AN ASSESSMENT OF THE MALABO PROTOCOL ON IMPUNITY IN AFRICA

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LEGON JULY 2018
DECLARATION

I, Bondah Kwabena Tsibo, hereby declare that this dissertation is the result of an original research conducted by me under the supervision of Dr. Kwadwo Appiagyei-Atua, and that no part of it has been submitted elsewhere for any other purpose.

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BONDAH KWABENA TSIBO
(STUDENT)

2018

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DR. KWADWO APPIAGYEI-ATUA
(SUPERVISOR)

2018

University of Ghana http://ugspace.ug.edu.gh
DEDICATION

This dissertation is dedicated to my mother, Joyce Bemah, who continues to inspire and support me in every endeavour. The ultimate dedication goes to God Almighty for His abundant grace bestowed on me.
ACKNOWLEDGEMENTS

This research work has been made possible through the help and support of several people. I take the liberty to acknowledge the following through expression of profound gratitude.

First, I acknowledge the fundamental role of God Almighty for the grace of enablement and the benefit of time and chance to undertake this research work.

Second, I am deeply indebted to my mother for her tremendous support and sacrifice during the period of my study for this master’s degree.

Third, my sincere thanks go to my supervisor, Dr. Kwadwo Appiagyei-Atua for his patience, diligence and guidance throughout the process of the research. I would also humbly express appreciation to my respondents Prof. Henrietta Mensa-Bonsu, Dr. Franklin Oduro, and Mr. William Nyarko for their invaluable time and immense contributions. My thanks also go to Mrs. Theodosia Adanu who helped format the bibliography of this work.

I say thank you all.
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<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ACILA</td>
<td>African Center for International Law and Accountability</td>
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<td>ACJHR</td>
<td>African Court of Justice and Human Rights</td>
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<tr>
<td>AfCHPR</td>
<td>African Court of Human and Peoples’ Rights</td>
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<tr>
<td>ANC</td>
<td>African National Congress</td>
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<td>ASP</td>
<td>Assembly of State Parties</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<td>AUCPCC</td>
<td>African Union Convention on Preventing and Combating Corruption</td>
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<td>AUPD</td>
<td>African Union High-Level Panel on Darfur</td>
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<td>CAR</td>
<td>Central African Republic</td>
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<tr>
<td>CDD</td>
<td>Center for Democratic Development</td>
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<td>CSOs</td>
<td>Civil Society Organisations</td>
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<td>DRC</td>
<td>Democratic Republic of the Congo</td>
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<tr>
<td>ECCC</td>
<td>Extra-ordinary Chambers in the Courts of Cambodia</td>
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<td>ECOWAS</td>
<td>Economic Community of West African States</td>
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<td>EU</td>
<td>European Union</td>
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<td>FATF</td>
<td>Financial Action Task Force</td>
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<td>G7</td>
<td>Group of Seven</td>
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<tr>
<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICGLR</td>
<td>International Conference on the Great Lakes Region</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICL</td>
<td>International Criminal Law</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>Acronym</td>
<td>Full Phrase</td>
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<td>-------------------------------------------------</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<tr>
<td>LECIAD</td>
<td>Legon Center for International Affairs and Diplomacy</td>
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<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<tr>
<td>NEPAD</td>
<td>New Partnership for Africa Development</td>
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<tr>
<td>NGOs</td>
<td>Non-Governmental Organisations</td>
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<tr>
<td>OAU</td>
<td>Organisation for African Unity</td>
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<tr>
<td>OTP</td>
<td>Office of The Prosecutor</td>
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<tr>
<td>PSC</td>
<td>Peace and Security Council</td>
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<tr>
<td>R2P</td>
<td>Responsibility to Protect</td>
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<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
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<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<tr>
<td>STC</td>
<td>Specialized Technical Committee</td>
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<tr>
<td>UCG</td>
<td>Unconstitutional Change of Government</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<td>UNGA</td>
<td>United Nations General Assembly</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>UNTOC</td>
<td>United Nations Convention against Transnational Organized Crime</td>
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<tr>
<td>USSR</td>
<td>Union of Soviet Socialist Republics</td>
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<td>WWII</td>
<td>World War II</td>
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ABSTRACT

