impunity.[196] Most individual African states have fulfilled this commitment by ratifying the Rome Statute or acceding to it. Some of them, particularly Uganda, have even established specific international crimes divisions in their national court systems.[197] Uganda, however, has faced criticism that the prosecutions have been directed to members of the Lord's Resistance Army (LRA) only, leaving out members of the government armed forces who are also alleged to have committed atrocities against civilians. Nevertheless, to the authors' view, despite these criticisms, the establishment of the international crimes division is a positive step in the fight against impunity regardless of who started to be prosecuted. The authors believe that since the legal mechanism is in place, perpetrators from the other side can face justice in future.

As a regional body, the AU further showed its commitment to fight impunity when it passed a decision mandating Senegal to prosecute Hissène Habré in its national courts, contributed funding for the Court and urged member states and other stakeholders to contribute towards funding the Court.[198] Therefore, the act of extending criminal jurisdiction to the African Court signifies the continuation of the AU's commitment to fight impunity by offering a permanent mechanism.

196 Assembly/AU/Dec.292(XV), Assembly/AU/Dec.397(XVIII), Assembly/AU/Dec.482(XXI).

197 L Moffett *Justice for victims before the International Criminal Court* (2014) 224.

198 AU Assembly, Decision on the Hissène Habré Case, Doc Assembly/AU/9(XVI), AU Doc Assembly/AU/Dec.340 (XVI).

3.1.2 Solving African problems in an African setup

In spite of the fact that international and transnational crimes have been committed, or can be committed, in any continent, the peculiarity of these crimes in Africa stems from its prevalence and the lack of accountability. The peculiarity is evidenced in the prevalence, magnitude and nature of the commission of the crimes.[199] Examples include: the horrible events of the 1994 Rwandan Genocide, believed never to have been witnessed in the world since the holocaust in Nazi Germany;[200] the amputation of limbs and lips in northern Uganda is beyond imagination;[201] the raping of women and girls as a weapon of war and the manner in which it is committed, particularly in the Democratic Republic of Congo (DRC) has never been witnessed anywhere in the world and has led to the country being labelled the 'rape capital of the world';[202] the abduction by Boko Haram of 276 school girls in Chibok-Bornu State, Nigeria and the atrocities suffered by these girls shocked the world with various national and international actors raising alarm;[203] recruitment of child soldiers has been rampant in African conflicts compared to other continents;[204] and the looting of natural resources has affected a number of African states by fuelling and intensifying civil wars.[205] Countries such as Angola, the Central African Republic, the DRC, Ivory Coast, Liberia, the Republic of Congo and Sierra Leone have suffered, and some are still suffering, due to being blessed with natural resources.[206]

While a few of the perpetrators in the above mentioned scenarios have been prosecuted or indicted by the ICC,[207] it would have been more

199 A Abass 'Historical and political background to the Malabo Protocol' in G Werle & M Vormbaum (eds) *The African Criminal Court: A commentary on the Malabo Protocol* (2016) 18.

200 A Smeulers & F Grünfeld *International crimes and other gross human rights violations: A multi- and interdisciplinary textbook* (2011) at xiii.

201 SR Whyte, L Meinert & J Obika 'Untying wrongs in Northern Uganda' in WC Olsen & WEA van Beek (eds) *Evil in Africa: Encounters with the everyday* (2016) 43-58.

202 UE Yang *The third world: Where is it? Forgotten corners of the world – But we have life and space* (2011) 131.

203 E Ezedani *Boko Haram Chibok girls and all matters Nigeria security* (2015) 1-8.

204 C Ryan *Children of war: Child soldiers as victims and participants in the Sudan civil war* (2012) 1.

205 A Alao *Natural resources and conflict in Africa: The tragedy of endowment* (2007) 4-9. See also M Ross 'The natural resource curse: How wealth can make you poor' in I Bannon & P Collier (eds) *Natural resources and violent conflict: Options and actions* (2003) 17-42.

206 As above.

207 *The Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06, *The Prosecutor v Joseph Konyi and Vincent Otti* ICC-02/04-01/05, *The Prosecutor v Bosco Ntaganda* ICC-01/04-02/06.

impactful where victims could easily follow up the justice process and feel connected to it. This is because for one to see that the suffering resulting from crimes has been considered, justice should not only be done, but should be seen and felt to be done, specifically by victims. Moreover, the trend before the ICC and the ad hoc tribunals has been to deal with few offenders, and particularly high profile individuals.[208] It is believed that in the African Court the number of perpetrators indicted to face justice could be greater. This is because of the additional number of crimes which in reality have caused suffering to the people in Africa, particularly the crime of unconstitutional change of government.

The crime of unconstitutional change of government is a serious problem in Africa, being one of the main sources of civil wars.[209] Since the crime is not within the mandate of the ICC it is an obligation of the AU to find mechanisms of dealing with it.[210] Under article 25(5) of the African Charter on Democracy, Elections and Governance, African states are empowered with discretion to create a competent court to try those responsible for unconstitutional change of government. The African Court shall therefore serve this purpose.

