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IS THE AFRICAN INTERNATIONAL CRIMINAL LAW SECTION A VIABLE ALTERNATIVE TO ICC? SOME ISSUES OF CONCERN

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Table of Contents

DECLARATION OF ORIGINALITY iii

ACKNOWLEDGEMENT v

Acronym vi

Abstract vii

CHAPTER ONE 1

1. INTRODUCTION 1

1.1 Background of the study 1

1.2 Statements of the problem 3

1.3 Research questions 4

1.4 Objectives 5

1.4.1General objectives 5

1.4.2 Specific objectives 5

1.5 Methodology of the research 5

1.6 Significances of the research 6

1.7 Scope of the study 6

1.8 Limitations of the study 6

1.9 The preferred citation rule 7

1.10 Chapter outline 7

CHAPTER TWO 8

2. Analysis of the Justifications to the establishment of African international criminal law section 8

2.1 Introductions 8

2.2 General overview of the relationship between AU and the ICC 9

2.2.1 Background to the establishment of African international criminal law section 9

2.2.2 The interaction between international and regional courts 10

2.3 AUs reservation and critics against the ICC and scholars critics 12

2.3.1 Justice should not be wall over achieving regional peace. 13

2.3.2 Abuse of universal jurisdiction by ICC against sitting head of state and government officials 14

2.3.2 Reservation against UNSC power to refer a case to the ICC 16

2.4 Is the African international criminal law section complementary or an alternative to the ICC? 17

2.4.1 Objectives of the ICC and the African international criminal law section 17

2.4.2 Why the ratification process of the Malabo Protocol is taking too long? 19
2.4.3 Concern about mass withdrawal of African States from the ICC 21
2.5 The reflection of AU political attack against ICC under the rules of Malabo Protocol: "immunity clause" 22
CHAPTER THREE 28
3. Some Issues of concerns about the African international criminal law section and their impact over "the court's viability to be alternative to ICC" 28
3.1 Introduction 28
3.2. Why is international criminal court needed? 28
3.2.1 Can the African international criminal law section achieve the same purpose ICC has while having an immunity clause? 30
3.2.2 AUs commitment to fight impunity and effect of the "immunity clause" under the Malabo Protocol 32
3.3 ACJHR Tripartite Court stricture vs. the ICC 38
3.3.1 Standard of proof 39
3.3.2 Possible conflict of jurisdiction between the human rights section and international criminal law section of ACJHR 41
3.4 Extensive lists of "international crimes" under the Malabo Protocol vs. the ICC 44
3.4.1 Domestic implementation legislations 44
3.4.2 Would transnational crimes concern the international community like that of core international crimes? 45
3.4.3 The capacity of domestic justice systems in the prosecution of transnational crimes vs. core international crimes 47
3.5 Corporate criminal liability 49
CHAPTER FOUR 52
4. Conclusion and Recommendations 52
4.2 Recommendations 54
Bibliography 55

DECLARATION OF ORIGINALITY

I, Natnael Engdawerk declare that this thesis is my original work. To the best of my knowledge, this thesis contains no material previously published by any other person except where due acknowledgment has been made. This thesis has not been submitted to any university for examination of degree or non-degree program.

Approval Sheet by Board of Examiners

Natnael Engdawerk's thesis entitled as "**Is the African international criminal law section a viable alternative to ICC? Some issues of concern"** is approved by the undersigned members to the examining board.

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Acronym

AU	African Union
ACJHR	African Court of Justice and Human Rights
ACHPR	African Court of Human and Peoples Rights
DRC	Democratic Republic of Congo
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for Yugoslavia
ILC	International Law Commission
UN	United Nations
UNSC	UN Security Council
OHCHR	Office of High Commissioner for Human Rights
UNHCR	Office of the United Nations High Commissioner for Refuges
UNCOT	United Nations Conventions against Transnational crime
UNCAC	United Nations Convention on Anti-Corruption

Abstract

African countries were on the leading spot during the adoption of the Rome Statute, which establishes the International Criminal Court (ICC). However, the controversy between African Union and ICC has begun after the ICC issued an arrest warrant against former Sudan President Al Bashir. Because of the disappointment and frustration of AU and African states against ICC, the AU adopted the Malabo Protocol, which extended the jurisdiction of the African Court of justice and human rights (ACJHR) to international criminal law. This thesis analyzes the justifications for the establishment of the African international criminal law section to identify whether the section is just a mere political attack against ICC or more than that. Moreover, it examines whether the different features under the Malabo Protocol prevent the section from being an alternative to ICC in terms of achieving the purpose and objectives of international criminal courts, which are fighting impunity, and prevention of future violation of core international crimes in the continent. The findings demonstrate that first; the justification for the establishment of the African international criminal law section is not purely to undermine the ICC. However, some of the rules under the Malabo Protocol reflect the AU attack against ICC because they do not have any relevance to the objectives of the court itself. Second, despite the motives of AU to establish the section, the different features under the Malabo Protocol prevent the section from being a viable alternative to ICC if the section becomes operational.

CHAPTER ONE

1. INTRODUCTION

1.1 Background of the study

On 17 July 1998, a conference of 160 States held in Rome, established the first treaty-based permanent international criminal court (ICC).[1] Among other things, it sets out the crimes falling within the jurisdiction of the court, war crimes, and crime of aggression, genocide, and crime against humanity, the rules of procedure, and the mechanisms for States to cooperate with the ICC.[2] The early relationship of the African States and the African Union (AU) with the ICC was amicable. The African States were on the leading spot from the beginning of the adoption of the Dakar declaration to the final ratification of the Rome Statute.[3] However, in 2009, when the ICC issued a warrant of arrest for former Sudanese President Omar al Bashir, wanted for crimes against humanity, war crimes, and crimes of genocide, the AU begun to reject the court's jurisdiction.[4]

In June 2014, the AU Assembly of Heads of State and Government meeting in Malabo, Equatorial Guinea, adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.[5] The Malabo Protocol came up with the division of the African Court of Justice and Human Rights (ACJHR) into three sections; the general affairs section, human rights section, and international criminal law section.[6] The extensions of the court jurisdiction to international criminal law escalate a lot of debate. There are two sides of

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[1] Mark Klamberg, *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic E Publisher Brussels,2017, p. 5

[2] Ibid

[3] Rowland JV Cole, 'African relationship with ICC more political than legal', (2013) 14 Melbourne journal of international law, p.5

[4] Ibid

[5] Amnesty international, Legal and institutional implication of the merged and expanded African court, 2016, P.5 available at: https://creativecommons.org/licenses/by-nc-nd/4.0/legalcode [accessed on December 2,2020]

[6] Ibid

arguments about the justification behind the extension of ACJHR jurisdiction to international criminal law.[7]

The argument of experts involved in the drafting process of the Malabo Protocol, articulated that the need for the establishment of an African Court having a criminal authority has been galvanized by reasons other than the AU's opposition of the ICC.[8] The idea of establishing an African court with jurisdiction of international criminal law was initiated long before the AU and ICC disagreed.

They support their argument by raising the recommendation of the committee established by the AU head of States to investigate the case of Hissene Habre. The committee recognizes the need to have an African Court with criminal jurisdiction in the recommendation.[9] On the other hand, the opposite argument is the idea of having an African Court with the jurisdiction of international criminal law is mainly motivated because of the discontent and frustration of AU against the ICC and the United Nations Security Council (UNSC).[10]

In addition to the debate about the motive behind AUs decision to extend the jurisdiction of ACJHR to international criminal law, an overlap of jurisdiction between the African international criminal law section and ICC is also one of the issues entertained about the relationship between the two organs. Overlap of jurisdiction exists based on three scenarios which are, a similar type of crimes listed in both court's authority, similarly targeted perpetrators, and having the same member's states parties.[11] The silence of both instruments on the relation between the two courts can be a source of cooperation as well as of competition. However, the idea of cooperation seems very far from reality considering the ongoing dispute between the AU and ICC.[12]

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[7] Zekarias Beshah, 'The African Court with a Criminal Jurisdiction and the ICC: A Case for Overlapping Jurisdiction?', (2017), 25 African Journal of International and Comparative Law, p.420

[8] Ibid

[9] Report of the Committee of Eminent African Jurists on the Case of Hissène Habré, , paragraph 39 available at: http://www.hrw.org/legacy/justice/habre/CEJA_Repor0506.pd [accessed on December 4, 2020]

[10] Ibid

[11] Ibid

[12] Ibid

Aside from the arguments and debates about the relationship between AU and ICC, it is important to note that the objectives provided under the preamble of the Rome Statute and the Malabo Protocols are similar.[13] That is rule of law, redress justice for victims of international crimes, and prevent impunity of individuals who are involved in the commission of international crimes.[14]

Under this paper, the writer assesses AU reservations and critics against ICC, analyzes the AU justifications behind the adoption of the Malabo Protocol. Moreover, the thesis examines whether the different or unique features of the African international criminal law section prevent the section to achieve the objectives of international criminal courts that the ICC has.

1.2 Statements of the problem

After the liberation of many African States from western colonialization in the 1960s, the continent suffered from many civil wars, ethnic conflicts, crimes of genocide, and crimes against humanity and many individuals who are responsible for the commission of international crimes live with impunity.[15] In many reports,[16] Africa perceived as the greatest concentration of crimes falling within the list of international crimes (genocide, crimes against humanity, war crimes), and the limitation of national justice systems to prosecute those crimes makes the establishment of a permanent international criminal court more significant to Africa than other continents.

The establishment of ICC was great hope for Africa to prevent the future commission of international crimes and to fight impunity. The ICC is considered a more efficient and well-organized independent judiciary organ. When the relationship between ICC and AU begins to crumble and many African States refuse to cooperate with the ICC, the AU preceded with the adoption of the Malabo Protocol that establishes the African international criminal law section.

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[13] Preamble of Malabo Protocol: Legal and Institutional Implications of The Merged and Expanded African Court, 22 January 2016, AFR 01/3063/2016, and preamble of UN General Assembly, Rome Statute of the International Criminal Court, 17 July 1998, ISBN No. 92-9227-227-6

[14] Ibid

[15] Eki Yemisi Omorogbe, 'The Crisis of International Criminal Law in Africa: A Regional Regime in Response?', (2019) 66 Netherlands International Law Review, p.287

[16] Every CRC Reports, International Criminal Court Cases in Africa: Status and Policy Issues, available at:< https://www.everycrsreport.com/reports/RL34665.html >[accessed on December 21,2020]

Notwithstanding, many individuals involved in the commission of international crimes in Africa are skipping prosecution, and violation of international criminal law is still proceeding in the continent.[17]

However, when the AU put forward the establishment of the African international criminal law section by extending the jurisdiction of ACJHR, it is necessary to analyze the justification for the adoption of the Malabo Protocol. Moreover, despite the motive of AU to establish the section, it is necessary to examine whether the rules under the Malabo Protocol alone can achieve the objectives of international criminal courts compared to ICC or they just reflect a mere political move by AU against the ICC. Because, the limitation of domestic justice systems to adjudicate international crimes and the refusal of African States to cooperate with ICC magnified the necessity of the African international criminal law section as a last resort judicial organ to the continent.

Unlike the Rome Statute, the Malabo Protocol came up with new ideas and rules such as the issue of immunity from prosecution for a head of government, head of state, and high government officials, the tripartite structure of the court, extensive list of international crimes and corporate criminal liability. The logical relation between the initial motive behind the establishment of the African international criminal law section and the incorporation of different features under the African international criminal law section might have its influence over the section's ability to achieve the purpose and objectives of international criminal courts.

1.3 Research questions

This paper tries to answer the following major research questions;

1. Is the establishment of African international criminal law section just a political attack against ICC or more than that?
2. Would the African international criminal law section achieve the same purpose and objective the ICC has while having different features compared to ICC?

[17] Ibid

1.4 Objectives

1.4.1General objectives

The cardinal objective of the research is to examine whether the African international law section can achieve the purpose and objectives of international criminal courts that the ICC has.

1.4.2 Specific objectives

The research aims at:

A. To illustrate the AU reservations against ICC and the role of those reservations to the establishment of the African international criminal law section.
B. To analyze justifications to the establishment of the African international criminal law section.
C. Examining whether the different features of the Malabo Protocol prevent the African international criminal law section to achieve the same objective ICC has.