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 (the Malabo Protocol) and called on AU Member States to sign and ratify it. The study examined the potential effect the Malabo Protocol will have on the fight against impunity in Africa. The study further examined the relevance of the unaccustomed ‘international’ crimes stipulated in the Malabo Protocol which seeks to establish an international criminal tribunal. To investigate these issues, qualitative research method was employed in the assessment of the Protocol. The theory of neo-institutionalism serves as the theoretical framework for this work. A semi-structured interview guide was used to elicit responses from experts. Several sources of secondary data were also used. The study found that, the Malabo Protocol cannot constitute a better instrument to judge and prosecute the authors of the most serious crimes of international concern regardless of the AU’s claim that the African Court of Justice and Human Rights (ACJHR) is aimed at fighting impunity in Africa. The study recommended among others that future amendment of the Malabo Protocol should get rid of the immunity provision contained in the Protocol.
CHAPTER ONE

INTRODUCTION

1.0 Background to the Study

The “International Criminal Court (ICC) was established as a permanent autonomous institution to prosecute individuals who have orchestrated and executed the most serious crimes of international concern. To many, the Rome Statute, coming into force in 2002, signified an end to impunity and the beginning of a new era of accountability primarily because, it was believed that the ICC was going to create a deterrent effect on crimes against humanity, the crime of genocide, crimes of aggression and war crimes.\(^1\) The function of the ICC is to mete out retributive or punitive justice. It views atrocities of international concern, as demanding a process to redress; so the Preamble to the Rome Statute states ‘to put an end to impunity for the perpetrators of these crimes and to contribute to the prevention of such crimes’.\(^2\) In effect, the ICC views itself as having a preventive and deterrent role through its rulings.\(^3\)

According to the Joint Report of the United Nations Commission on Human Rights” on Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity;

‘Impunity’ means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account- whether in criminal, civil, administrative or disciplinary proceedings- since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.\(^4\)

Convinced as such, impunity means that an individual or entity that violates a law, or commits a crime, is able to escape the consequences. When a State fails to prosecute those who commit human rights violations, the perpetrators are said to enjoy impunity.\(^5\)
Also, as observed by Equipos, impunity denotes the idea of “[L]ack of punishment, of investigation, of justice. The possibility of committing crimes- from common robberies to rape, torture, murders- without having to face, much less suffer, any punishment, hence, the implicit approval of the morality of these crimes. Forgiving and forgetting without remembering- or remembering too well, but not caring that, what is forgotten will be repeated. Thus, what is done without any punishment, can be repeated without fear’.

Impunity is the exact opposite of the rule of law. The normative significance of law across societies quickly weakens when egregious or paradigmatic occurrences of illegal conduct remain unaddressed. Soares argues that, in order to uphold confidence in the rule of law, those who perpetrate the most egregious violations of the law- most importantly, the politically and economically powerful- must be prosecuted and punished. Hence, accountability is crucial to the rule of law and, with that, to development. This position was corroborated by Vilmer who posits that, anti-impunity is not just a moral precept: it is also a way to attain prosperity and stability. Today’s unpunished crimes are the roots of tomorrow’s conflict.

The reality of the Rwandan genocide of 1994 convinced many African governments of the need to support an international criminal justice regime which would confront impunity and the persistence of mass human rights violations on the continent. African countries were therefore part of a wider campaign of support for the ICC- Senegal was the first to deposit its instrument of ratification and, of the 122 parties to the Rome Statute establishing the ICC, 34 are African, representing the largest continental support bloc. Over the past nine years, however, the embrace has become less warm. The arrest warrant against Sudan’s Omar al-Bashir in March 2009, the indictment of Kenya’s Uhuru Kenyatta and William Ruto in March 2011, and the arrest warrant against Libya’s Muammar Gaddafi in June 2011 have soured relations between Africa and the
ICC. Albeit explicable, a perceived bias against African leaders on the part of the ICC has emboldened the continent, through the African Union (AU), to introduce mechanisms to curtail its reach: In June 2014, the AU Assembly met in Malabo, the capital of Equatorial Guinea, and adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (hereafter, the Malabo Protocol) and called on AU State-parties to sign and ratify it.\textsuperscript{12} The original plan for the African Court of Justice and Human Rights (ACJHR) was a court composed of two sections, that is: a Human Right Section and a General Affairs Section. The Malabo Protocol proposes a third section i.e. the International Criminal Law (ICL) Section. If the Malabo Protocol enters into force, the ACJHR will have the power to exercise jurisdiction over the following 14 crimes:\textsuperscript{13}