3.1.3 Crimes not within the jurisdiction of the ICC

Apart from the core international crimes of genocide,[211] war crimes,[212] crimes against humanity[213] and the crime of aggression,[214] the Malabo Protocol has empowered the African Court to try ten other crimes: the crime of unconstitutional change of government;[215] piracy;[216] terrorism;[217] mercenarism;[218] corruption;[219] money laundering;[220] trafficking in

208 Some of the high profile ICC cases include: Sudanese President Omar Al-Bashir, Lord's Resistance Army Commander Joseph Kony, former Ivory Coast President Laurent Gbagbo and son of former Libyan President Moammar Gadhafi, Saif al-Islam Gadhafi.

209 Abass (n 199).

210 As above.

211 Article 28B of the Statute Annexed to the Malabo Protocol.

212 Article 28D of the Statute Annexed to the Malabo Protocol.

213 Article 28C of the Statute Annexed to the Malabo Protocol.

214 Article 28M of the Statute Annexed to the Malabo Protocol.

215 Article 28E of the Statute Annexed to the Malabo Protocol.

216 Article 28F of the Statute Annexed to the Malabo Protocol.

217 Article 28G of the Statute Annexed to the Malabo Protocol.

218 Article 28H of the Statute Annexed to the Malabo Protocol.

219 Article 28I of the Statute Annexed to the Malabo Protocol.

220 Article 28I bis of the Statute Annexed to the Malabo Protocol.

person;[221] trafficking in drugs;[222] trafficking in hazardous wastes;[223] and illicit exploitation of natural resources.[224] All are serious crimes having troubled African states and the continent for a long time, playing a great role in destabilising peace and security and the economy within the continent. Some of these crimes are transnational in nature. Article 2 of the United Nations Convention Against Transnational Organised Crime[225] defines a crime as transnational if:

> (a) it is committed in more than one state; (b) it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; (c) it is committed in one state but involves an organised criminal group that engages in criminal activities in more than one state; or (d) it is committed in one state but has substantial effects in another state.[226]

Thus, it becomes imperative for Africa to combine resources and efforts to deal with such offences at a regional level.

3.1.4 Forum shopping

Sirleaf notes that one of the advantages of a regional system is that it encourages forum shopping where actors would strive to select the forum that best suits their interests.[227] This he emphasised is a result of the fact that there are different rules of access to membership and participation in international institutions.[228] African state parties will have an opportunity to choose between the ICC and the regional court. This would not hinder the ICC Prosecutor from exercising her powers to initiate investigation but will definitely dampen the enthusiasm of African countries towards the ICC.[229] If the regional court is viable, it will also affect the referral of non-state African parties by the UNSC.

221 Article 28J of the Statute Annexed to the Malabo Protocol.

222 Article 28K of the Statute Annexed to the Malabo Protocol.

223 Article 28L of the Statute Annexed to the Malabo Protocol.

224 Article 28L bis of the Statute Annexed to the Malabo Protocol.

225 UN General Assembly, United Nations Convention against Transnational Organised Crime: Resolution adopted by the General Assembly, 8 January 2001, UN Doc A/RES/55/25 (2001).

226 See also, article 1(x) of the African Union Non-Aggression and Common Defence Pact, adopted by the Fourth Ordinary Session of the Assembly, held in Abuja, Nigeria, on Monday, 31 January 2005.

227 M Sirleaf 'Regionalism, regime complexes and international criminal justice' (2016) 54 *Columbia Journal of Transnational Law* 759.

228 As above.

229 Sirleaf (n 227) 760.

3.1.5 Synergy between ICC and the ACJHPR

Another benefit would be that the ICC and the regional court could synergise thereby allowing the ICC to focus on very serious crimes while the regional court will attend to less complex and everyday crimes within the same country.[230] In the CAR for instance, the government noted that the national justice system was too weak to handle large scale atrocities during recent crises so in 2014, it referred the situation that had occurred since 2012 to the ICC.[231] The interim governments also set up specialised courts inside the national justice system to prosecute crimes that were not likely to be selected by the ICC[232] and were committed since 2003. This practice in the CAR has shown that the regional court and the ICC could work together in demanding accountability by sharing their roles considering the geographic, historical and cultural bonds existing between states. Again, decisions of a regional court are likely to be accepted with less – or no – resistance than a pronouncement from an international court.[233]

3.1.6 Enhancement of domestic trials

The Regional Criminal Court proposed in the Malabo Protocol will enhance national/domestic trials as states will be encouraged to develop their national criminal law to enable them try some crimes which hither to they have been unable to effectively carry out. This is due to the fact that the national courts would have the first bite at the pie of prosecution and they would fail at this assignment if the domestic criminal law is not comprehensive to enable the trials. State parties would be under an obligation to enact domestic implementing legislation. The legislation would domesticate the Malabo Protocol crimes. This would mean a review of domestic criminal laws to bring them in line with the provisions of the Statute of the regional court thereby giving primacy to national courts in line with the principle of complementarity and they can only resort to the regional court when they are unable to prosecute the cases. It

230 G Mattioli–Zeltner 'Taking justice to a new level: The Special Criminal Court in the Central African Republic' *Jurist* 9 July 2005 https://www.justiceinfo.net/en/1283-taking-justice-to-a-new-level-the-special-criminal-court-in-the-central-african-republic.html (accessed 11 July 2020).