1.5 Methodology of the research

The thesis is doctrinal; it is largely based on legal analysis and literature review, which includes both relevant primary and secondary sources. In fulfilling, the objectives of this study issue of AU reservations against ICC and their link with some of the different aspects of the Malabo Protocol and impacts of different features of African international criminal law section to achieve the objectives of international criminal courts, perhaps like that of ICC dealt in detail. Moreover, the writer utilizes the main and relevant publicly available books, journals articles, laws (Regional and International), archives, and internet sources.

The thesis relayed on, AU declarations and statements, and the rules of Malabo Protocol to explore the AU reservations against ICC. Additionally, the doctrinal approach applied to illustrate whether the establishment of the African international criminal law section is a political attack against ICC or it is more than that. Finally, Rome Statute, precedents or cases in international criminal law and cases of international criminal law involving the African States utilize to examine whether the different features of the Malabo Protocol prevent the section to achieve the same purpose and objectives the ICC has.

1.6 Significances of the research

The research paper intended to contribute to identifying the African international criminal law section's ability to carry out the function of ICC in Africa. In addition to that:

- To clarify whether the establishment of the African international criminal law section is just a mere political move by AU against ICC and whether the section has a genuine intention and ability to achieve the objectives of international criminal courts.
- To recommend solutions that make the African international criminal law section a feasible judicial organ to carry out the function of ICC in Africa.
- The finding of this study will provide a reference for further research on the archives related to the area.

1.7 Scope of the study

The research focused only on examining major issues of concern about African international criminal law section, which are the reservations and critics of AU against ICC and justification to the establishment of the African international criminal law section and examine whether the different rules under the Malabo Protocol prevent the section from achieving the purpose and objectives the ICC has. The research addresses Malabo Protocol, AUs motive to establish international criminal law section and its role in the prevention of international crimes violations, the objective and purpose of international criminal courts, and rules of Rome Statute.

1.8 Limitations of the study

The writer admits from the outset that the research is by no means exhaustive due to the following limitations:

The African international criminal law section is not yet operational: The constraints identified from the different features of the Malabo Protocol are from the assumptions that the African international criminal law section might possibly confront if the section becomes operational.

The controversy between AU and ICC has been going on for more than a decade. The emergence of new issues of concerns from time to time is unavoidable. The writer might miss some relevant points considering the complexity and fast updated nature of the controversy issue of AU and ICC dispute.

Despite the identified limitations, the study provides a clear result based on the analysis of the relevant books, authenticated documents, and literature, international and regional legislations necessary to the issue.

1.9 The preferred citation rule

Oxford Standard for Citation of Legal Authorities (OSCILA) applied.

1.10 Chapter outline

The study encompasses four chapters. The first chapter presents the Introduction part which supplies the necessary background information, which includes the background of the study, statement of the problem, research objectives, research questions, research method, the scope of the study, the significance of the study, a limitation of the study, preferred referencing and citation style and thesis organization.

Chapter two of the study reviews the general relationship between AU and ICC, illustrates the reservations of AU against ICC and explains why the African international criminal law section is seen as an alternative to ICC. Chapter three of the study examines whether the different features incorporated under the Malabo Protocol prevent the section to achieve the same objective the ICC has. The final chapter contains conclusions and recommendations.

CHAPTER TWO

2. Analysis of the Justifications to the establishment of African international criminal law section

2.1 Introductions

The AU Member States was instrumental in the creation of the Rome Statute and the establishment of the ICC. The creation of ICC was rooted in a strong desire to prevent a repeat of human suffering, triggered through decades of massive crimes, a desire, and commitment shared by the many African States that participated in the Rome conference.[18] However, in a string of decisions from 2008-2016, the AU Assembly has criticized some of the ICC's prosecutions and investigations against African leaders.[19]

The last decade has seen stagnation in the relationship between the ICC and some African States. Allegations of bias and calls for non-cooperation with the ICC are common on the side of AU: the power of the UNSC to refer a case to ICC, the application of universal jurisdiction, the question of immunity, and the necessity of retributive justice are some of the issues being raised.[20] The collapse in relations has also seen increased commitment to create a regional international criminal law section for the delivery of international criminal justice in Africa.[21] However, there has been little eagerness for similar efforts at a continental level. The ratification rate of protocols that will enable the prosecution of international crimes by an African Court, thereby addressing many of the concerns elevate by African leaders, has been depressingly slow.[22]

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[18] Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum (Eds), International Criminal Justice Series "*Africa and the International Criminal Court*", Published by Asser Press, 2014, p 13

[19] Ibid

[20] Sascha-Dominick Dov Bachmann,' the African union: ICC controversy before the ICJ: A Way Forward to Strengthen International Criminal Justice?' (2020) 29 Washington international law journal, p.248

[21] Ibid

[22] Francis Ssekandi and Netsanet Tesfay, 'Engendered Discontent: The International Criminal Court in Africa'(2017) 18 Georgetown Journal of International Affairs, p.80

Under this chapter of the thesis, the writer addresses the following major issues; background to the establishment of the African international criminal law section, AU reservations and critics against rules of the Rome Statute, and the question about African international criminal law section being a complementary or an alternative to ICC. In addition, the link between AU reservations and some of the different aspects of the African regional criminal court dealt with in detail.

2.2 General overview of the relationship between AU and the ICC

2.2.1 Background to the establishment of African international criminal law section

In the wake of mass atrocities such as the Rwandan genocide, and aware of their lack of capacity to adequately respond to them, African States initially welcomed the creation of the ICC.[23] Having experienced a process of democratization and an improvement in human rights standards that paralleled the court's establishment, many African States were supportive and actively engaged in the negotiation of the Rome Statute in the 1990s.[24] It was a time of excellent cheer, as the document had the support of the majority of African States. Today, Africa is still the largest regional bloc of the ICC, with 33 signatories.[25]

However, towards the end of the 2000s, the increased issuance of warrants of arrest for African officials and the dearth of such warrants for crimes committed outside the continent changed the relationship for the worse.[26] In addition to allegations of bias, the ICC's pursuit of retributive justice also appeared to clash with Africa's preference for restorative justice.[27] Many scholars believe that the African States, at the encouragement of the AU, attempts to reform the ICC, and,

[23] Pauline Martini, 'The International Criminal Court versus the African Criminal Court',(2020) 2 Journal of International Criminal Justice, p.4

[24] Ibid

[25] Ibid

[26] Amari M and others(Eds) "origins and Issues of the African Court of Justice and Human and Peoples' Rights", published by Cambridge press,2017 p.8

[27] Ibid

where they have failed, they stop cooperating with the court, by sacrificing the credibility and effectiveness of the ICC.[28]

The breakdown in relations has also seen renewed efforts to establish an African alternative to the ICC that satisfies the AU's understanding of justice, namely the African Court for Human and Peoples' Rights (African Court), with an expanded mandate.[29]

Some countries and leaders in Africa might support the establishment of an African international criminal law section or system only to undermine the ICC, or because they desire, it will make the ICC irrelevant.[30] Moreover, the current accusations of selective justice and alleged regional, ethnic, or regional bias by the ICC against Africa have indicated the current debate regarding this issue.[31] Nevertheless, to the extent that the idea of establishing a court or mechanism within Africa to adjudicate serious international crimes antecedes, the establishment of the ICC, it is too schematic to say that the proposal for the adoption of the Malabo Protocol is purely motivated by a desire to undermine the ICC. At least, it was not the original intent of AU, if we observe the recommendation of the committee that was established by the AU assembly on the case of Haissen Habre.[32] Moreover, there has never been a discussion in the AU on the need to adopt the Malabo Protocol precisely to supplant the ICC as such.[33]

2.2.2 The interaction between international and regional courts

Whenever two legal systems or regimes can each exercise jurisdiction over the same issues, some mechanism will usually develop to determine which one precedes first. However, this scenario would be much complex when two international legal systems establish jurisdiction over the same issues. The new regionalism is a recent development and the new wave of

[28] Ibid

[29] Ibid

[30] Cayley Cliford, 'Justice beyond the international criminal court: towards a regional framework in Africa' [2019] South African Institute of International Affairs, p. 2

[31] Ibid

[32] n(9)

[33] Ibid

regionalism relates to the current transformation of the world order and is associated with or caused by certain structural changes of the global system.[34]

Regionalism includes economically disposed objectives, but also environmental, political, social, and democratic objectives.[35] The move towards enhancing regionalism in Africa could explain by a confluence of factors. Regional economic communities have stretched their concern from economic matters to human rights considerations, and now to international criminal law issues in Africa.[36] As Thomas Gehring and Benjamin Faude explain…

> "Regime complexes form where there is an overlap of governance activities. They result because of disaggregated decision making in the international legal system, which means that agreements reached in one forum do not automatically extend to, or trump, agreements developed in other forums.'' This phenomenon heightened when it comes to international courts because ''there is no hierarchy in the international judicial arena."[37]

For instance, the International Court of Justice (the main judicial organ of the United Nations), has never reached, at the peak of some universal judicial order,[38] same with ICC in the field of international criminal law. Indeed, no singular regulatory regime has emerged as of yet in the area of international criminal law to encompass all actors.[39] International and specialized tribunals as well as domestic courts have been free to accept or reject the ICC's decisions.[40] These various forms of judicial bodies created to adjudicate international criminal law violations form part of an

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[34] J Delbrück, 'A more effective international law or a new world law Some aspects of the development of international law in a changing international system' ,[1993], Indiana Law Journal, p. 706

[35] : Matiangai and Sirleaf, 'Regionalism, Regime Complexes & International Criminal Justice'(2015) 108 American Society of International Law p. 162

[36] Ibid

[37] Thomas Gehring and Benjamin Faude, The Dynamics of Regime Complexes: Micro foundations and Systemic Effects, (2013) Global Governance p. 112

[38] Martti Koskenniemi and Pa¨ivi Leino, 'Fragmentation of International Law? Postmodern Anxieties',(2002) 15 Leiden journal of international law, p.23

[39] Ibid

[40] Ibid

emerging regime complex. African international criminal law section could expand the regime complex and will likely magnify the fragmentation of international criminal law.[41]

However, if we observe the regional human right courts such as the European human rights court and inter American human rights system and their contribution for effective implementation of international human rights law, the increasing relevance of regionalism in international law might lead to greater enforcement and promotion of international institution in general.[42] The experience of regional human rights courts shows promising outcomes to achieve the objectives of the international human rights court.

International justice advocates are concerned that the regionalization of international criminal law will result an adjustment to moral relativism, or a return to primacy exercising massive influence over particular regions.[43] Yet, if the field of international human rights law is any indication, regionalization of international criminal law with genuine intention to achieve international criminal justice may lead to greater enforcement and promotion than is possible at the international or domestic level.[44]

2.3 AUs reservation and critics against the ICC and scholars critics

The controversy between the AU and ICC has been going on for nearly a decade and it never grows boring. It has been a challenge to keep track of all instances in which the AU has objected to the ICC's perceived interference and intrusions in the internal affairs of African countries, particularly their domestic criminal justice systems.[45] The AU reservations against ICC are illustrated below, and some of the arguments are sound and supported by the rules of international law.

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[41] Ibid

[42] Benjamin Authers and Hilary Charlesworth, 'International Human Rights Law and the Language of Crisis',(2013) 18 RegNet Research Paper , p.8

[43] Ibid

[44] Ibid

[45] Tim Murithi, 'Africa Relations with the ICC: A Need for Reorientation? In perspective' [2012] polish law analysis & comment, p. 4

2.3.1 Justice should not be wall over achieving regional peace.

AU objection against ICC begins when the ICC start issuing an arrest warrant against leaders of African state while the AU putting effort to foster peace and reconciliation processes in Darfur, thereby accusing the ICC of failure to appreciate having on the peace building efforts in Sudan.[46] The ICC has issued arrest warrants in eight situations, of which six were active civil conflict situations at the time of intervention.[47] Nevertheless, the approach of ICC was different in other conflicts, which looked peace than justice. During the Nuremberg trials, as well as the trials of Argentina's military dictatorship, it was only after the conclusion of violence that justice pursued.[48] There is a need for the ICC to consider how and when it should intervene, especially in ongoing conflicts; AU argues, this is not only a matter of determining priorities but also of evaluating whether the court's intervention in a war-ravaged country advances the primary goals of achieving a peaceful resolution to the conflict.[49]

The AU argued that the ICC's interference in the internal affairs of Africa was scrambling the peace and reconciliatory efforts in Darfur and the Eastern Democratic Republic of the Congo (DRC).[50] Solving the conflict is not easy as an indictment of justice, which is why to the minimum it is important not to rush into investigation and prosecution of parties to the conflict especially the head of states and governments.[51] The central idea of this argument is, justice should not be priorities over peace especially in the context of Africa where conflicts often take place. Scholars who support the AU argument also raise that the procedures and processes used by the ICC to prosecute criminals cannot bring real justice to the direct victims of international crimes and they believe that the reconciliation process in many countries is more effective in bringing justice for victims than the ICC.[52]

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[46] Rowland(n3)

[47] Mark Kersten, Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace, Oxford: Oxford University Press, 2016, p.8

[48] Ibid

[49] Constitutive Acts of African Union, preamble, paragraph 3

[50] Ibid

[51] African Union Assembly, Decision on Africa's relationship with the International Criminal Court (ICC), Ext/Assembly/AU/Dec. 1, 2013

[52] Amnesty international (n22)

However, international organizations and scholars argue that the justice versus peace comparison by the AU is the wrong discord.[53] The preamble of the Rome Statute provides that "the most serious crimes of concern to the international community as a whole must not go unpunished and their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation."[54] Thus, the AU should not expect the ICC to consider regional peace and reconciliation over the indictment of justice, both can be achieved through a political solution, and the only thing that is an issue in African countries is their willingness to achieve full accountability of perpetrators of international crimes.[55] Their final remark is true and long-lasting peace can only be achieved through justice.