- Genocide
- Crimes against humanity
- War crimes
- Crimes of aggression
- The crime of unconstitutional change of government
- Piracy
- Terrorism
- Mercenarism
- Corruption
- Money laundering
- Trafficking in persons
- Trafficking in drugs
- Trafficking in hazardous wastes
Illicit exploitation of natural resources

In essence, the Malabo Protocol is an agreement which when ratified by 15 AU Member States, will empower the ACJHR to function as an international criminal court, operating in a mode akin to the ICC but within a limited defined geographical boundary.\textsuperscript{14} The proposal to set up a court at the African regional court to try international crimes did not arise recently. This was first proposed in the early 1980s during the drafting of the African Charter on Human and Peoples’ Rights (hereafter, the African Charter).\textsuperscript{15} However, at this point, the establishment of an African Human Rights Court was perceived to be premature. Instead, a quasi-judicial treaty body comprising of 11 members i.e. the African Commission on Human and Peoples’ Rights was established.\textsuperscript{16} Nevertheless, the prospect for a regional criminal court was left open, which could be introduced in the future, pending the adoption and ratification of additional protocol to the Charter.\textsuperscript{17}

In July 2004, the discourse concerning the possibility of launching an African regional criminal court resurfaced when the question of election of judges to the African Court on Human and Peoples’ Rights (AfCHPR) was brought before the AU Assembly.\textsuperscript{18} By this time, two critical institutional strides had taken place within the AU. First, in July 2003, the AU adopted the Protocol of the Court of Justice, establishing the legal framework to operationalize the African Court of Justice as the primary judicial arm of the AU.\textsuperscript{19} Second, the Protocol to the African Charter on the Establishment of an AfCHPR came into force in January 2004 which paved a route for the election of judges. The principal function conceived for the Human Rights Court was and is to complement the tutelary mandate of the African Commission by hearing and adjudicating cases on human rights violations.\textsuperscript{20}
However, the election of judges to the Human Rights Court did not happen in July 2004 as anticipated primarily because, only a handful of candidates had been proposed. Rather, the discourse at the AU Assembly of Heads of State and Government” took a diametrical and unforeseen twist. The then Chairperson of the AU Assembly of Heads of State and Government, Olusegun Obasanjo- President of Nigeria, suggested that the African Human Rights Court and the African Court of Justice should be merged into a single court. In his comments, he hinted on the prospect of conferring international criminal jurisdiction on the proposed merged court. He indicated that:

> Why shouldn’t the Court of Justice take along with it the Court on Human and Peoples’ Rights so that we have a Court of Justice which will have a division, if you like, for border issues, a division for human rights issues, a division for cross-border criminal issues or whatever.

Following that, the AU Assembly of Heads of State and Government resolved to merge the African Human Rights Court with the African Court of Justice. The Protocol on the Statute of the ACJHR was adopted in July 2008.

### 1.1 Statement of the Research Problem

On 15th and 16th May 2014, the First AU Ministerial Meeting of the “Specialized Technical Committee (STC) on Justice and Legal Affairs met in Addis Ababa, Ethiopia to consider the 2012 Draft Protocol on Amendments to the Protocol on the Statute of the ACJHR. One of the key objectives of the meeting, as specified by the AU’s legal counsel at the outset of the meeting was to ponder over issues pertaining to immunities of Heads of State and consequently insert a new provision on this matter into the Protocol.

Thus, a primal resolution made during the meeting was to exempt not only Heads of State and Government from the criminal jurisdiction of the ACJHR, but also, undefined category of senior
State official. In conformity with international law, the 2012 Draft Protocol on Amendments to the Protocol on the Statute of the ACJHR did not provide for immunity for State officials including Heads of State and Ministers of Foreign Affairs. Despite criticism of the revisions introduced by the STC from a broad cross-section of stakeholders, especially on the question of immunities, the AU Assembly of Heads of State and Government meeting for its 23rd ordinary session in Malabo, Equatorial Guinea, adopted the Malabo Protocol. The Amended Statute of the ACJHR was annexed to the Malabo Protocol. The Malabo Protocol will enter into force 30 days after the deposit of instruments of ratification by 15 AU Member-States. As of July 31, 2018, eleven AU Member-States (Benin, Chad, Comoros, Congo Brazzaville, Ghana, Guinea-Bissau, Kenya, Mauritania, Sierra Leone, Sao Tome and Principe and Uganda) have signed the Protocol and none has ratified it.