231 As above.

232 As above. This is the first time that national international crimes have created a hybrid court to try serious international crimes committed in their own country and to work alongside the ICC.

233 Sirleaf (n 227).

will also afford Africa the opportunity to investigate and prosecute mass crimes in the region.[234]

3.2 Challenges facing the fight against impunity in the African Court

3.2.1 Political will

By 'political will' we mean the commitment by key decision makers to take necessary steps to achieve the desired goals or to implement the laws and policies set out for a particular function. Whether African leaders have the political will to make the Court function effectively is doubtful. It should be recalled that for the Court to become operational it needs a deposit of 15 instruments of ratification,[235] yet the trend of ratifying instruments since the establishment of the African Court on Human and Peoples' Rights is extremely disappointing. The Protocol to the African Charter on Establishment of the African Court on Human and Peoples' Rights was adopted in June 1998 and entered into force on 25 January 2004, taking almost six years to become operational. Additionally, for citizens and NGOs with observer status before the African Commission on Human and Peoples' Rights to file a case, states are required to sign a Declaration accepting the jurisdiction of the Court. To date only ten states have signed the Declaration: Benin, Burkina Faso, The Gambia, Ghana, Ivory Coast, Malawi, Mali, Rwanda, Tanzania and The Republic of Tunisia.[236] Luckily these states shall not need to sign new Declarations with the coming of the Malabo Protocol thereby automatically permitting citizens from these states to approach the Court whenever they are faced with matters needing determination by the Court.[237]

Rwanda who had previously signed the declaration withdrew in February 2016 and prayed for suspension of all matters against her

234 M Mahdi 'Africa's International Crimes Court is still a pipe dream' *Reliefweb*15 October 2019 https://www.reliefweb .int/report/world/africa-s-international-crimes-court-still-pipe-dream (accessed 8 July 2020).

235 Article 11(1) of the Malabo Protocol.

236 African Court on Human and Peoples' Rights 'African Court Coalition Discussions: State withdrawals from article 34(6) of the African Court Protocol – A publication of the Coalition for an Effective African Court on Human and Peoples' Rights' Official Bulletin Volume 1, May 2020 http://www.african-court.org and https://www.acc-publication_volume-1_2020_eng/ (accessed 13 June 2020). Within a space of four years 2016-2020, four countries (Benin, Cote D'Ivoire, Rwanda and Tanzania) have withdrawn the article 36(4) Declaration leaving only six member states (Burkina Faso, Ghana, Mali, Malawi, The Gambia and Tunisia).

237 Article 8(3) of the Protocol on the Statute of the African Court of Justice and Human Rights.

pending in the Court.[238] The withdrawal was filed at the time Rwanda was facing several cases including that filed by Ms Victoire Ingabire who contested against President Kagame in the 2014 elections and was later detained and charged with genocide ideology, among other charges, in the Rwandan court.[239] This made it look like a mechanism by Rwanda to fight this particular case even though Rwandan officials claim that it was just a coincidence as the aim was to prevent the 1994 genocide perpetrators from using the African Court to escape justice for their crimes.[240] The act of Rwanda withdrawing the declaration is further proof of the lack of political will by some African leaders. This assertion can also be backed up by notifications of withdrawal from the ICC by countries like Burundi, South Africa and The Gambia.[241] The Gambia and South Africa reversed their withdrawals.[242] Only Burundi has withdrawn and its withdrawal took effect in October 2017.[243] These acts of withdrawing show that African states are not willing to be taken to court. The authors are of the view that if leaders protect the states from being taken to court then definitely they will protect themselves from being taken to court to face criminal charges.

Similarly, the merger Protocol on the Statute of the ACJHR was adopted in July 2008, with only six states having ratified it: Benin, Burkina Faso, Congo, Libya, Liberia and Mali.[244] Seven years since the adoption of the Malabo Protocol only fifteen of the 55 member states have signed: Benin, Chad, Comoros, Congo, Equatorial Guinea, Ghana, Guinea Bissau, Guinea, Kenya, Mauritania, Mozambique, Sierra Leone, Sao Tome & Principe, Togo and Uganda.[245] The Malabo Protocol's rate of

238 In the Matter of *Ingabire Victoire Umuhoza v Republic of Rwanda* (Application 003/2014) [2018] AFCHPR 5 (7 December 2018).