2.3.2 Abuse of universal jurisdiction by ICC against sitting head of state and government officials

As early as 2008, the AU Commission published a report on the abuse of the principle of universal jurisdiction by some non-African states.[56] In this report, the AU Commission noted the potential for abuse arising from universal jurisdiction, including the proliferation of litigation and the disregard for the principle of sovereign equality of States.[57] The report also noted that to avoid the abuse of jurisdiction, summonses issued to heads of state to appear before the courts of another country must be subject to the consent of the head of state concerned as well as respect for diplomatic confidentiality.[58] Additionally, the AU argument submitted to ICJ in 2017 for advisory opinion state that, Article 98 of the Rome Statute also obliges the court not to proceed

[53] Ibid

[54] The Rome Statute, preamble

[55] Philomena Apiko & Faten Aggad, The International Criminal Court, Africa and the African Union: What way forward?, Discussion paper (2016) No.201,p.3, < file:///C:/Users/hp/Desktop/new%20topic/DP201-ICC-Africa-AU Apiko-Aggad-November-2016.pdf> (accessed on January 27,2020)

[56] African Union, The Executive Council Thirteenth Ordinary Session, Report of the Commission on the use of the principle of universal jurisdiction by some non-African states as recommended by the Conference of Ministers of Justice/Attorneys General.(2008)

[57] Ibid, paragraph 79

[58] Congressional research service, International Criminal Court Cases in Africa: Status and Policy Issues,2011, p.28

with a request for surrender or assistance, which would require the requested state to act inconsistently with their obligations under international agreements or international law. [59]

AU claims that the issue of universal jurisdiction came to the idea just to undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in different parts of Africa.[60] Because it was the first time, the UNSC was using its power under Article 13 of the Rome Statute to activate the jurisdiction of the Court to investigate a situation within the territory of a state that was not a party to the Rome Statute.[61] Many African leaders spoke up against the ICC's alleged persecution of Al-Bashir, which was deemed to be contrary to the customary international law principle of Head of State immunity as a manifestation of the principle of sovereign equality under Article 2(4) UN Charter.[62]

In the request of advisory opinion before the ICJ, the AU raised two fundamental and related questions against the ICC. **One,** whether immunities granted as a matter of customary international law to a head of state may be waived by a treaty (in this case the Rome Statute), and **two**, what was the impact of a referral by the UNSC as it pertains to the relationship between Articles 27 and 98(1) of the Rome Statute.[63] However, the ICJ has not yet given a ruling on the AU request for an advisory opinion. If the ruling of ICJ favors the side of ICC, AU would probably shift its intention to encourage the ratification of the Malabo Protocol.

However, the ICC Pre-Trial Chamber I noted that it had the sole authority to decide whether immunities are applicable in a particular case[64] and that the AU and its Member States are not entitled to rely on Article 98(1) of the Statute to justify refusing to comply with the cooperation

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[59] Sascha-Dominick and Naa A 'the AU and ICC controversy before the ICC: a way forward to strength international criminal justice?' (2018) 29 Washington international law journal, p. 249

[60] Ibid

[61] Ibid

[62] Ibid

[63] Ibid

[64] The Prosecutor v. Omar Hassan Ahmad Al Bashir, Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, No. ICC-02/o 5 -o1/o 9 -14o (13 December 2011), < www.icc-cpi.int/iccdocs/doc/doc1384955.pdf >[accessed on January 11,2021]

request.[65] The chamber concluded that customary international law creates an exception to head of state immunity when international courts seek a head of state's arrest for the commission of international crimes.[66] In reaction to this decision, the AU Commission expressed its deep frustration by noting that the decision has the effect of professing to change customary international law concerning immunity and rendering Article 98 of the Rome Statute redundant, non-operational.[67]

Additionally, the AU model national law in universal jurisdiction excludes prosecution of the head of states and high government officials and the AU recommends that universal jurisdiction over the head of states and high government officials should be exercised by securing the consent of the head of state concerned and it must be exercised without prejudicing diplomatic confidentiality.[68] The ruling of ICJ supports the AU argument about universal jurisdiction, which has confirmed that the absolute nature of the immunity from criminal process accorded to a serving foreign minister subsists even when it is alleged that he or she has committed an international crime and applies even when the foreign minister is abroad on a private visit. [69]

2.3.2 Reservation against UNSC power to refer a case to the ICC

The relationship between the ICC and the UNSC is defined in Articles 13, 16, 19, 53, and 87 (7) of the Rome Statute and the Negotiated Agreement between the ICC and the UN.[70] The UNSC can activate the ICC's jurisdiction over non-party States. However, the Rome Statute governs the rest of the process. The referral process of the ICC in which reinforces this view, ICC can still indict non-State parties to the Rome Statute if the UNSC decides to refer them.[71] A referral

[65] Ibid

[66] Ibid

[67] African Union press release No.002/2012 available at:<www.au.int/en/sites/default/files/PR-%2o002-%2olCC%2oEnglish.pdf >[accessed on January 11,2021]

[68] Ibid, p.4

[69] *Germany v. Italy: Greece intervening*, Jurisdictional Immunities of the State (< https://www.icj-cij.org/en/case/143> [accessed on January 12,2020]

[70] Jalloh C, Akande D, du Plessis M, 'Assessing the African Union concerns about Article 16 of the Rome Statute of the International Criminal Court' (2011) 4 African journal of legal study, p.55

[71] Ibid

requires nine affirmative votes, but any permanent member of the UNSC can exercise its veto power to prevent a referral.[72]

Allowing the UNSC to refer cases that are not even a member of the Rome Statute to the ICC is a clear violation of international customary law. Scholars[73] argue that since article 13(b) of the Rome Statute threatens one of the most fundamental principles of the international legal order that a State does not incur rights and obligations under a treaty without its consent and it is difficult to defend the legality of Article 13(b) both under the UN Charter and under international law.

However, other scholars argue against the AU argument by referring to article 13(b) with article 17(2) of the ICC –UN agreement. According to Oxford Professor, Dapo Akande,[74] when the UNSC refers States to the ICC under Article 13(b), the UNSC does not make the ICC Statute binding on the non-party State but merely puts such State in a position 'analogous' to that of a State party to the ICC Statute.[75] In other words, without making the State a party to the treaty, which can only be achieved lawfully through treaty ratification, the UNSC creates the same legal effect simply by adopting a Chapter VII resolution.

2.4 Is the African international criminal law section complementary or an alternative to the ICC?

2.4.1 Objectives of the ICC and the African international criminal law section

Preambles of both the Malabo Protocol and the Rome Statute share many similarities. For example, paragraph 16 of the Preamble of the Malabo Protocol states that "the present Protocol will complement national, regional and continental bodies and institutions in preventing serious

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[72] Ibid

[73] John-Mark Iyi, 'Re-thinking the Authority of the UN Security Council to Refer Nationals of Non-party States to the ICC', (2019) 66 Netherlands International Law Review,p.27 available at < file:///C:/Users/hp/Downloads/Re-thinkingtheAuthorityoftheUNSCtoReferNationalsofNon-PartyStatestotheICC.pdf >[accessed march 1,2021]

[74] D. Akande 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 Journal of International Criminal Justice p.333

[75] Ibid

and massive violations of human and people rights in keeping with Article 58 of the African Charter on Human and Peoples Rights and ensuring accountability for them whenever they occur."[76] This is similar to paragraph 5 of the Preamble of the Rome Statute which states that the objective of the ICC is to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[77] Paragraph 10 of the Preamble of Malabo Protocol is also similar to paragraph 7 of the Preamble of the Rome Statute, where they highlight respect for human life and the significance of abstaining from the use of force.[78]

The Malabo Protocol and the Rome Statute shared more common features than just the objective, such as the language in the criminal elements of the four international crimes,[79] the exercise of jurisdiction for prosecution,[80] and the mode of jurisdiction.[81] These similarities create conflicts arising from state obligations for parties to both instruments.

For example of conflicts could exist when both the ICC and the African international criminal law section would prosecute the same person (national of Country X) for the same conduct related to the same crime. Moreover, both institutions have asked Country Z (a state party to both the Rome Statute and the Malabo Protocol) to surrender the respective suspect to their respective courts. Ultimately, Country Z can only choose one court to surrender the suspect, which would inevitably violate their treaty's obligation under the other instrument. Although only nine states have signed the Malabo Protocol so far,[82] the AU has thirty-two states[83] that are State parties to the Rome Statute. Thus, the Malabo Protocol has the potential to put an impact on the functionality of the ICC. If thirty-two states withdraw from the Rome Statute or give upper jurisdiction to the Malabo Protocol, the jurisdiction of ICC in Africa will practically terminate.

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[76] The Malabo protocol, preamble

[77] The Rome Statute, preamble

[78] The Malabo protocol, preamble, and the Rome Statute preamble

[79] The Malabo protocol Article 28B-N and Rome Statute Article 5

[80] The Malabo protocol Article 46E and Rome Statute Article 12

[81] Ibid

[82] Amnesty International, Malabo Protocol: legal and institutional implication of the merged and expanded the African court, snap chat available at < https://www.amnesty.org/download/Documents/AFR016137201 > [accessed on June 27,2021]

[83] Ibid

2.4.2 Why the ratification process of the Malabo Protocol is taking too long?

Regardless of the objectives of the African international criminal law section offers, to fight impunity, the section prevented from achieving its objectives because the Malabo Protocol has not yet entered into force. The slow ratification of AU treaties is an ongoing problem, which 'has always been raised as a concern at almost every AU Summit, that the African States are not ratifying their conventions.[84] However, some reasons affect the ratification process of the Malabo Protocol.

When ratifying the Malabo Protocol States sign up to all three of the African Court's sections. Yet, given that the 'slow pace of ratifications of all conventions and legal instruments of the AU, the trend is also challenging the Malabo Protocol',[85] it is doubtful that the protocol will come into force any time soon. However, the Malabo Protocol is not the only instrument that has the problem of a slow process of ratification.

Currently, only thirty out of fifty-five States are members of the African Court of Human and people's Rights (ACHPR) minding that the court established back in 2004.[86] Even if all thirty states party of the ACHPR ratified the Malabo Protocol this would still leave twenty-five AU members as non-parties. Getting these twenty-five states to ratify the Malabo Protocol will be a challenge as 'how are they going to buy into this thing the African Court if they are also required to assume the criminal element of it'[87] when they have not yet accepted the human rights side of the court.

As a treaty-based institution, the Malabo Protocol 'does not create either obligations or rights for a third State without its consent'.[88]However, this should not disqualify the section from being an

[84] AU, Brainstorming on the strategy to speed up Ratification, Accession and Implementation of OAU/AU Treaties in Eastern Africa Region, Available at: https://au.int/fr/node/13152 [accessed on June 27,2021]

[85] Ibid

[86] African Court on Human and Peoples' Rights report, available at <: https://www.achpr.org/afchpr/ >[accessed on July 29,2021]

[87] Tiyanjana Maluwa, 'Ratification of African union instruments by member states: Law, policy and practice'(2012) 13 Melbourne Journal of International Law, p.15

[88] Vienna convention on the laws of treaty, Article 36

alternative to the ICC. Because non-state parties can accept jurisdiction on an ad hoc basis 'by declaration lodged with the Registrar'. For instance, the ICC has been successfully used the declaration method to extend its reach when Côte d'Ivoire made a declaration accepting ICC jurisdiction in 2003[89] before it ratified the Rome Statute in 2013.