Most often, national governments are reluctant or incapable of conducting prompt, autonomous, impartial and efficient investigations into allegations of crimes under international law, and ultimately to bring all those suspected of criminal responsibility to justice in fair trials before ordinary civilian courts. Thus, a Regional Criminal Court, as conceived under the Malabo Protocol, has the potential to fill the palpable accountability gap at the national level. However, it appears the proposal is an attempt by the AU to shield AU Heads of State and senior State officials from being held to account when there are reasonable grounds to believe that they are criminally responsible for international crimes. Unlike the Rome Statute that does not regard immunities, the Malabo Protocol provides that the ACJHR” will not receive any charge against any sitting AU Head of State and Government or anybody acting or eligible to be held in such capacity or any other senior State official during incumbency.

What possible motivation(s) triggered the drafting of the Malabo Protocol?
What is the justification for the immunity clause (Article 46A bis) contained in the Malabo Protocol?

What is the relevance of the unaccustomed ‘international’ crimes provided in the Malabo Protocol?

To what extent does the ACJHR as conceived represents an alternative that can avoid the criticisms posed against the ICC?

1.2 Objectives of the Study

The objectives of the research are:

To assess the motivation(s) that led to the drafting of the Malabo Protocol.

To assess the justification for the immunity clause (Article 46A bis) contained in the Malabo Protocol.

To assess the relevance of the unaccustomed ‘international’ crimes provided in the Malabo Protocol.

To assess the implication of the Malabo Protocol on justice and accountability.

1.3 Scope of the Study

This study is undertaken from an interdisciplinary perspective, combining international politics and international law. There may be numerous financial and other obstacles that may impede the ACJHR effectiveness if it comes into existence. It is beyond the scope of this dissertation to address these constraints. Instead, I interrogate to a lesser extent, the legal, and to a larger extent, the political and practical considerations for such a Court.
1.4 Rationale of the Study

This research work attempts to provide a balanced and constructive assessment that can be utilized by State actors and members of the public to rally behind an acceptable version of the Malabo Protocol and the potential ACJHR which it seeks to establish.

1.5 Hypothesis

The Malabo Protocol is an effort by the AU to fight impunity in Africa.

1.6 Theoretical Framework

Among the prominent theories in international relations include: Realism, Institutionalism, Liberalism and Constructivism.\(^{31}\)

According to the realist narrative, States are the dominant actors and constantly compete with each other in the anarchical international system. International law and by extension, international cooperation are deemed to be useful only when they promote State interests. Realism places hefty emphasis on the interests of powerful States and belittles the ability of international rules and institutions to constrain States behaviour. Posner and Goldsmith stand out in “International Criminal Law (ICL) scholarship as realists for their proposition that the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY) did not wield any ‘gravitational pull’\(^{32}\) to lure defendants such as former President Slobodan Milošević for trial before the ICTY.\(^{33}\) Because realists conceive sovereignty as predating international law, realists hold the view that international law cannot limit sovereignty.\(^{34}\)

Liberal theorists for their part do not disregard the importance of State actors in international politics, but reckon that State interests are determined more by domestic politics than by
considerations of relative power. In this context, liberal theorists hold the view that, the fundamental actors in international politics are both individuals and private groups.\textsuperscript{35}

Conversely, constructivism holds the view that, international actors socialize within a context of shared norms, which constitute the identities and determines appropriate modes of conduct.\textsuperscript{36} Hence, rudimentary concepts such as the State and sovereignty can only be ascertained by reference to the rights and duties held by a State.\textsuperscript{37} Constructivism emphasizes normative commitments and the internalization of these norms extending beyond the socializing institution in a ‘norm cascade’.\textsuperscript{38} Constructivists contend the pre-dominance of State actors as analytical units in international law and advance the development of individuals, local organisations and States within international institutions in order to persuade these institutions beyond the preferences of the powerful units within it.\textsuperscript{39} A classic example is the role played by the sheer numbers of Non-Governmental Organisations (NGOs) involved in lobbying for the ICC during Rome Conference\textsuperscript{40} and the subsequent statutory acknowledgment of their role in propagating these norms within the ICC.\textsuperscript{41}