239 As above.

240 As above.

241 M Ssenyonjo 'State withdrawals from the Rome Statute of the International Criminal Court: South Africa, Burundi, and The Gambia' in CC Jalloh & I Bantekas (eds) *The International Criminal Court and Africa* (2017) 214-218.

242 E Keppler 'Gambia rejoins ICC: South Africa, Burundi now outliers on exit' HRW 17 February 2017 https://www.hrw.org/news/2017/02/17/gambiarejoins-icc (accessed 20 June 2020). See EY Omorogbe 'The crisis of International Criminal Law in Africa: A regional regime in response?' (2019) 66 Netherland International Law Review 287 at 296.

243 As above. See BBC News 'Burundi leaves International Criminal Court amid row' *BBC News* 7 October 2017 http://www.bbc.com/news/world-africa-41775951.amp (accessed 10 June 2020).

244 AU 'OAU/AU Treaties, Conventions, Protocols & Charters' https://au.int/en/treaties/status (accessed 20 July 2020).

245 J Chella 'A Review of the Malabo Protocol on the Statute of the African Court of Justice and Human Rights, Part I-Jurisdiction over international crimes https://www.ilareporter.org.au/2021/01/a-review-of-the-malabo-protocol-on-the-statute-of-

ratification does not match the enthusiasm AU leaders exerted during the process of drafting the Protocol and the Statute thereto.

The fact AU leaders were disappointed with the ICC's indictments against some sitting heads of state also creates doubts as to their true commitment in fighting impunity. It appears that at the time of signing the Rome Statute the AU leaders had an intention of it being applicable to other persons, particularly the rebels while themselves getting away free with impunity when they commit international crimes.[246] The same spirit is seen in the Malabo Protocol where the leaders have been shielded by the immunity provision.

3.2.2 Immunity of leaders from prosecution

The question of immunity has become the centre of attraction whenever the Malabo Protocol is being discussed;[247] due to the controversy it brings in the fight against impunity whereby it appears to shield leaders from prosecution. Immunity for leaders defeats the essence of having an international criminal court. International criminal courts are specifically designed to complement national jurisdictions, coming into play when it is impossible to try international crimes at the national level due to incapacity or unwillingness. African leaders commit international crimes within their own and other countries. For example, the trial and conviction of Charles Taylor in the Specialised Court for Sierra Leone;[248] Rwandan state officials before the ICTR;[249] Hissène Habré in Senegal;[250] and Jean Pierre Bemba before the ICC.[251] Even where such individuals

the-african-court-of-justice-and-human-rights-part-i-jurisdiction-over-international-crimes-jessie-chella (accessed 14 June 2022).

246 LS Sunga 'Has the ICC unfairly targeted Africa or has Africa unfairly targeted the International Criminal Court?' in T Mariniello (ed) *The International Criminal Court in search of its purpose and identity* (2015) 171.

247 Deya (n 34), Murungu (n 62), Mashamba (n 77) and Abass (n 48).

248 Charles Taylor was convicted in April 2012 on 11 charges arising from war crimes, crimes against humanity, and other serious violations of international humanitarian law, committed from 30 November 1996 to 18 January 2002 during the course of Sierra Leone's civil war. See Open Justice Initiative 'The trial of Charles Taylor before the Special Court for Sierra-Leone: The appeal judgment' (September 2013) https://www.justiceinitiative.org/publications/trial-charles-taylor-special-court-sierra-leone-appeal-judgment (accessed 18 June 2021).

249 UN 'The ICTR in Brief: 93 individuals indicted by the ICTR' https://www.unictr.irmct.org/en/tribunal (accessed 16 June 2021).

250 'Senegal/Chad: Court upholds Habré conviction' *HRW News* 27 April 2017 http://www.hrw.org/news/2017/04/27/senegal/chad-court-upholds-habre-conviction (accessed 17 July 2020).

251 *The Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05-01/08 (21 March 2016). He was

have not directly participated in the perpetration of the crimes, they can be held responsible under command responsibility for failing to take action against subordinates who commit such crimes or to prevent them.[252] In most states, leaders are protected from prosecution under their national constitutions for crimes committed while in office. While some countries, like Tanzania, go further and grant the head of state immunity from prosecution even after he leaves office.[253] Under these circumstances national courts are incapable of dealing with such crimes, thus it becomes imperative for an international criminal court to come into play.

Immunity is granted to heads of state or government, ministers or responsible government officials/senior state officials.[254] Initially the Malabo Protocol provided immunity to senior state officials without providing a description of what amounted to 'senior state official'. This became a subject of criticism among scholars. Amendments were thereafter made to article 46A bis to the Statute annexed to the Malabo Protocol. The amendment prohibits charges to be commenced or continued before the African Court against

> any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials based on their functions, during their tenure of office.[255]

Still an exhaustive list of 'senior state officials based on their functions' could not be provided in this amendment considering the difficulty in coming out with an exhaustive list. It was therefore resolved to leave it to the Court to interpret and determine who qualifies as a senior state official on a case by case basis, taking into consideration their functions in accordance with international law.[256] The jurisprudence on this area shall therefore keep growing as the cases are being taken to the Court.

acquitted by the Appeals Chamber of the ICC on 8 June 2018 on charges of war crimes and crimes against humanity, thereby bringing the case to a close.