Budget Constraints are also the factors that limit the ratification process of the Malabo Protocol. Despite the AU, reviewing the financial implications of the new court there is still uncertainty surrounding the actual costs.[90] If states are unsure of the costs, it will prove difficult to motivate them to contribute, especially when the majority of African States already struggle to fulfill their AU contribution obligations.[91]

Another reason for the poor rate of ratification of the Malabo Protocol could be entering into the Malabo Protocol may result in a breach of international law.[92] No African Member State to the Rome Statute has officially withdrawn from the ICC so far. Thus, Article 30 of the VCLT applies to parties who entered into a treaty with conflicting obligations and do not want to actively withdraw from their current treaty at the same time.[93]

The general principle under international law is that states that have contracted themselves to an earlier treaty cannot contract into another treaty that has conflicting treaty obligations. If a country enters into a treaty that concludes the same subject matter as the previous one, the latter treaty is said to be tainted with illegality. Therefore, the ratification of the Malabo protocol while being a member of the Rome Statute might result in invalidity of the ratification of the protocol.

In conclusion, The AU's ability to encourage its member states to ratify the Protocol is the biggest hurdle to fight impunity. The ACHPR suffers from low membership, which could be an indicator that the Malabo Protocol is likely to suffer from ratification problems. Nevertheless, based on the slow rate of ratification, it is simplistic to say the African international criminal law

[89] Daniel D Ntanda Nsereko, 'Triggering the jurisdiction of the International Criminal Court,'[2004] African human rights law journal p. 56

[90] Ibid

[91] Ibid

[92] Jacky Fung Wai Nam, 'Jurisdictional Conflicts between the ICC and the African Union: Solution to the Dilemma' (2020) 44 Denver journal of international law, p. 41

[93] Vienna Conventions on the Laws of Treaty, Article 30

section is not an alternative to the ICC, because most of the African treaty-based institutions passed through this process.

2.4.3 Concern about mass withdrawal of African States from the ICC

In January 2017, at its Annual Assembly of Heads of State and Government, the AU decided by consensus on a strategy for mass withdrawal from the ICC.[94] This announcement followed moves by Burundi, South Africa, and The Gambia to withdraw from the Rome Statute – the legal base of the ICC – in October 2016. [95]African States constitute the biggest bloc in the ICC, with 34 out of the 124 current states parties, and this decision caused ripples.[96]

However, the title of the AU's Withdrawal Strategy Document is evasive. A collective withdrawal from the ICC has no any international law recognition. Every state is sovereign in its decision to leave the court or to remain and, so far, only Burundi has successfully initiated the process to withdraw.[97] Further, many ministers voiced their disagreement over the decision, particularly those representing Nigeria, Senegal, and Cape Verde; and 17 member states entered their reservations, which is significant as this is a non-binding strategy.[98]

One way to resolve the possible conflict between the African international law section and ICC is by voluntary withdrawal. Article 127 of the Rome Statute provides that State parties can withdraw from the Rome Statute by written notification one year from the date of the receipt of the notification.[99]On the contrary, both the Malabo Protocol and the Protocol on ACJHR do not provide any provisions regarding withdrawal of the treaty. In addition to the Rome Statute, Article 54(a) of the Vienna Convention on the Laws of Treaty (VCLT) provides that the party may expressly agree to terminate any treaty.[100]

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[94] Aaron Maasho, African Union Leaders Back Mass Exodus from International Criminal Court, U.K Independent (Feb. 1, 2017), available at < https://www.independent.co.uk/news/world/africa/african-union> [accessed on July 1 2021]

[95] Ibid

[96] Sascha-Dominick(n59)

[97] Ibid

[98] Jacky Fung(n 92)

[99] Ibid

[100] Ibid

Article 54 of the VCLT states that, the termination of a treaty or the withdrawal of a party may take place in two different ways. One In conformity with the provisions of the treaty itself and two, by consent of all the parties after consultation with the other contracting States to the treaty. This leaves African countries that wish to withdraw from the Rome Statute the option of exercising their rights under Article 54(a) of the VCLT and Article 127 of the Rome Statute.[101]

2.5 The reflection of AU political attack against ICC under the rules of Malabo Protocol: "immunity clause"

In the true sense, the word immunity derives from the Latin "immunities", which means the condition of someone being exempt from taxes, or any charges or duties.[102] In recent times, the availability of immunity concerning international crimes has been debatable. There are two types of immunity, personal and functional immunity. Personal immunity protects the acts of person's essential to a state's administration, whether in their personal or official capacity, for the duration of their term in office. On the other hand, functional immunity protects official acts of state representatives carrying out their functions for the State and continues to protect their acts after the end of their term in office.[103]

Principle of immunity proceeds from notions of sovereign equality. Impunity aims to ensure that States do not interfere with other States' affairs unreasonably.[104] However, international criminal courts like ICC circumvent the rules of immunity by labeling all international crimes as private acts and not official acts of the state. Nevertheless, the Rome Statute has no clear statement about how the act of State officials carried out in their official capacity is remote from their private act.[105]

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[101] Ibid

[102] Black law dictionary,2nd edition available at < https://thelawdictionart.org/immunity/> [accessed on march 1 of 2021]

[103] Dapo Akande and Sangeeta Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', (2011) 21 European Journal of International Law, p.818

[104] Joanne Foakes, Immunity for International Crimes? Developments in the Law on Prosecuting Heads of State in Foreign Courts, briefing paper, 2011.p 4

[105] Ibid

Article 27 of the Rome Statute expressly provides that no condition or privilege can be taken into account to stop the prosecution opened against the perpetrator of international crimes and the ICC could investigate and prosecute individuals for the crime they committed during their term of office.[106] Thus, the issue of immunity is one of the basic different aspects of the African regional criminal court from ICC.

One of the AU reservations against the ICC was using universal jurisdiction to exclude the immunity of a head of states and government-granted under customary international law. The AU argues, the ICC request for the African States to cooperate in the arresting of the head of States is contrary to the rules of international customary law on immunity. Article 98 of the Rome Statute also obliges the court not to proceed with a request for surrender or assistance, which would require the requested state to act inconsistently with their obligations under international agreements or international law.

Therefore, the reservation of AU against ICC concerning the issue of immunity is reflected under the Malabo Protocol article 46(A) which gives immunity to the head of state, head of government, and high government officials. Additionally, the AU has voiced concern about indicting and prosecuting sitting African heads of state because of the political instability it can cause in the heads country.[107] Therefore, because of the AU reservation and justifications illustrated below, the immunity clause is a major differentiating feature of the African international criminal law section that reflects the political attack of AU against ICC because the immunity clause has no relevance to achieve the purpose and objectives of the section itself

The AU argues that the immunity clause is significant considering the current situation context of the continent. If the ACJHR has jurisdiction over all Member States of the AU, including those that are not member states of the ICC, The immunity clause would help to increase those non-member states' consent to submit to the jurisdiction of the ACJHR.[108] Additionally, the AU argues that the immunity clause also allows government officials to focus on their

[106] The Rome Statute, Article 27

[107] Ibid

[108] Abass A,' Prosecuting international crimes in Africa: rationale, prospects and challenges' (2013) 24 European Journal of International law, p. 939

responsibilities while in office.[109] Since their immunity protection will no longer be invoked after the expiration of their time in the office, leaders are presumed to be more responsible to prevent violation of international crime considering their accountability for their action under the court jurisdiction after the expiration of office term.[110]

The AU also argues that the immunity clause prevents the constitutional duties of state officials from being disrupted[111], to support this argument they raise the incident that happened in Kenya in 2007. In that situation, if the head office were indicted, they would not be able to focus on their responsibilities to ensure national and regional security.[112] Therefore, if there is no immunity guaranteed to the head of state and high government officials, in situations that threaten national and regional security, the state might leave without any leaders to fix and reconcile the situation. AU also states that, indicting sitting state officials would disrupt the functions of constitutional institutions. Considering the continent's circumstances such as the political instability of many African countries, charging, and arresting a sitting head of state or government will defiantly interrupt and affect the smooth and peaceful function of constitutional organs of the State.[113]

Finally, the AU believes that the immunity clause also preserves the sovereignty of African nations. The sovereignty of nations is based on the concept that states have exclusive jurisdiction over their territory and population and do not interfere with the exclusive jurisdiction of other states[114]. Though the ICC is not a state, its indictment of state officials is undue interference of an international entity in the sovereign jurisdiction of African states. Therefore, by granting

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[109] Garth Abraham, '*Africa's Evolving Continental Court Structures: At the Crossroads?'* OCCASIONAL PAPER 209, 2015, P.13

[110] Ibid

[111] Ibid

[112] African Union Decisions and Declarations, Decision on Africa's Relationship with the International Criminal Court (ICC) 6–7, Oct. 2013, African Union indicating the President of Kenya's indictment by the ICC interferes with security issues<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1001&context=tjrc-icc> [accessed on January 26,2021]

[113] Miriam Abaya, 'No place for immunity: the arguments against the African criminal courts article 46BIS', (2016) 30 Temple international and comparative law journal, p.194

[114] Abassa A.(n108)

immunity for the head of state and government and high government officials, the sovereignty of African nations would protect from the interference of international Organs like the ICC.[115]

Critics against Article 46 E of the Malabo Protocol

Scholars argue that the immunity clause under the Malabo Protocol is contrary to international law. Considering 34 AU countries that have ratified the Rome Statute of the ICC and bind to complement the obligation provided under the Statute, where Article 27 states that "a person's official capacity will not exempt them from criminal responsibility..."[116] and granting immunity to leaders from prosecution under ACJHR would, at minimum, violate these countries obligations under the Rome Statute. Under international customary international law, states should abide by any treaty obligation they have consensually ratified unless the condition to withdraw or revoke treaty obligation provided under the Vienna Convention is fulfilled.[117]

Personal immunity, which is recognized under the Malabo Protocol, protects high-ranking government officials for both official and unofficial acts and protects these high-ranking officials while they are still in office.[118] However, under international law, core crimes such as genocide, torture, and crimes against humanity were considered outside the official capacity of senior state officials, and therefore personal immunities could not protect these senior state officials from prosecution for these crimes.[119] In addition to that, international Courts and Tribunals deny immunity for sitting state officials at a different time, for instance under the case of arrest warrant between Congo and Belgium which was adjudicated by the ICJ senior state officials were denied immunity while they were in office.[120]

The other argument raised against the immunity clause under Malabo Protocol is related to the final statement of the provision, which states, "Anybody acting or entitled to act in such capacity

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[115] Ibid

[116] Miriam (n113), p.199

[117] Ibid

[118] Dominique Mystris, 'The African Union's Rethinking of International Criminal Justice', (2020) 42 Queen Mary Studies in International Law, p.249

[119] Mark A. 'Immunity or Impunity the Potential Effect of Prosecutions of State Officials for Core International Crimes That Are Not Parties to the Statute of ICC', (2006) 31 Brooklyn journal of international law, p.46

[120] Arrest Warrant of 11 April 2000 (Democratic Republic of Cong. v. Belgium), Judgment, 2002 I.C.J. (Feb. 14)

or other senior state officials".[121] This statement of the provision leads to ambiguities since there is no clear and official definition of what constitutes a senior official. As a result, it may lead to immunity for any senior government official irrespective of the gravity of crimes they commit. Either the immunity clause could benefit accused individuals for the commission of international crimes to gain positions of power to avoid proceedings against them, democratically or through more means that are violent.[122]

The domestic practices of states indicate that states are bound to eliminate immunity for sitting state officials as a matter of customary international law.[123] Many African country's laws and cases eliminate State official immunity for core crimes, some of the states are Niger, South Africa, Kenya, Uganda, and the Democratic Republic of Congo that they created laws that abrogated state official immunity if someone in such a position violates a core international crime.[124]In addition, our country Ethiopia, a state not a party to the ICC, incorporated no head of state immunity for international core crimes under both the constitution and criminal code.

In conclusion, the controversy between the AU and ICC results in the adoption of the Malabo Protocol, which is an extension of the ACJHR jurisdiction to international criminal law. The AU has been vocal for the last decade about its reservations and critics against the rules of ICC. Some of the critics are political, such as allegations of ICC for afro focus approach, conspiracy theory as new colonialism to Africa which is unfounded by strong arguments. The AU's major reservations against ICC about the referral power of the UNSC, the application of universal jurisdiction, and the effectiveness of retributive justice are sound and valid.