The theory of neo-institutionalism is used as the theoretical lens through which this study is carried out. Studies of European integration during the 1950s and 1960s paved the way for the institutionalist theories which gained momentum in the 1990s.\textsuperscript{42} The term ‘neo-institutionalism’ was coined by Olsen and March to emphasize the theoretical worth of institutions.\textsuperscript{43} To Olsen and March, political institutions had receded in value from the position they held in the earlier theories of international relations. Olsen and March argued to ‘bring the State back in’ and to ‘structure politics’.\textsuperscript{44}
The cardinal assumptions of neo-institutionalism include the following: institutionalists acknowledge the competing interests in the anarchical international system but consider that because States creates international institutions to impose order, institutions may modify State behaviour. Neo-institutionalists identify ‘islands of cooperation’ in which State actors are disposed to cooperate in order to legitimize different forms of inter-state action. They also provide affinity ties that bind citizens together regardless of the many things that may divide them. Institutions are defended by insiders and validated by outsiders, and because their histories are encoded into rules and routines, their internal mechanisms and rules cannot be changed arbitrarily. The changes that may occur are most likely to reflect the adaptation to local experience and thus, be relatively shortsighted and meandering, rather than optimizing, as well as inefficient, in the context of not reaching a uniquely optimal arrangement.

The basic critique levelled against neo-institutionalism is the question as to whether neo-institutionalism presents anything new and whether its claims- both empirical and theoretical- can really be sustained. Guy Peters contends that, neo-institutionalism poses some theoretical inconsistencies. To Peters, should multiple researchers employ different versions of this approach, they may end up with different empirical evidence, leading to assorted predictions about behavior, than had they adopted other versions. Peters further posits that, new institutional theories are better at explaining differences among types of institutions than explaining the development of a single institution due to the fact that, new institutional theories tend to be variant theories.

Nevertheless, neo-institutionalism is relevant to this study because it enables the study to better explain how the AU” has become a central maker in the process of preference formation thus, involved in every dimension of politics and political processes every step of the way.
1.7 Literature Review

The study reviewed journal articles and other scholarly literature on the Malabo Protocol. The literature on ICL was also reviewed. The aim was to identify some gaps in the literature to be addressed by the research. Literature that addresses part of the research questions were relied upon as secondary sources of data to support the research work.

Writing on the “Role of African Union in the Fight against Impunity in Africa, Appiagyei-Atua analyses some critical issues embedded in the theory and praxis of immunity and impunity from the African perspective, in particular, Article 4 of the Union’s Constitutive Act on ‘rejection of impunity’ and the right of intervention in case of ‘grave circumstances’. The author noted that application of the principles to truly end impunity on the African continent has been a challenge. The author suggests that African States, through the AU, have not matched rhetoric with action. In this regard, he discusses some of the factors that may account for this: First is the maintenance of the age-old culture of externalizing the causes of Africa’s problems. In this case, the ICC has been labelled as an anti-African institution. Second, African leaders are unwilling or unable to break away from the age-old culture of solidarizing with one’s brother (or sister) even where the brother or sister is wrong- perhaps as a way of expressing ‘African unity’ or as an insurance against similar treatment from the brother (or sister). Third, African leaders’ understanding and appreciation of international law, in some respects, is not progressive. In this regard, Appiagyei-Atua suggests that, it is important for African leaders to realize that they can no more rely on sovereign immunity to perpetuate impunity primarily because, the notion of sovereignty has been pierced and significant inroads have been made into the concept.

Writing on The African Justice Cascade and the Malabo Protocol, Sirleaf cited the proliferation of institutions and funding concerns as harbingers to merge the African Court of Justice and the
AfCHPR. The author highlights the vital importance of the Malabo Protocol expanding the number of crimes deserving regional, if not international attention. Sirleaf argues that the Malabo Protocol seeks to limit the utilization of the ICL to advance the interests of powerful States in the global North and to counteract perceived biases. Notwithstanding the depth of her analyses on the imperatives of the Malabo Protocol’s provision for corporate criminal liability, and her broad discussion on the prospects of a regional approach to international criminal justice, Sirleaf does not explore the political motivation(s) in according the proposed ACJHR the jurisdiction to try unaccustomed ‘international’ crimes. This creates a lacuna for the present research to address.

Ademola Abass, on his part, provides arguably a comprehensive overview of the background to the Malabo Protocol in his book chapter *Historical and Political Background to the Malabo Protocol*. Abass rejects the argument that Africa began prospecting for international criminal jurisdiction after and as a consequence of the fall-out over the al-Bashir arrest warrant. The author establishes three fundamental bases as grounds for proposing international criminal jurisdiction for an African regional court i.e.: a historical imperative for a regional criminal court to prosecute crimes which are perpetrated in Africa but which are of no prosecutorial interest to the rest of the world; a treaty obligation to prosecute crimes under international law in Africa—article 4(h) of the AU Constitutive Act; and the existence of crimes peculiar to Africa but over which the permanent ICC has no jurisdiction.