252 For example, *The Prosecutor v Jean Paul Akayesu*, ICTR-96-4-T (2 September 1998); and *Gombo* (n 251).

253 Article 46 of the United Republic of Tanzania Constitution, 1977.

254 Executive Council of the African Union 'The Report, the Legal Instruments and Recommendations of the Ministers of Justice/Attorney General-Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights: Revisions up to Tuesday 15th May 2012 (Exp/Min/IV/Rev.7)' EX.CL/731 (XXI) Addis Ababa (Ethiopia), 9-13 July 2012.

255 Executive Council of the African Union 'The Report, the Draft Legal Instruments and Recommendations of the Specialised Technical Committee on Justice and Legal Affairs' EX.CL/846(XXV), Malabo (Equatorial Guinea), 20-24 June 2014.

256 As above.

As noted earlier, the immunity granted under article 46A bis is not absolute. Heads of state and government and senior state officials are only protected while in office. However, one should not forget that Africa is a continent where a number of leaders strive to remain in power for life. Africa has witnessed 14 attempts to change state constitutions to extend the term limits to accommodate sitting presidents to hold onto power. Successful attempts include: Burkina Faso, Burundi, Chad, Congo-Brazzaville, the DRC, Gabon, Guinea, Rwanda, Togo and Uganda, while the unsuccessful attempts occurred in Zambia, Malawi and Nigeria.[257] In states such as Burkina Faso, the DRC and Burundi, the process of changing the constitutions culminated in civil unrest.[258] Judging by this trend, it is obvious that granting immunity under the Malabo Protocol shall encourage leaders who know they could be held responsible for international crimes to cling to power.

Under international law heads of state and senior state officials are also accorded immunity on acts done in their official capacity on behalf of their states.[259] However, the scope of what amounts to 'senior official' has not been precisely stated. The International Court of Justice (ICJ) in the Arrest Warrant Case[260] when referring to officials entitled to immunity referred to high ranking officials 'such as heads of state, heads of government and ministers for foreign affairs'.[261] The ICJ included ministers for foreign affairs because it was entertaining a case involving such a minister and was concerned by the fact that ministers for foreign affairs travel frequently on activities representing their states. However, the phrase 'such as...' used by the ICJ entailed that other categories of senior officials could be added. In another case on Armed Activities in the Territory of the Congo[262] the ICJ included minister for justice in the category of senior officials. In the Arrest Warrant Case, the ICJ was deciding on a situation where a state official was subjected to the jurisdiction of a foreign state.[263] The position is different under international criminal courts whereby generally, heads of

257 AT Hengari 'Presidential term limits: A new African foreign policy challenge' SAIIA Policy Briefing 138, June 2015 https://saiia.org.za/research/presidential-term-limits-a-new-african-foreign-policy-challenge/(accessed 14 June 2020).

258 As above.

259 As above.

260 *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium),* International Court of Justice (ICJ) (14 February 2002), extracted from J Foakes *The position of heads of state and senior officials in International Law* (2014) 128.

261 As above.

262 As above.

263 Foakes (n 260).

states and other state officials do not enjoy immunity from prosecution.[264] The function of the International Criminal Law Section of the African Court shall not be different from that of the ICC, ITCY and ICTR, that is, to complement national jurisdictions where prosecutions cannot take place under such national jurisdictions. As pointed out earlier, most national jurisdictions fail to prosecute the heads of state and other senior state officials, hence making it relevant to have the criminal jurisdiction in the African Court. The immunity in the Malabo Protocol should therefore be removed as it defeats the main essence of establishing an international criminal court.

3.2.3 Numerous crimes and funding

The list of crimes enshrined under the Malabo Protocol is rather ambitious. Some of the crimes cannot be attributed to international criminal law. For instance, despite the effects it creates on states, a crime such as corruption is seen not to be serious to the extent of warranting intervention of an international criminal court. Such crime can effectively be dealt with under national jurisdictions.[265] National jurisdictions need to be strengthened to handle such cases effectively. Where such crimes become transnational the culprit could be tried in the state which has experienced the effects of the crimes or he/she could be extradited to the state where the crime was committed. The strengthening of the national criminal justice systems should go along with strengthening the laws in mutual assistance in criminal matters as well as on extradition laws and agreements between states.