Africa's criticisms of the ICC should not, however, be seen as a rejection of the principles of international criminal justice. Several developments signify support for efforts to guarantee accountability in respect of international crimes. However, If African states are sincere about

[121] Ibid

[122] Gerhard (n15) p.198

[123] Aya Tochigi , 'Removing Head of State Immunity: Utilizing Domestic Courts to Promote Access to Justice',[2012]SetonHallLaw,p.5,available<https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1026&context=student_scholarship> [accessed on march 4,2020]

[124] Michael Bachrach, 'The Protection and Rights of Victims under International Criminal Law', (2005) 34 The international lawyer journal, p.14

their commitment to delivering international criminal justice; they must prove this by adopting and ratifying the protocols on the ACJHR. Failure to do so will only confirm the fears of critics that these so-called ‘efforts’ are just a front for the protection of criminal leaders.

The slow process of ratification of the Malabo Protocol, the incorporation of immunity clause, the issue of mass withdrawal from the ICC might demonstrate that the motives for the establishment of the African international criminal law section are AUs political attack against ICC. However, it is too simplistic to claim that the proposal for such a mechanism is only motivated by a desire to undermine the ICC.

Other than the motive behind the establishment of the African international criminal law section, the objectives of the Malabo Protocol reflected under the preamble, the establishments of jurisdiction, definitions of core international crimes are similar to the rules of the Rome Statute. While having those similarities with the Rome Statute, the Malabo Protocol incorporated different rules that might have an impact on the achievement of the purpose and objectives of international criminal courts or perhaps the ICC has. In the scenario, it is necessary to identify whether the African international criminal law section is a viable alternative to the ICC if the Malabo Protocol becomes operational.

CHAPTER THREE

3. Some Issues of concerns about the African international criminal law section and their impact over "the court's viability to be alternative to ICC"

3.1 Introduction

Whatever the motivation the AU has, the Malabo Protocol is a creative and courageous approach, as a regional criminal court has not been endeavor before.[125] While the motivations for and adoption of the Malabo Protocol are multifaceted, if the African international criminal law section is anti-ICC one would expect this to be reflected in its purpose, and consequently, on its ability and commitment to achieve the purpose and objectives of international criminal courts.

ICC being the first permanent international criminal court, its enabling Rome Statute incorporates substantive and procedural rules as a tool to achieve the objectives of the court. The ACJHR international criminal law section or it enabling the Malabo Protocol also incorporate its own substantive and procedural rules to achieve the same objectives the Rome Statute has. While the objectives of these two organs are similar, there is a difference in the rules they apply to achieve those objectives. This chapter of the thesis examines whether the different rule or feature under Malabo Protocol limits the section to achieve the same objectives the ICC has.

The African international criminal law section was established to be an alternative to ICC for the African States that happens to have a reservation over some rules of the Rome Statute. The basic question is would the African international criminal law section be a viable alternative to ICC while having a different feature such as immunity clause, tripartite stricture of court, extensive lists of international crimes, and corporate criminal liability? We examine those different features in line with the purpose and objective of the international criminal court; compare rules of ICC and ACJHR over international criminal violations in Africa, logical reasoning arguments.

3.2. Why is international criminal court needed?

[125] Kamari Maxine Clarke "*Affective Justice, the International Criminal Court and the Pan-Africanist Pushback"* Duke University Press, 2019 , p. 177

As the armed conflicts and serious violations of human rights and humanitarian law continue to victimize millions of people throughout the world, the reasons for an international criminal court became compelling.[126] In many conflicts around the world, armies or rebel groups attack ordinary people and commit terrible human rights abuses against them. [127]Often, these crimes do not punished by the national courts.[128]The international criminal court was established to bringing an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of grave crimes threaten the peace, security, and well-being of the world".[129]

The commitment of the international community to achieve international criminal justice through establishing judicial organs as ICC went to the extent where any individual should not go unpunished for heinous acts, he/she committed against international criminal law. [130]The history of the 20th century shows that individuals with political power including head of state, head of government, and high state officials have committed many grave crimes. As per the report of ILC, "…Crimes under international law by their very nature often require the direct or indirect participation of several individuals at least some of whom are in positions of governmental authority or military command."[131] In addition to that, the judicial approach of international criminal tribunals shows that the immunity given to the head of states is irrelevant when it comes to criminal liability; the ICTY in blasiki case stated that:

> "…Those responsible for (war crimes, crime against humanity and genocide) cannot invoke immunity from national or international jurisdiction if they perpetrated such crime while acting in their official capacity."[132]

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[126] Kai Ambos, 'Establishing an International Criminal Court, and International Criminal Code', (1996) 7 European journal of international law, p.519

[127] Ibid

[128] Ibid

[129] The Rome Statute, preamble

[130] Carsten Stahn, Justifying International Criminal Justice: Towards a Relational Approach,(2019) Available at SSRN: http://dx.doi.org/10.2139/ssrn.3483669 [accessed on April 22,2021]

[131] Report of the International Law Commission, year book of the international law commission (1996) available at < https://legal.un.org/ilc/publications/yearbooks/english/ilc_1996_v2_p2.pdf > [accessed on April 22,2021]

[132] *Prosecutor V. Blaskic* (Appeal chamber Judgment) case No ICTY- IT-95-14, 18 july1997; Para 41

The reason many individuals accused of commission of international crimes have never substantially prosecuted by domestic courts especially in Africa was that the political power of those individuals has been manipulating the domestic justice system and they could skip domestic prosecution easily.[133]

Because of the above-mentioned reasons, the Rome Statute which establishes the first permanent international criminal court provide that immunity or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the court from exercising its jurisdiction over such a person.[134] Not only has the Rome Statute, but the AU Constitutive Act also put an obligation on member states to fight impunity of perpetrators of international crime and African leaders committed themselves to fight impunity with the adoption of the Constitutive Act.[135]

Against the entire trend, rules, and experience of international criminal law courts, Article 46 E of the Malabo Protocol granted the immunity to head of states, head of government, and high government officials from prosecution over the crimes listed under article 28B of the Malabo Protocol.[136] The AU provides its explanation for incorporation of the immunity clause based on protecting the constitutional order, attacking more member states to the Malabo Protocol and respecting state immunity under international customary law. Some argue the provision proofs the establishment of the international criminal law section is a mere political move against ICC. However, despite the justification behind, how the immunity clause under article 46 E fits with the purpose and objectives of international criminal courts?

3.2.1 Can the African international criminal law section achieve the same purpose ICC has while having an immunity clause?

The preamble of the Malabo Protocol provides that, one of the basic justifications to extend the jurisdiction of ACJHR to international criminal law is to reiterate the commitment of AU to fight

[133] Ibid

[134] As cited in Robel T, 'immunity from Prosecution of Head of State for Crimes of Genocide, Crime against Humanity and War Crimes: with Particular Reference to the Red Terror Trials in Ethiopia', master thesis,

[135] The AU Constitutive Act, Preamble, paragraph 3

[136] The Malabo protocol, Article 46E

impunity in conformity with article 4(o) of the constitutive acts of the AU.[137] The AU and African States agreed on the necessity of fighting impunity of perpetrators of international crimes while reserving their objection to investigating and prosecution of sitting head of state, head of government, and high government officials.

As per Article 46A bis of the Malabo Protocol “, no charges shall be commenced or continued before the court against any serving head of state or government, or anybody acting or entitled to act in such capacity or other senior state officials based on their function during their tenure of office.” [138] This specific rule is inconsistent with not only the objective and purpose of ICC but also the objective of the Malabo Protocol itself and the Constitutive Act of AU.[139]

In the majority of African cases that were brought to ICC concerning war crimes, the ICC prosecutor finding proof of the involvement of the State officials in the commission of war crimes.[140] Not only in African experience but also globally as the ICL revel, “Crimes under international law by their very nature often require the direct or indirect participation of several individuals at least some of whom are in positions of governmental authority or military command.” [141] International criminal court established without having jurisdiction over main potential international criminals is a barking dog without teeth. Therefore, the African international criminal law section is not able to achieve the same objective the ICC has towards fighting impunity and prevention of future violations of international crimes if those individuals in Africa are protected by the immunity clause.

However, the AU argues that the door of the African international criminal law section does not close to investigate and prosecute those officials. Because the immunity clause under Malabo Protocol can only be invoked by serving officials during their term of office and since no provision preclude the court from investigating and prosecuting those officials after the expiry of

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[137] The Malabo Protocol, preamble, paragraph 11

[138] The Malabo Protocol, Article 46bis A

[139] Ibid

[140] International criminal court, Prosecutor receives referral of the situation in the Democratic Republic of Congo ICC-OTP-20040419-50 available at < https://www.icc.org > [accessed April 1/2021]

[141] Ibid

their tenure of office; individuals who can invoke the immunity clause are not free from responsibility entirely.[142]

3.2.2 AUs commitment to fight impunity and effect of the "immunity clause" under the Malabo Protocol

The AU has its argument in favor of the incorporation of the immunity clause and the ICC, other international organizations and NGOs have their critics over the immunity clause based on international customary law, international law, and domestic laws of Africa nations. The AU has the mandate to fight impunity under article 4(O) of the AU constitutive act. The AU Peace and Security Council play a great role in the prosecution of international crimes since it has jurisdiction to refer a situation to the African international criminal law section.

Who was responsible for the commission of international crimes in different parts of Africa? In addition, how would the African international criminal law section adjudicate the violation of international crimes in the continent with competency like the ICC despite its different features specifically the "immunity clause"? To answer this question, we select to examine the conflict in Libya and South Sudan by comparing the rules of the Malabo Protocol and ICC.

The conflict in Libya

After popular movements overturned the rulers of Tunisia and Egypt, its immediate neighbors to the west and east, Libya experienced a full-scale revolt beginning on 17 February 2011 and By 20 February, the unrest had spread to Tripoli.[143] Al Jazeera and other agencies reported that Mohammed Gadhafi government was arming pro-Gaddafi militiamen to kill protesters and defectors against the regime in Tripoli and Organs of the United Nations, including United Nations Secretary-General Ban Ki-moon and the United Nations Human Rights Council, condemned the crackdown as a violation of international law.[144]

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[142] Ibid

[143] Ibrin UbaleY, and Musa Mohammed B, 'Libya crisis and the escalation of conflict and insecurity in Africa' (2020) 18 international Journal of Humanities & Social Sciences, p.27

[144] Ibid

On 27 June 2011, the International Criminal Court issued an arrest warrant for Gaddafi, alleging that Gaddafi had been personally involved in planning and implementing a policy of widespread and systematic attacks against civilians and demonstrators, and dissidents.[145] In addition, the International Coalition against War Criminals gave an estimate that 519 people had died, 3,980 were wounded and over 1,500 were missing until the death of Gadhafi in 2011.[146]

International organizations including the Office of High Commissioner for Human Rights (OHCHR) and the United Nations High Commissioner for Refugees (UNHCR) report on the widespread violation and abuse of international human rights law, international humanitarian law, and international criminal law.[147] Those included are forced disappearance, ill-treatment, torture and sexual abuses against men and women, unlawful killings, and attacks against civilians (war crimes).

ICC response to the situation

The ICC issued arrest warrants for Saif Al-Islam Gaddafi[148] and Abdullah Al-Senussi[149] on 27 June 2011 for their alleged criminal responsibility as indirect co-perpetrators on two counts of crimes against humanity murder under Article 7(1)(a) and persecution under Article 7 (1)(h) of the Rome Statute. The ICC investigates the accused individuals based on the referral of the UNSC.

Even if the referral power of UNSC to ICC over nonmember states to the Rome Statue is still debatable, we cannot ignore the benefit of UNSC referral power. One of the most important factors affecting the work of the ICC is the cooperation of states since the ICC has no

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[145] *The Prosecutor v. Saif Al-Islam Gaddafi*, ICC-PIDS-CIS-LIB-01-014/20_ available at https://www.icc-cpi.int/CaseInformationSheets/GaddafiEng.pdf >[accessed on April 1/2021]

[146] Coalition for the international criminal court ,Libya: Send Saif Gaddafi to ICC, available at < https://www.coalitionfortheicc.org/news/20170613/libya-send-saif-gaddafi-icc >[accessed on April 1/2021]

[147] Ibid

[148] Warrant of Arrest for Saif Al-Islam Gaddafi, Situation in the Libyan Arab Jamahiriya, No ICC-01/11, Pre-Trial Chamber, 27 June 2011.