Abass posits that the tension between the ICC and Africa was a disaster bound to happen even if the ICC and the AU had not fallen out over the arrest warrant issued against al-Bashir. The author however fails to seize the opportunity to engage in a deeper and broader conversation in this regard.
As a normative proposition, arguments against the immunity provision in the Malabo Protocol are often based on the fight against impunity. Dire Tladi in his work provides an evaluation of the immunity clause in the context of international law devoid of the ‘supposed’ political considerations that gave rise to the instrument.

The author articulates that the text of Article 46A bis is ambiguous and not well drafted. First, Tladi points out that the meaning of the phrase ‘or anybody… entitled to act in such capacity’, is unclear. He suggests that a broad interpretation of the phrase could refer to any number of persons including potentially, all Ministers and even all Members of Parliament in some States depending on the constitutional system of each State which would result in applying different rules to officials from different States.

The second ambiguity pertains to whether Article 46A bis purport to provide two distinct regimes of immunity, that is immunity *ratione materiae* and immunity *ratione personae*, or only one. Tladi posits that, an ordinary meaning of Article 46A bis appears to support two separate regimes of immunity with the alternate interpretation establishing only immunity *ratione personae*. Under the alternative interpretation, Tladi analogizes from the decision of the International Court of Justice (ICJ) on the Democratic Republic of the Congo (DRC) vs. Belgium arrest warrant case and posits that, officials whose functions do not exhibit the characteristics identified by the ICJ would not have immunity before the ACJHR. Nonetheless, the author concludes by emphasizing that the decision of the AU to provide for immunity of officials sends out wrong signals about its commitment to the fight against impunity.

In his work *The International Criminal Court, Justice, Peace and the Fight Against Impunity in Africa: An Overview*, Mangu discusses the effect of the Malabo Protocol on the fight against
impunity in Africa. The author argues that, while the AU criticizes the ICC of being bias against Africa which in his view is unfounded from an international law perspective, the AU acts as a ‘Club of Heads of State and Government’ favouring the impunity of some of their colleagues despite their condemnation and rejection of impunity in the AU Constitutive Act- Article 4(o) as in the case of Presidents Bashir of Sudan and Kenyatta of Kenya. According to Mangu, the AU’s attempt to bypass the ICC by establishing an ICL section mandated to deal with international crimes within the AfCHPR is unlikely to end impunity on the continent. This, in his view, is because, the ACJHR would not receive charges against persons covered by immunities and against states which did not make the declaration required to receive direct complaints from individuals and Civil Society Organisations (CSOs). Though the focus of the literature highlights the negative effect of the immunity clause i.e.: article 46A bis on the fight against impunity on the African continent, its failure to investigate the justification for the immunity clause affords this study the opportunity to address.

Nmehielle\textsuperscript{65} interrogates the question as to whether the AU’s decision to expand the remit of the AfCHPR to try international crimes is in any way obstructive or a distraction to international criminal justice accountability. The author posits that decades of brutal conflicts across the region, including \textit{inter alia} the Rwanda genocide, the long war in Sierra Leone did not elicit a resolve within the former Organisation of African Unity (OAU) or the 10-year old AU to think of a mechanism for dealing with impunity or serious violations of humanitarian law among its ranks.

The author identified the activities of the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) as Africa’s closest experience (at least territorially) with international criminal justice accountability mechanisms. However, Nmehielle
points out that the ICTR and the SCSL were not African mechanisms in the sense of ownership and the responsibility for their effective functioning. The United Nations (UN) and some of its Member States were responsible for these ad hoc criminal tribunals. Thus, the AU’s plan to venture into international criminal justice accountability mechanisms breaks new grounds.

The author concludes that while the AU’s desire to establish an ICL section within its human rights court may have largely been informed by the politicization of the international criminal justice system and its concern about the ICC’s nearly exclusive focus on Africa, there is nothing in international law that prevents the AU” from embarking on such initiative.