Prosecuting international crimes has huge financial and time implications, for example, the process involved in collecting evidence is very costly. Additionally, the International Criminal Law Section shall have several offices, that is, the Pre-Trial Chamber, the Trial Chamber, the Appellate Chamber, and the Office of the Prosecutor and the Defence Office. All these offices are staffed by different personnel who have to be paid salaries and other remunerations, thus increasing the expenses.[266] The number of crimes under the jurisdiction of the Court increases the expenses in terms of conducting investigations in countries where the crimes are committed, detention of the accused persons who have to be taken care of and in handling of witnesses. Experience from other international courts reveals how expensive it is to handle international crimes. The case of

264 Article 27 of the Rome Statute of the ICC; art 7(2) of the ICTY Statute; and art 6(2) of the ICTR Statute.

265 Mashamba (n 77) 53-54.

266 Abass (n 199) 24.

Charles Taylor in the Specialised Court for Sierra Leone, for example, cost more than USD 50 million, almost exceeding the annual budget of the African Court on Human and Peoples' Rights.[267]

At the national level the handling of international crimes has also proved very expensive and time consuming. The gathering of relevant evidence and the battle on legal issues consumes time and money. The defence would usually bring up legal issues on preliminary points with an intention of discontinuing the trial process. For instance, *Uganda v Kwoyelo Thomas*[268] before the International Crimes Division (ICD) of the Ugandan High Court has been in court since 2011. Among the issues delaying the finalisation of the case are a number of preliminary objections including: the entitlement to amnesty as per the Ugandan Amnesty Law; the legality of Justice Susan Okalany presiding over the trial, as she was not specifically appointed to the ICD; and the legality of the pre-trial proceedings held in the absence of approved rules of procedure.[269] While the Constitutional Court ruled that Kwoyelo had a right to be granted amnesty, this decision was reversed by the Supreme Court on appeal by the Director of Public Prosecutions (DPP) in April 2014.[270] Following the Supreme Court's decision the case proceeded to the ICD.[271]

Financial resources are also a problem in facilitating effectiveness in the trail process. Due to a financial deficit, counsel was not allocated and Kwoyelo had to stay in prison for one year without trial.[272] The case of Kwoyelo demonstrates how expensive and time consuming a single criminal case can be. It also demonstrates how financial inability of a state can hinder the effective prosecution of international and transnational crimes. In fact, it brings up concerns that if Uganda has failed to prosecute this single case in its national court due to lack of finances, how can it

267 As above.

268 HCT-00-ICD, Case 02/10.

269 LO Ogora 'Landmark ruling on victim participation in the case of Thomas Kwoyelo' *International Justice Monitor* 4 October 2016 https://www.ijmonitor.org/2016/10/landmark-ruling-on-victim-participation-in-the-case-of-thomas-kwoyelo/ (accessed 19 July 2020). Also KT Seelinger 'Uganda's case of Thomas Kwoyelo: Customary international law on trial' Report, May 2017 http://www.californialawreview.org/cutomary-international-law-on-trial (accessed 19 July 2020). Also K McNamara 'Seeking justice in Ugandan courts: Amnesty and the case of Thomas Kwoyelo' (2013) 12 *Washington University Global Studies Law Review* 653 http://www.openscholarship.wustl.edu/law_globalstudies/vol12/iss3/19 (accessed 19 July 2020).

270 As above.

271 S Oola 'In the shadow of Kwoyelo's Trial' in C de Vos, S Kendall & C Stahn *Contested justice: The politics and practice of International Criminal Court interventions* (2015) 163-164.

272 W Jordash QC & MR Crowe (eds) 'Evidentiary challenges for the defence' in E Van Sliedregt & S Vasiliev *Pluralism in international criminal law* (2014) 281.

contribute to the budget of the African Court to try numerous cases that shall be instituted? The authors believe that the situation in Uganda is a situation facing many African states, something which creates doubts on the ability of these states to effectively finance the activities of the African Court.[273]

Deriving experience from the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, Phan says it is quite a difficult issue for developing countries to provide enough funds to run the courts due to poor resources and dependence on donors in funding even the existing Human Rights Court.[274] While the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights states that the expenses of the Court, including emoluments and allowances for judges and the budget of its registry, shall be borne by the Organisation of African Unity (OAU) (now AU),[275] it is not clear under the Malabo Protocol as to how the expenses of the Court shall be catered for.[276]

The AU however endeavours to financially sustain its own institutions including the African Court. In the Kigali Financing Decision, the AU resolved for member states to contribute 0.2 per cent of their import levy to finance the Union.[277] The challenge is that some of the member states do not pay their yearly contribution.[278] In 2018 the AU strengthened its sanctions regime to ensure member states meet their financial obligations. The new sanction regime provides for short and long term measures against member states defaulting to pay either partly or fully their assessed contributions. The time ranges from six months to two years. The sanctions are categorised into cautionary, intermediate and comprehensive.[279] With

273 MM Gil & A Bandone 'Policy briefing: Human rights protection mechanisms in Africa: Strong potential, weak capacity' Directorate-General for External Policies: Policy Department (February 2013) https://www.europarl.europa.eu/RegData/etudes/briefing_note/join/2013/491487/EXPO-DROI_SP (2013)491487_EN.pdf (accessed 13 June 2021).