[149] Warrant of Arrest for Abdullah Al-Senussi, Situation in the Libyan Arab Jamahiriya, No ICC-01/11, Pre-Trial Chamber, 27 June 2011

enforcement powers of its own[150], cooperation of states is the quintessential element that gives meaning to the court's decisions. Libya does not object to the jurisdiction of ICC rather claims the inadmissibility of the case by stating there was an ongoing domestic prosecution process against those accused individuals.[151]

Therefore, for individuals accused of commission of international crimes in a Libya situation, the rules in the Rome Statute allow the ICC to proceed with investigation and prosecution of the accused individuals irrespective of their political status to achieve the objectives of the international criminal court that it no perpetrators of international crimes should go unpunished.[152]

What would be the response of ACJHR to the Libya situation?

If the African international criminal law section came into force and functional at the time of the Libya conflict, the response of the court would not be the same as the ICC response for two major grounds. **One** the immunity clause incorporated under the Malabo Protocol would prevent the ACJHR prosecutors to investigate and prosecute the accused individuals for violation of international crime because of their political status and **two** similarly with the situation in Sudan[153] the AU Peace and Security Council would priorities political solution over referring the case to the African regional criminal court.

Article 46E of the Malabo Protocol give a wide immunity for a head of state, head of government, and high government officials against prosecution for violation of international crimes and If we see the individuals who are accused of the massive violation of international crime during the Libya conflict, majority of the individuals falls under the Malabo Protocol

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[150] Ibid

[151] Ibid

[152] "This Statute shall apply equally to all persons without any distinction based on official capacity. Official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute…", The Rome statue, article 27(1)

[153] The AU objectified the UN security council authority to refer a case to ICC because of the arrest warrant opened against al Bashir, because the UN security could use its power for political influence against African states, Jalloh C (n38)

"immunity privilege". The immunity clause given under Malabo Protocol is very vague and open to be abused because of the final statement of the provision which states, "…Anybody acting or entitled to act in such capacity or other senior state officials".[154] This statement of the provision could be easily abused since there is no clear and official definition of what constitutes a senior state official. As a result, it may lead to awarding immunity for any senior government official irrespective of the gravity of crimes they commit. The individuals accused of commission international crimes in the Libya conflict, Mohamed Gadhafi (former president of Libya), Saif al-Islam Gadhafi (diplomat on behalf of Gadhafi), Abdulla al sanussi, and Al Tuhamy Mohammed Khalid (the former head of Libyan internal security agency)[155] could claim the immunity provision of the Malabo protocol since their political status entitled them a senior state official.

The other reason why the response of the African international criminal law section would not be satisfactory as of the ICC in the conflict of Libya is the AU Peace and Security Council would not refer the case to the ACJHR international criminal law section.[156] Similarly, with the UNSC, it is unlikely to expect the AU Peace and Security Council to refer a case to the ACJHR[157] because same with the UNSC, the AU Peace and security is a political organ. Political organs would priorities political solutions than the inducement of justice.

The first AU discussion on the Libyan crisis focused on the Libyan authority's repression of demonstrations and the threats that Gaddafi was making against the opposition. [158] Later the AU Peace and Security Council established a high-level ad hoc committee made up of Heads of State. The committee recommends that,

> "…Anticipating to immediate cessation of hostilities; Cooperation of the concerned Libyan authorities to facilitate the timely delivery of humanitarian assistance to

[154] The Malabo protocol, article 46E

[155] Ibrin (n 118)

[156] Jalloh C (n70)

[157] The Malabo Protocol, Article 15

[158] Ademola Abass, 'The African Union's Response to the Libyan Crisis: A Plea for Objectivity', (2014) 7 African Journal of Legal Studies, p.123

needy populations; humanitarian aid and Dialogue between the Libyan parties and establishment of a consensual and inclusive transitional government…”[159]

Nevertheless, the recommendation does not mention or address the necessity of prosecution of individuals who were involved in violation of international criminal law during the conflict.

The conflict in South Sudan

In December 2013, political tensions among major leaders in South Sudan exploded with violence.[160] The political conflict that triggered the crisis was not based on ethnic identity but overlapped with preexisting ethnic and political complaints, sparking armed conflicts and targeted genocide in the capital, Juba, and elsewhere.[161] A political power struggle between South Sudanese President Salva Kiir and former vice president Riek Machar resulted in violent clashes between ethnic army factions. Since then fighting has spread across South Sudan and claimed the lives of around 10,000 people.[162] Both parties of the conflict President Salva Kiir, an ethnic Dinka, and his opponent, former vice president Riek Machar, an ethnic Nuer were instrumentalizing ethnic identities and pulling their communities into their feud.[163]

UNOCHR report portrays the appalling human rights situation in South Sudan.[164] Attacks were committed with an alarming degree of brutality and, like elsewhere in the country, appeared to have an ethnic dimension.[165] Some of the human rights violations and abuses committed in and

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[159] Wilson Kajwengye, The African Union’s Response to the Libyan Crisis of 2011, a master’s thesis ,2013, p.6

[160] Aljazeera report on July 2011, “South Sudan road to civil war” available at < https://www.aljazeera.com/news/2011/7/9/south-sudan-becomes-worlds-newest-nation > [accessed on April 1/2021]

[161] Frederick Appiah Afriyie, ‘Comprehensive analysis of South Sudan conflict: Determinants and repercussion’, [2020] research gate publication, p.34

[162] BBC report on September 2016, “South Sudan's Kiir and Machar profited during war” available at < https://www.bbc.com/news/world-africa-37338432 >[accessed on April 1/2020]

[163] Israel Nyaburi Nyadera, South Sudan Conflict between 2013 and 2018: Rethinking the causes, situation, and solutions, Research Gate publication,2018, p.63

[164] *“South Sudan: UN report contains “searing” account of killings ,rapes and destruction*” United nation human rights office of the high commissioner report ,available at https:// www.ohchr.org/EN/N ewsEvents/Pages/ Display News.aspx?NewsID=17207 [accessed on April 2/2021]

[165] Ibid

around Yei (the area where war crimes were committed) may amount to war crimes and/or crimes against humanity and warrant further investigation.[166] South Sudan is still experiencing numerous episodes of violations of human rights and international criminal law and lack of capacity as well as an "official policy that privileged peace and stability" have resulted in a seemingly entrenched culture of impunity, which gives favor for perpetrators of international crime.[167]

What would be the response of the African international criminal law section to the situation in South Sudan?

South Sudan does not ratify the protocol on the establishment of ACJHR and the amended Malabo Protocol yet. Even if the ACJHR international criminal law section had jurisdiction over South Sudan, the immunity clause provided under the Malabo protocol and the AU Peace and Security Council redundancy would affect the investigation and prosecution of individuals who are responsible for the broke out of the civil war that took tens of thousands of lives of South Sudanese.[168]

The AU Constitutive Act aims to promote and protect human and people's rights, consolidate democratic institutions and culture, and ensure good governance and the rule of law. [169] However, in reality, the issue of rule of law seems forgotten if we observe the response of AU Peace and Security Council for the South Sudan situation released on the counsel's day mission in 2018 it states that…

> " …in light of the foregoing, the Delegation expressed the necessity for the international community to sustain its valuable support to all aspects of the

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[166] Israel (n 148)

[167] Israel (n 148)

[168] The Malabo protocol article 46E

[169] AU, Constitutive Act of 2000, adopted at the Lomé Summit, Togo, on 11 July 2000

> peace process in order prevent relapse to conflict and possibly devastating consequences on innocent civilians…." [170]

Unlike the UNSC, the AU Peace and Security Council show redundancy for the indictment of justice. Let alone, the recent official statement of the AU Peace and Security Council over the matter of South Sudan, none of the previous press statements or resolutions also mentioned or noted the necessity of bringing individuals who are responsible for the conflict to justice. Therefore, the possibility of the AU Peace and Security Council to refer a case to the ACJHR would be very rare.

If the rules of the Malabo Protocol are applied[171] for the situation in South Sudan, the outcome of the case will not be effective as of the ICC in terms of fighting impunity since it does not make both parties of the conflict responsible for violation of international crimes. President Kiir could invoke the immunity privilege since he has the status of head of state. Only, first Vice President Riek Machar, who formerly led a rebellion against Kiir's government, would be investigated and prosecuted even if he does not commit war crimes because the ACJHR amended protocol categorize a rebel act as an international crime since it's one way of unconstitutional change of government.

In conclusion, the AU insists on the advantages of the incorporation of the immunity clause. However, the very objective and purpose of international criminal court, cases of violation of international criminal law in Africa demonstrate that the African international criminal law section could not be a viable alternative to the ICC as long as it has the immunity clause. The redundancy of AU for inducement of justice, the abuse of the immunity clause by the head of state, and targeting only rebel groups for the prosecution of international crimes seems the immunity clause under the Malabo protocol incorporated as a political attack against ICC than a genuine intention to achieve the objectives of international criminal courts.

3.3 ACJHR Tripartite Court stricture vs. the ICC

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[170] African Union, Press release, AU Peace and Security Council Concludes a Three-Day Field Mission to the Republic of South Sudan available at < https://au.int/sites/default/files/pressreleases/38139-pr-au-psc-concludes-field-mission.south-sudan.pdf > [accessed on April 1,2020]

[171] Ibid

Neither on the Statute of the African Court of Justice and Human Rights (Merger Protocol) nor the Malabo Protocol has yet received the required number of ratifications to enter into force. Currently, the African Court of human and peoples right (ACHPR) is the only operative regional judicial bodies, with no criminal jurisdiction.[172]

The merger of three courts under one single court structure is a new experience to international law. The ACJHR is a court that has three different sections dealing with different subject matters.[173] Under this tripartite court, the African international criminal law section will adjudicate international criminal law violations while the other two chambers will be dedicated to determining international human rights violations and issues of general international law respectively.[174] This section examines the effect of the ACJHR tripartite court structure in terms of achieving the objectives of international criminal courts.

3.3.1 Standard of proof

Formal judicial mechanisms provide the clearest framework for standards of certainty. For example, common law countries apply the "beyond reasonable doubt" standard of proof when establishing guilt in criminal trials and the "degree of certainty" used notably in civil court proceedings.[175] However, whether or not such standards can be easily transferred to international fact-finding processes is not self-evident, because the international courts are less formalized and have limited mandate.[176]

The European human rights court, the international court of justice, and many regional human rights courts are silent concerning an explicit standard of proof they apply over the cases, but as we observe from their decision in different cases, it is possible to say that they apply different

[172] AU, Protocol on the Statute of the African Court of Justice and Human Rights, Status of Ratification < https://www.au.int/web/en/treaties/protocol-statute-african-court-justice-andhuman-rights > [accessed march 23/ 2020]

[173] The Malabo Protocol, Article 17

[174] Ibid

[175] Stephen Wilkinson's, *standard of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions,* published by Geneva academy of humanitarian law and human rights,2018, p.20

[176] Ibid

types of standard of the proof case by case.[177] Nevertheless, international criminal tribunals, like the ICTY, used a standard of proof beyond reasonable doubt as to its state in the court's rule of evidence…

> "When both parties have completed their presentation of the case, the Presiding Judge shall declare the hearing closed, and the Trial Chamber shall deliberate in private. A finding of guilt may only reach when a majority of the Trial Chamber is satisfied that guilt has been proved **beyond a reasonable doubt.** "[178]

The ICC standard of proof: the standard of proof applies under the ICC differed from each stage of the process in the prosecution and investigation. During the stage of the investigation, the prosecutor needs to have just a reasonable base to precede the case. In the second stage, to request an arrest warrant or summons to appear, the prosecutor is required to provide the standard of proof a reasonable ground to believe the person has committed a crime. In the final stage, to get a confirmation of charges, it requires substantial grounds to believe, and to convict the accused the ICC requires a standard of proof beyond a reasonable doubt.[179]

Scholars like Ilias Bantekas and Susan Nash said that there are major differences between courts dealing with state responsibility and those dealing with individual criminal responsibility, including those very different evidentiary standards that will apply.[180] While state responsibility is determined with reference to the standard of a balance of probabilities, the standard in an international criminal court is that of beyond reasonable doubt.[181] In addition, they argue that, it

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[177] Ibid 21

[178] Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, (IT/32/Rev.45), Amended 8, rule 87, December 2010, p. 89, [emphasis added]

[179] ICC-ASP/1/3, Rules of Procedure and Evidence, p.37

[180] Ilias Bantekas, Susan Nash, *International Criminal Law,* 3rd Edition, published by Routledge-Cavendish, June 2007, p.146

[181] Chiara Seclì, Reaching the 'Beyond Reasonable Doubt' Standard in International Criminal Law Cases: A Comparison with Italian Doctrine and Jurisprudence, Stockholm University Research Paper No. 67 ,2019,p.8

is another potential negative consequence of the introduction of a tri-sectional judicial institution is the likelihood of the reduction in the focus on human rights.[182]

Other than The African court admissibility guideline, article 56(4) provides that, the admissibility of the case to the African court required information that could be used as potential evidence, not just media and media-centered reports.[183]There is no specific standard of proof in the admissibility process provided under the guiding rule. The Malabo Protocol, the Statute of African Court of Human and People's Rights Court, and the protocol of the African Court of Justice and Human Rights are silent concerning the standard of proof they apply in the investigation and conviction of the accused individual or State. Since three sections of the ACJHR which deal with three different subject matter operate under one structure, the standard of proof they apply over cases needs to be identified otherwise the African international criminal law section would not be able to function effectively comparing to the ICC.