Du Plessis posits that the African Court will not have retrospective jurisdiction, so it cannot solve the existing frustration that the AU palpably feels in respect of the ICC’s current cases nor would the prosecution of a case by the African Court bar the ICC from prosecuting the very same case under the principle of complementarity, as Article 17 of the Rome Statute refers to “States” and not to other Courts.66

1.8 Methodology and Sources of Data

The research was conducted using the qualitative research approach with a descriptive design. This research method was employed because it enables the researcher to gain a deeper understanding of the issue under study. Again, it makes the researcher an integral part of data collection.67 Purposive sampling technique was adopted. According to Silverman, purposive sampling is deemed appropriate because it enables the researcher to solicit for responses from respondents that the researcher is specifically interested in.68

The study combines data from both primary and secondary sources. Secondary data was obtained from books, journal articles, dissertations, official reports and the internet. Primary data was
obtained mainly through semi-structured interviews. The respondents include Professor Henrietta Mensa-Bonsu, a member of the OAU’s Committee of Eminent Jurists on the Lockerbie Case, a member of the AU’s Committee of Eminent African Jurists on the Hissène Habré Case and also, the Director of the Legon Center for International Affairs and Diplomacy (LECIAD); Mr. William Nyarko, the Executive Director of the African Center for International Law and Accountability (ACILA); Dr. Franklin Oduro, Deputy Director of the Center for Democratic Development (CDD).

A semi-structured interview approach was used to allow the respondents the opportunity to give more detailed information on the subject and to ask follow-up questions based on the responses given during the interview. The choice of the resource persons was based on their in-depth knowledge and experience in the field of ICL.

1.9 Arrangement of Chapters

The study is arranged into four chapters. Chapter one constitutes the introduction, which entails background to the study, statement of the problem, research questions, objectives of the study, scope of the study, rational of the study, the hypothesis, theoretical framework, literature review, methodology and sources of data and finally, the arrangement of chapters. Chapter two attempts to identify the motivation(s) behind the adoption of the Malabo Protocol. The first part of Chapter three assesses the justification for the immunity clause contained in the Malabo Protocol. The second part examines the relevance of the unaccustomed ‘international’ crimes contained in the Malabo Protocol which seeks to establish an international criminal tribunal. Chapter four constitutes the summary of findings, conclusions and recommendations.
ENDNOTES


2 See, Preamble of the Rome Statute


4 See, under ‘Definitions’ A of the Amended Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity.


8 Ibid.

9 Ibid.


12 Assembly/AU/Dec.529(XXIII)

13 See, Article 28A of the Malabo Protocol


21 Ibid.


25 See Article 46B of the Draft Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights


27 Decision on the Draft Legal Instruments "Assembly/Au/Dec.529(Xxiii)."

28 See, Article 11 of the Malabo Protocol


30 See Article 46Abis of the Malabo Protocol

33 Ibid.
36 Ibid.
39 Ibid.
41 See, Article 15(2) of the Rome Statute
46 Ibid.
47 Ibid.
50 Ibid.
51 Ibid.
52 Ibid.
54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid.
59 Ibid.
62 See, Article 46A bis of the Malabo Protocol
CHAPTER TWO

REASONS FOR THE ADOPTION OF THE MALABO PROTOCOL

2.0 Introduction

The chapter attempt to assess the motivation(s) behind the adoption of the Malabo Protocol by the AU. The first part of the chapter examines how African resistance to anti-impunity has evolved and augmented over a period of time. Primarily, I treat the AU as a major actor because, the AU has become the principal ‘vehicle’ for state-parties to devise resistance to anti-impunity. Again, the AU has become a place where efforts to fashion-out African solidarity takes place and can be vested with power, authority and legitimacy. I rivet chiefly on the official assertions and activities of the AU’s supreme governing structure, the Assembly and its Peace and Security Council (PSC). While I treat the AU as a principal actor, I do not disregard intra-AU dynamics such as the case of Uganda, South Africa, Namibia, Kenya, Gambia and Burundi. The second part critically analyses the legitimacy of the criticisms levelled against the ICC and also contributes to the ‘Peace vs. Justice’ debate.