274 HD Phan *A selective approach to establishing a human rights mechanism in Southeast Asia: The case for a Southeast Asian court of human rights* (2012) 221.

275 Article 32.

276 Abass (n 199).

277 AU 'FAQs (Frequently Asked Questions) about financing of The Union: What is financing of the Union' https://au.int/sites/default/files/pages/35739-file-faqs_on_financing_of_the_union.pdf (accessed 31 July 2020).

278 AU 'Sustainable financing' https://au.int/en/aureforms/financing (accessed 31 July 2020).

279 'African Union strengthens its sanction regime for non-payment of dues' *AU Press Release* 7 November 2018 https://au.int/en/pressreleases/20181127/African-union-strengthens-its-sanctions-regime-non-payment-dues (accessed 31 July 2020).

all this positive progress, the AU is still incapable of fully funding its total budget. For example, the budget adopted for the year 2020 is at US$647.3 million. The AU only fully funds the operating budget set at US$157.2 million. The programme budget set at US$216.9 million is funded by the AU at 41 per cent and 59 per cent is solicited from international partners. The same applies to peace support operations whereby the AU member states fund 38 per cent and 61 per cent comes from international partners.[280]

It is encouraging to see that at the very least the operational budget is fully met by the AU member states. This shall enable the core business of the Court to proceed. However, the authors are of the view that all 55 AU member states should fully honour their obligations to pay their contributions to achieve the goals for establishing the Court. Having a budget is one thing and actual funding of the budget is another. If some of the member states continue failing to meet their financial obligations the prosecution of crimes under the jurisdiction of the Court shall not be realised. The AU should also endeavour to fully fund the programme budget. This is because the programme budget is equally important for the sustainability of the Court as it caters for, among other things, infrastructure and skills development. Sometimes the budget is not fully paid. This can be seen on the 2019 budget of the African Court which was set at US$13 992 891.[281] In this, US$13 045 445 (93.23 per cent) was to come from the member states while US$947 445 (6.77 per cent) was to come from international partners. By 31 December 2019 only US$12 757 670, which is 91.2 per cent of the budget was executed. Member states funded US$7 603 978 and international partners funded US$529 096.[282] It should be noted that when the criminal jurisdiction becomes operational the budget of the Court shall definitely increase. If the trend in underfunding continues, is shall be difficult for the Court to effectively prosecute the numerous crimes enshrined in the Malabo Protocol.

3.2.4 Prosecutors independence

For a successful discharge of the office, the Prosecutor must enjoy independence to the greatest extent possible. The Malabo Protocol provides that 'the office of the prosecutor may initiate investigation *proprio motu* on the basis of information on crimes within the jurisdiction

280 'African Union sustainable funding strategy gains momentum' *AU Newsletter* 28 May 2022 https://au.int/ar/node/37145 (accessed 31 July 2020)

281 Executive Council 'Activity Report of the African Court on Human and Peoples' Rights (ACHPR) 1 January-31 December 2019' EX.CL/1204(XXXVI), 06-07 February 2020, Addis Ababa Ethiopia.

282 As above.

of the court'.[283] This provision is strengthened by the provision of article 22(6) which guarantees the independence of the prosecutor. It provides that the office of the prosecutor shall be responsible for the investigation and prosecution of the crimes specified in the statute and shall act independently as a separate organ of the court and shall not seek or receive instructions from any state party or any other source.[284] Bringing the above provisions into operation, it seems in essence, that the Prosecutor's ability to initiate prosecution as prescribed above in article 46A(1), should be free of any political influences from the organs of the AU. One begins to wonder what the extent of this independence is, if the Prosecutor and his deputy are to be elected by the Assembly from amongst candidates who shall be nationals of state parties nominated by states parties.[285] Where the Prosecutor and Deputy Prosecutor are elected by the Assembly, can their independence be guaranteed, as they will most likely be answerable to their appointers? The matter is made worse in the face of the fact that their remuneration and conditions of service will be determined by the Assembly on the recommendations of the Court through the Executive Council.[286] This completely brings the office of the Prosecutor under the control of the Assembly. This type of scenario applies in national judiciaries and has stifled the independence of the judiciary at the national level in some African states. The judiciary is tied to the apron strings of the executive as it appoints judicial officers and determines the budgetary allocations to the judiciary.[287] The office of the Prosecutor should have a budget managed by it without undue interference from the Assembly. The Prosecutors office must not only be said to be independent but must be seen to be so in all respects.