3.3.2 Possible conflict of jurisdiction between the human rights section and international criminal law section of ACJHR

Crime against humanity and serious human rights violations are two intertwined notions. Indeed, the latter is arguably the central defining element of crimes against humanity.[184] However, most of the characteristics of both violations are similar which may result in a claim of jurisdiction between the two sections of ACJHR or as we refer it positive conflict of jurisdiction. The following point identifies the similarity of the two issues. **One,** Serious human rights violations and crimes against humanity constitute mainly grave breaches of the same constitutive acts of core human rights which are protected by international instruments and other legal sources.[185] Thus, the definition of both serious human rights violations and crimes against humanity constitute similar acts and those constitute acts of both portrayed as extremely pernicious attacks against very basic human rights such as the rights to life, physical integrity, and freedom from

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[182] Ibid

[183] Admissibility of complaints before the African Court, Practical guide, June 2016, p.12

[184] Juan Pablo, 'The Close Relationship Between Serious Human Rights Violations and Crimes Against Humanity: International Criminalization of Serious Abuses', (2016) 17 Mexican international law, p.148

[185]Kamari M. and others, "*origins, and Issues of the African Court of Justice and Human and Peoples' Rights*", Cambridge press, 2009 p.17

slavery.[186] **Two,** both serious human rights violations and crimes against humanity constitute violations of peremptory norms and/or similar international customary rules and principles.[187] This corresponds to the fact that the evil acts underlying both serious human rights violations and crimes against humanity shock the very foundational values shared by the international community considered as a whole.[188] Moreover, the commission of either serious human rights violations or crimes against humanity poses a serious threat to peace and international security.[189]

Thus, the qualification of a set of facts as serious human rights violations and/or crimes against humanity normally leads to similar legal consequences. [190]A serious human rights violation, provided under African charter of human and people's right give jurisdiction to the human right section of ACJHR[191] and under the Malabo protocol, a commission of a crime against humanity constitutes a jurisdiction to the international criminal law section of ACJHR.[192] Both of the court sections could claim a situation where the constitutive acts of great human right violation or crime against humanity taken place. Not only it creates a conflict of jurisdiction between the two sections but also it could affect determining who is responsible for the violation of such acts.

The human rights section of the ACJHR could establish a jurisdiction against states for violation of serious human rights that results from state responsibility and the African international criminal law section could establish jurisdiction over an individual for violation of human rights, which is recognized under ICC as a crime against humanity. As Theodor Meron, (former President of the ICTY), pointed out, crimes against humanity "overlap with some violations of

[186] Ibid

[187] Leila Nadya Sadat, 'Crimes Against Humanity in the Modern Age', (2013) 107 The American Journal of International Law, p.335

[188] Ibid

[189] Ibid

[190] Jua Pablo(n182)

[191] The Malabo Protocol, Article,17(2)

[192] The Malabo Protocol, Article 17(3)

fundamental human rights (such torture, rape, or enslavement), which thus become criminalized under a multilateral treaty, the ICC Statute".[193]

There are two regimes of responsibility entailed by the commission of international crimes under international law, that is, aggravated state responsibility and individual criminal liability.[194] Overlaps between state and individual responsibility concerning crime against humanity are found under the ACJHR tripartite court structure.[195] The court allows the ACJHR criminal law section to adjudicated human rights violations that originally result from state responsibility since the constitutive acts of crime against humanity incorporates serious violation of human rights as a crime against humanity.[196] In addition, this issue combining with the absence of the rule of a standard of proof for human rights and international criminal law sections makes the ACJHR difficult to function.

Unlike the ACJHR, the ICC does not have any flaws regarding conflict of jurisdiction since the court established a single structure with exclusively defined jurisdiction over the four crimes listed under the Rome Statute.[197] Additionally, no international human right court exists, that could claim a situation that fit with both serious violations of international human rights and a crime against humanity. Therefore, it is possible to say that the African international criminal law section would be more complicated concerning conflict of jurisdiction issues than the ICC.

In conclusion, the tripartite structure of ACJHR is one of the key different aspects of the African international criminal law section compared to the ICC. The biggest question is would the section serve justice with competency like that of ICC despite its tripartite structure? The answer is NO! Because of the merger of three courts under one court structure, there are flaws that we identified from ACJHR. Under the African international criminal law section, there is no

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[193] Meron, Theodor, 'International Law in the Age of Human Rights-General Course on Public International Law', (2003)301 de Droit International law journal, p. 165

[194] Beatrice I. Bonafè, the *Relationship Between State and Individual Responsibility for International Crimes*, published by MARTINUS NIJFOOF,2009, P.23

[195] Ibid

[196] The Rome Statue , Article 7.2.g of the ICC Statute (crime against humanity of persecution), provides for a specific reference to serious human rights violations as follows: "'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity".

[197] The Rome Statute, Article 5

specified standard of proof in the process of investigation, prosecution, and conviction of the accused like that of ICC. Additionally, The existence of two sections of the court with jurisdiction over the same acts that constitute both series of violations of human rights and a crime against humanity results in a conflict of jurisdiction and overlap of state and individual responsibility for the same acts. However, the ICC does not have those flaws since it is a single stricture court and it has no issue of conflict of jurisdiction since there is no international human rights court.

3.4 Extensive lists of "international crimes" under the Malabo Protocol vs. the ICC

The extensive lists of international crimes provided under the Malabo Protocol are one of the key different aspects of the African international criminal law section compared to the ICC. Other than the four core international crimes, the Malabo Protocol incorporated, piracy, corruption, drug trafficking, human trafficking, mercenaries, illicit exploitation of the natural resource, terrorism, unconstitutional change of government, trafficking in hazardous wastes, and money laundering.[198] As we observe from the nomenclature "ACJHR international criminal law section", the section identifies its subject matter jurisdiction as an international criminal law section. However, the majority of the crimes listed under article 28A of the Malabo Protocol fall under the transnational crime category. Considering the expensive nature of international criminal courts, is the incorporation of those crimes under the court jurisdiction necessary in terms of the requirement of domestic implementing legislation, concern for the international community, and capacity of the domestic justice system to prosecute transnational crimes?

3.4.1 Domestic implementation legislations

Under the Rome Statute system, and due to the principle of complementarity, state parties to the ICC are under a duty to enact domestic implementing legislation. This legislation should domesticate the Rome Statute crimes as well as provide for procedures of cooperating with the ICC.[199] The Malabo Protocol also provides that it is complementary to national jurisdictions,[200]

[198] The Malabo protocol, Article 28A

[199] The Rome Statute, Article 88

[200] The Malabo protocol, Article 46H

and as such, those states party to the Protocol will have to ensure that their domestic legislation is in line with the Protocol. It follows that the process of amending, updating, or indeed adding further provisions into domestic legislation to incorporate the Malabo Protocol legislative requirements needs to be considered by states party to both the ICC and the African international criminal law section.

The Malabo Protocol contains some variations in the definitions of Rome Statute crimes as well as several crimes the Rome Statute has not listed. Most importantly, considering the difference between the rules of the Rome Statute and Malabo Protocol, states who are parties to both institutions cannot have consistent domestic implementation legislation for both instruments. Additionally, transnational crimes incorporated under domestic transnational laws are required to be consistent with the definitions of the Malabo protocol extensive lists of transnational crimes, and that requires a substantial amount of drafting and legislative work.[201]Making all of those extensive lists of crimes consistent with the domestic legislation requires many amendments and revisions of states' domestic criminal laws and that potentially affect states' interest to ratify the Malabo protocol.

3.4.2 Would transnational crimes concern the international community like that of core international crimes?

The legal instruments of international criminal courts and tribunals address the subject-matter jurisdiction over core international crimes.[202] Considering the diversified development of international criminal law, the biggest question is whether other categories of crimes live up to the standard of the “most serious concern” threshold, and thus shall be incorporated within the jurisdiction of international criminal courts and tribunals.[203] There were attempts to include drug trafficking, terrorism, and prohibition of the threat or use of nuclear weapons within the jurisdiction of the ICC during the latest ICC Review Conference in Kampala but it was not

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[201] Ibid

[202] Iryna Marchuk, The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis, published by Springer, ISBN 978-3-642-28246-1 (eBook) 2014, p.69

[203] Ibid

successful. [204]In rather strong terms, the Rome Statute Commentary submits that only crimes that meet the "most serious concern" threshold, those that are the same kind within the four enumerated categories, belong in the Statute.

International crimes, War crimes, crimes against humanity, genocide, and aggression are regularly referred to as the "core" international crimes and they reach the status of most serious concern because of the historical experience of human beings suffer from those acts.[205] The focus on core crimes implies that these other crimes like "transnational" and "treaty crimes" are peripheral or somehow less important.[206] The horror of the Second World War, the tragedy of Yugoslavia and Rwanda lead to the recognition of four international crimes. The gravity of these crimes convinces the international community to establish an international court that could share some jurisdiction with domestic courts to make sure that those evil acts will never happen again.

Unlike the ICC, the African international criminal law section establish jurisdiction over fourteen crimes notwithstanding, the court called as "international criminal law section". Other than the four core international crimes, the majority of the crimes are categorized into transnational crimes.[207] The Rome Statute declares four crimes as core international crimes based on the formulation of the Nuremberg Principles and the draft Statute for the permanent international penal court, which was initiated by the international law commission.[208] However, the Malabo Protocol justification to establish jurisdiction over transnational crimes is based on how those crimes are a threat to the peace and security of the continent.

The incorporation of extensive lists of crimes under the ACJHR has two perspectives. One, the incorporation of new transnational crimes under the international criminal court is a demonstration of a new development of international criminal law over other concerns of acts

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[204] Sara Wharton, 'Redrawing the Line? Serious Crimes of Concern to the International Community beyond the Rome Statute',(2014) 52 The Canadian Yearbook of International Law, p.129

[205] Ibid

[206] Ibid

[207] Ibid

[208] ICC, Applying the Principles of Nuremberg in the ICC, available at :<https://www.icc-cpi.int/nr/rdonlyres/ed2f5177-9f9b-4d66-9386-5c5bf45d052c/146323/pk_20060930_english.pdf > [accessed on April 10,2021]

that are a threat to the peace and security of the continent.[209] Two, the incorporation of this extensive amount of crimes under the ACJHR jurisdiction is degrading the status of international criminal crimes because those crimes do not attain the level of “most serious concern” and they do not require a continental level of the judicial system.[210] Investigating and prosecuting transnational crimes under international criminal court is misplacing the time, resource, and commitment required to punish core international crimes perpetrators to crimes that the domestic courts could adjudicate.

3.4.3 The capacity of domestic justice systems in the prosecution of transnational crimes vs. core international crimes

One of the fundamental justifications for the establishment of international criminal courts was that the individuals, who involve in violation of international criminal law, happens to be powerful and in control of the domestic justice, system and they could or might escape the domestic prosecution very easily.[211] What is the experience of the African state's domestic justice system concerning the prosecution of core international crimes incorporated under ICC?

In Africa, state officials, particularly heads of state regarded traditionally as a symbol of the nation, and they are a symbol of national unity especially considering the nature of multi-ethnic societies in Africa.[212] Hence, any attempt to prosecute a sitting president is might lead to the disintegration of the state unity and may create anarchy and chaos within the state concerned.[213] Even if domestic laws of many African states criminalize and exclude immunity for core international crimes, we do not find substantial investigation and prosecution for international crimes against African leaders in Africa.