3.2.5 Relationship with the ICC

On one side of the divide, it would seem un-imaginable that the proposed ACJHPR will not have any relationship with the ICC. The EU representative at the African Judicial Dialogue noted this when he said that 'the Malabo Protocol lacks complementarity with the ICC'.[288]

283 Article 46G(1) of the Malabo Protocol.

284 Article 22A(2) of the Malabo Protocol.

285 Article 22A(2) of the Malabo Protocol

286 Article 22A(10) of the Malabo Protocol

287 This has been the situation in Nigeria. In 2020, the President, General Muhammadu Buhari (Rtd) decided to grant financial autonomy to the Nigerian judiciary and this has not gone down well with the federating states/units. The judiciary in Nigeria has been on strike for over two months in 2021 for the non-implementation of financial autonomy by the federating states.

288 Amnesty International (n 190) 31.

It is also unfortunate when we consider the fact that 33 African states are members of the ICC and the AU expects that these states will sign up to the Malabo Protocol. If it so happens, it would raise jurisdictional issues. The ACJHPR would want member states to institute action for crimes which happen in the region of the Court as part of the 'African Solution Mechanism' but these states are also members of the Rome Statute, resulting in potential conflicts of obligations or duties. The Malabo Protocol did not provide for its relationship with the ICC. This may be so because African states may not want a court that would appear inferior to the ICC. In order to solve this, the AU called for the massive withdrawal of African states from the ICC.[289] Interestingly, the Rome Statute made provision for ICC's cooperation with regional institutions[290] and there is a possibility of the ICC seeking cooperation and information with the ACJHR at least in theory.

On the other side of the divide is the point that there could be synergy between the two courts. There is also the advantage of forum shopping by states since most African states are still members of the ICC. One possible way of resolving this will be to emphasise that cooperation with ICC would be between two coexisting and equal courts. To achieve this, the AU and the ICC must have an agreement on cooperation on issues of mutual recognition of judicial decisions or pronouncements emanating from the courts. They must also agree that parties to the suit must not be allowed to institute proceedings in both courts when the subject matter and the parties are the same and the case had already been filed and pending before one of the courts (*lis pendens*). Another area of cooperation would be in the area of exchange of information and judicial dialogue. The Malabo Protocol has made provision to 'seek co-operation or assistance of regional or international courts, non-States parties or co-operating Partners of the African Union and may conclude Agreements for that purpose'.[291] The proposed Court may rely on this provision if it desires to establish a working relationship with the ICC. This will obviously depend on a broader relationship between the AU and the ICC. Currently, that relationship is at its lowest ebb. The AU had rejected the proposal from the ICC to open a *liason* office in Addis Ababa in 2010.[292] These processes if

289 AU Assembly, 28th Ordinary Session, Decision on the International Criminal Court (ICC) Doc. EX. CL/1006 (XXX), AU (30-31 January 2017) https://www.au.int/web/sites/default/files/decisions/32520-sc19553_e_original_assembly_decisions_621-641_xxviii.pdf (accessed 6 July 2020).

290 Articles 54(3)(c) and 87(6) of the Rome Statute of the ICC.

291 Article 46L(3) of the Malabo Protocol.

292 Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec.296

followed would greatly enhance the cooperation and effectiveness of both courts especially the regional court.

4 Conclusion

The atrocities that Africans have suffered and witnessed during armed conflicts and under dictatorial regimes need to be ameliorated through a judicial organ. As such a regional international criminal court that shall be closer to the people appears to be crucial. The kinds of crimes under the jurisdiction of the African Court, particularly of 'unconstitutional change of government' pose serious problems in Africa. Such crimes do not fall under the jurisdiction of the ICC to which most African states are state parties. Thus, it was a thoughtful act for the AU to create a mechanism to deal with such crimes. However, taking into account the existing challenges, this article concludes that there is less hope as to whether Africa as a region shall be able to effectively fight impunity through the regional Court. This is because African leaders have not exerted true and convincing commitment in the fight against impunity.

The fact that seven years have elapsed since the Malabo Protocol was adopted in June 2014 and none of the states has ratified it creates doubts as to the seriousness of the leaders in making the Court operational. The question of immunity erodes the major essence of having an international criminal court which is to prosecute those who cannot be easily prosecuted at national level. Immunity can lead some leaders not adhering to the rule of law and committing atrocities and clinging to power out of fear of prosecution. A crime like that of aggression cannot under normal circumstances be committed without the head of state or senior state official's involvement as it involves armed invasion on the sovereignty of another state. Thus, when such a crime is committed there might be no prosecutions at all because the perpetrators are protected under immunity.[293] If such challenges continue to exist, prospects for a brighter future on fighting impunity in Africa shall never be realised. To overcome this problem the authors recommend that the AU should reinforce and streamline its practice of removing errant heads of state from power like it did with Charles Taylor in corroboration with ECOWAS. The AU should also ensure that member states within their states have a good succession plan to prevent a descent into lawlessness like the situation that occurred

(XV), para 8.

293 Kenyans for Peace with Truth & Justice 'Granting Presidents immunity is wrong' http://www.kptj.africog.org (accessed 20 June 2020).

in Libya when Muammar Gadhafi was ousted and in Somalia when Siad Barre left.