No state practice exists in Africa where a sitting president or head of government is prosecuted whilst in office. However, some heads of States prosecuted before national courts in African

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[209] Charles j (n 96)

[210] Gerhard and others (n15)

[211] Margaret M. de Guzman, ‘Gravity and the Legitimacy of the International Criminal Court’ (2008) 32 Fordham International Law Journal, p .1400

[212] Immunity and prosecution of state officials for international crimes in selected African jurisdictions, university of Pretoria, available at :< file:///C:/Users/hp/Desktop/new%20topic/05chapter5.pdf >[accessed on May 10,2021]

[213] Ibid

states, but only after the expiry of the office term. This trend was observed in Malawi and Zambia where former presidents were put on trial, but for domestic crimes.[214] So far, no substantial suspect of violation of international crime was prosecuted in Africa for international crimes before the national courts of his own country. The only close scenario would be that of Hissene Habre who was indicted in Senegal for crimes against humanity, particularly torture, committed in Chad.[215] Another example is that of Colonel Mengistu Haile-Mariam who was prosecuted in Ethiopia for genocide.[216] These are the only two exceptions thus far in Africa.

Therefore, because of either unwillingness or genuine inability of the domestic justice system to investigate and prosecute core international crimes in Africa, the necessity of regional or international judicial organs as a last resort for prosecution of core international crimes is not questionable. But, is there the same scenario concerning crimes listed under the Malabo protocol where transnational crimes are beyond the capacity of the domestic justice system and required a regional criminal court like that of core international crimes?

The justification to incorporate transnational crimes under the jurisdiction of the African international criminal law section is provided as follows. Out of regional interest, to remove impunity from corporations operating in Africa that engages in criminal conduct and inter-African difficulties in cooperation.[217] States within Africa are worried about transnational crimes and the political difficulties of extradition.[218] These justifications implied that similarly with core international crimes, African domestic justice systems have a genuine inability to prosecute transnational crimes.

However, even if the domestic justice system has a genuine inability to prosecute transnational crimes, international legal frameworks such as the United Nations Conventions against

[214] PM Wald, on prosecution of former presidents of Malawi and Zambia, (2009) Tyrants on trial: Keeping order in the courtroom

[215] Ibid

[216] Special Prosecutor v Col Haile-Mariam and 173 Others, Preliminary Objections, Criminal File No.1/87, Decision of Meskerem 29, 1988 EC (GC); reported in Oxford Reports on International Law –ILDC 555(ET1995), 9 October 1995.

[217] O. Nmehielle, 'Saddling the New African Regional Human Rights Court with International Jurisdiction: Innovative, Obstructive, Expedient?', (2014) 7 African Journal of Legal Studies , p. 30

[218] Ibid

Transnational crime (UNCOT) and United Nations Convention on Anti-Corruption (UNCAC) are available to prosecute transnational crimes in Africa.[219] In addition to the international legal frameworks, it is easier to find a solution to overcome the challenges of domestic justice systems to prosecute transnational crimes than misplacing the time, resources, and commitment required to prosecute core international crimes.

In conclusion, the extensive lists of transnational crimes under the Malabo Protocol would prevent the ACJHR from achieving the objectives of the international criminal courts. As the ICC conference held in Kampala, demonstrated, transnational crimes do not fulfill the requirement of major concern to the international community to be treated as core international crimes. Considering the expensive nature of the international criminal court, if the ACJHR establishes jurisdiction over those transnational crimes, the time, resource, and commitment required in the prosecution of core international crimes would be less than the ICC, which investigates and prosecute only four core international crimes. Therefore, it is non-realistic to say the African international criminal law section would be a viable alternative to ICC while investigating and prosecuting extensive lists of transnational crimes in addition to the core international crimes.

3.5 Corporate criminal liability

Corporate criminal liability is also one of the different aspects of ACJHR from the ICC. The Malabo Protocol establishes jurisdiction over both legal and physical persons. Many scholars appreciate and support the incorporation of corporate criminal liability under the ACJHR. They believe that it's a new development for international law because the subject matter of international law has been only States for a very long time and recently physical persons also become a subject matter through international criminal law and the fact that legal entities are coming under the jurisdiction of international law demonstrate a new development of international law.[220] However, the basic question is does the incorporation of corporate criminal liability under the Malabo protocol makes the ACJHR better or less alternative to the ICC?

[219] Ibid

[220] Nadia Bernaz, 'Corporate Criminal Liability under International Law' (2015) 13 European journal of international law, p.313

The ICC can prosecute heads of state, political and military leaders, and the leaders of irregular warring factions, yet corporations are not subject to criminal liability before the ICC.[221] The office of the prosecutor in ICC may prosecute corporate officers, managers, and employees, but not the corporate entity itself. Following the philosophy of the Nuremberg Tribunal that "international crimes are committed by men, not by abstract entities,[222]" Article 25(1) of the Rome Statute ultimately limited the Court's jurisdiction to "natural persons." On the other hand, the Malabo Protocol article 46 E provides the criminal liability of corporates if they involve in any of the crimes listed under article 28B of the Malabo Protocol. In addition, the intent requirement of corporates accused of violation of international crimes determined by the policy and regulations they have concerning acts or omissions that result in violation of international crimes.[223]

Article 1 provides that the term 'person' as it appear in the Statute 'means a natural or legal person'. The term 'legal person' does not define. Despite this broad language, it is argued that Article 46C grants the ACJHR jurisdiction over a limited range of legal entities, namely those incorporated under domestic law.[224] While only States are excluded from the definition of a legal person under the corporate criminal liability, state-owned companies are not excluded from the jurisdiction of the court.

In many conflicts that occurred in Africa and result in violation of international criminal law, there was an involvement of corporates through financing parties of the conflict.[225] Even the finding of the ICC prosecutor's investigation over the case of DRC demonstrates that there was an involvement of corporates in the conflict by wiring finances. Moreno Ocampo (ICC prosecutor over the case of DRC) has recently made several statements indicating the office of

[221] Julia Graf, 'Corporate War Criminals and the International Criminal Court: Blood and Profits in the Democratic Republic of Congo', (2004)11 Human Rights Brief, P.23

[222] Jonathan Kolieb, 'Through the Looking-Glass: Nuremberg Confusing Legacy on Corporate Accountability Under International Law' (2015) 32 American university international law review, p.580

[223] The Malabo protocol, Article 46E/

[224] Ibid

[225] Luke A. Patey,' Understanding Multinational Corporations in War-torn Societies: Sudan in Focus' [2006] Danish Institute for International Studies, p.1

the prosecutor's interest in investigating the financial links to crimes committed in the Democratic Republic of Congo (DRC).[226]

In the office of the prosecutor policy paper, Moreno Ocampo stated, "financial transactions … for the purchase of arms used in murder may well provide evidence proving the commission of such atrocities."[227] The involvement of corporates in many conflicts in Africa is associated with the role of resource exploitation in fuelling conflict. The evidence suggests that civil wars are most likely in countries where there is a high dependence on resource extraction; prominent examples are Angola, Sierra Leone, and the Democratic Republic of the Congo (DRC).[228]

Therefore, the ACJHR jurisdiction over corporate criminal liability is one key improvement of the court from the ICC. The rules of the Rome Statute are closed to investigate and prosecute corporates involving in the commission of an international crime. As we observe from the case of DRC, Angola, and Sierra Leone, conflicts and violation of international crimes, Africa needs a legal framework that could investigate and prosecute corporates for violation of international crimes. As the report of the ICC prosecutor's investigation portrays, the involvement of corporates in conflicts where international crimes are committed is very high and the ACJHR would be the better alternatives to ICC to prosecute those corporate criminals.

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[226] Lydia de Leeuw,' Corporate Agents and Individual Criminal Liability under the Rome Statute' (2016) 5 Pluto journals,p.244 available at : https://www.jstor.org/stable/10.13169/statecrime.5.2.0242?seq=1&cid=pdf [accessed on April 27,2021]

[227] Julia (n210)

[228] Ibid

CHAPTER FOUR
4. Conclusion and Recommendations

The controversy between AU and ICC led to the establishment of an African international criminal law section, which extended from ACJHR through the adoption of the Malabo Protocol. Since the AU keeps refusing to cooperate with the ICC and influence its member states to do the same, having a last resort for prosecution of international crimes in Africa is necessary. Because AU and the African States refused to cooperate with ICC and the absence of effective domestic justice systems in Africa, impunity of perpetrators of international crimes is sky rocking.

The justifications to the establishment of the African international criminal law section are miscellaneous. The slow process of ratification of the Malabo Protocol, the incorporation of immunity clause, the issue of mass withdrawal from the ICC might demonstrate that the motives behind the establishment of the African international criminal law section are AUs political attack against ICC. However, it is too simplistic to claim that the proposal for such a mechanism is only motivated by a desire to undermine the ICC.

Some of AU's reservations against ICC such as abuse of universal jurisdiction by ICC, reservation against UNSC referral power, and ICCs ignorance of retributive justice in Africa are somehow logical and supported by the rules of international law. Additionally from a legal framework perspective, under the Malabo Protocol, the purpose and objectives provided in the preamble, conditions to the establishment of jurisdiction, and definitions of core international crimes are similar to the Rome Statute. Thus, Africa's criticisms of the ICC should not, however, be seen as a rejection of the principles of international criminal justice.

Despite the motives of AU to establish the African international criminal law section, the Malabo Protocol incorporated different features compared to the ICC. If the controversy between AU and ICC continues and the African international criminal law section becomes operational, the majority of the different features under the Malabo Protocol prevent the section from achieving the same purpose and objectives the ICC has. The immunity clause, the tripartite structure of ACJHR, extensive lists of international crimes, and corporate criminal liability are the major different aspects of the African international criminal law section.

The immunity clause incorporated under the Malabo Protocol is inconstant with the objectives of the Malabo Protocol, Rome Statute, and Constitute Act of the AU. The reaction of the AU Peace and Security Council in the case of the Libya conflict and recently in the South Sudan conflict shows the redundancy of the institution to fight impunity, which might also implicate the incorporation of the immunity clause as just a political attack against ICC. The "immunity clause" has no relevance with achieving the purpose and objectives of the African international criminal law section. The African international criminal law section cannot be a viable alternative to the ICC as long as the potential international criminals in Africa are protected by the immunity clause.

The tripartite structure of ACJHR restrains the African international criminal law section to operate as of ICC because of the flaws derives from its structure. Lack of specific standard of proof, conflict of jurisdiction between human rights and international criminal law sections, and overlap of state vs. individual responsibility would potentially affect the effectiveness of the African international criminal law section compared to the ICC. The ICC has a clear rule concerning the standard of proof applied in each stage of investigation and prosecution. In addition, no international human rights court could claim situations that constitute both crime against humanity and serious violation of human rights currently. As a result, the ACJHR would not be a viable alternative to ICC since those flaws limit the effective function of the court.

The other different aspect of ACJHR is its jurisdiction over extensive lists of transnational crimes. Other than the core international crimes, the majority of the crimes are categorized into transnational crimes, and the justification given for the incorporation of those extensive lists of crimes is that they are a threat to the peace and security of the continent. Transnational crime does not reach the thresholds of most serious concern requirement as of core international crimes under international criminal law. As a result, the African international criminal law section would not be a viable alternative to ICC while investigating and prosecuting extensive lists of transnational crimes in addition to the core international crimes.

Finally, one of the key differentiating features of ACJHR is the incorporation of corporate criminal liability. Many civil wars result in violation of international crimes in different parts of Africa sponsored by corporates with the interest of exploiting natural resources and these facts are found by investigation of the ICC prosecutor who recommends the necessity of corporate

criminal liability in the continent. Therefore, the incorporation of corporate criminal liability under the ACJHR jurisdiction makes the court a better alternative to ICC since the ICC investigated and prosecuted only physical persons.

4.2 Recommendations

If the African international criminal law section become operational, despite the motives of AU to adopt the Malabo Protocol the following issue needs to be amended and revised if the criminal law section desire to achieve the purpose and objectives the ICC has

1. The incorporation of the immunity clause under the Malabo Protocol is a clear demonstration of AU political attack against ICC and it is inconsistence with the entire purpose of international criminal courts. Thus, it must be excluded from the Malabo Protocol.

2. The rules of the Malabo Protocol need to be clear concerning the interrelationships between the three sections of the court specifically the standard of proof and conflict of jurisdiction.

3. The extensive lists of crimes under the Malabo Protocol need to be minimized to make the court more efficient in investigating and prosecuting core international crimes.

4. The AU shall carry out its peaceful conflict resolutions mechanisms in a manner that would not prevent the African international criminal law section from achieving the purpose of international criminal courts.

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