2.0.1 The Hissene Habre Test Case Trigger

The genesis of the AU prospecting for regional international criminal justice accountability has its roots in the experiment to bring “Hissène Habré, the former president of Chad, to justice for alleged gross human rights violations.” After Habré fell from power, he went into brief exile in Cameroon and subsequently to Senegal where he was granted political asylum. While in Senegal, a (state-party) to the Convention Against Torture or Other Cruel, Inhuman, Degrading
Treatment or Punishment, a group of victims of torture during the Habré regime broached in the year 2000 a ‘complaint with a civil-party application with the senior investigating judge at the Dakar tribunal regional hors classe’ making various allegations against him, including allegations for crimes against humanity and torture.²

The indictment brought against Habré was annulled by the Dakar Court of Appeal followed by the Court of Cassation’s dismissal of an appeal against the annulment of the record of indictment on the ground of lack of jurisdiction.³ Then after the case against Habré in Dakar, another groups of victims filed in Belgium another complaint against Habré. Belgium sought the extradition of Hissène Habré to its territory. Senegal refused to extradite Hissène Habré to Belgium but brought the matter to the attention of the AU to seek a solution on the way forward.

Abdoulaye Wade, former President of Senegal in early 2006 briefed the AU on the Hissène Habré situation, whereupon the AU resolved to seek a decision on the matter. At its Sixth Ordinary Session in Khartoum in January 2006, the AU decided to establish a ‘Committee of Eminent African Jurists’.⁴ The mandate assigned to the committee was to ‘consider all aspects and implications of the Hissène Habré case as well as the options available for his trial…’⁵ The committee was to take a number of factors into account:

- Adherence to the principles of total rejection of impunity;
- Adherence to international fair trial standards including the independence of the judiciary and impartiality of proceedings;
- Jurisdiction over the alleged crimes for which Mr. Hissène Habré should be tried;
- Efficiency in terms of cost and time of trial;
- Accessibility to the trial by alleged victims as well as witnesses;
➢ Priority for an African mechanism.\textsuperscript{6}

Additionally, the Committee was asked to make concrete recommendations on ways and means of dealing with issues of synonymous nature in the future and required to report to the AU at its next session in July 2006.\textsuperscript{7} The Committee of Eminent Jurists submitted its report as demanded and made recommendations specifically regarding the Hissène Habré case and the future in terms of a case in similar manner arising in the future. Regarding Hissène Habré, the Committee recommended inter alia:

➢ ‘An African option’ for dealing with the case should be adopted;
➢ Since Senegal is a party to the Convention Against Torture, it is the best suited to try Hissène Habré as it is bound by international law to perform its obligations;
➢ An \textit{ad hoc} tribunal could be established in any AU Member-State;
➢ Any African state-party to the Convention Against Torture could take on the responsibility and exercise jurisdiction over Hissène Habré;
➢ That whatever the solution chosen (national jurisdiction or \textit{ad hoc} regional jurisdiction), it is imperative for the AU to assist the African State that will assume responsibility for the trial of Hissène Habré or host the \textit{ad hoc} tribunal.\textsuperscript{8}

With regard to future cases of similar nature, the Committee, recognising that there is urgency in sending signals throughout Africa that impunity is no longer an alternative honed in on the ongoing process for the merger of the AfCHPR and the African Court of Justice. The Committee further recommended that the AU should confer criminal jurisdiction on the new merged Court as a single AU Court and must be allowed to operate as an independent institution free from all forms of pressure, so that it can be impartial, and be seen to be impartial.\textsuperscript{9}
At its July 2006 Summit in Banjul- Gambia, the AU Assembly noted the report of the Committee of Eminent Jurists and the recommendations on the Hissène Habré case and mandated Senegal to try him on behalf of the AU, particularly because the crimes for which he was accused were within the jurisdiction of the AU taking into account the provisions of Articles 3 and 4 of the Constitutive Act. Also, the AU mandated Senegal to try Hissène Habré on the footing that the AU does not have a competent judicial organ to try him. The AU also relied on the fact that Senegal is a state-party to the UN Convention Against Torture.\textsuperscript{10} The AU requested Member-States to cooperate with Senegal on the Habré case and appealed to the international community to render support to Senegal.\textsuperscript{11} Senegal took measures that made it possible for its domestic punitive and constitutional systems to accommodate and enable it conduct the trial.\textsuperscript{12} However, Senegal was unable to conduct the trial mainly because of financial constraints.\textsuperscript{13}

Following the suit filed against Senegal by Belgium at the ICJ where the ICJ decided that Senegal was under an obligation to try Hissène Habré without further delay, President Macky Sall committed to putting Habré on trial.\textsuperscript{14} The AU signed an agreement with Senegal on arrangements for the trial.\textsuperscript{15} Thus, the resolution of the ICJ on the case filed by Belgium against Senegal regarding its obligation to try Hissène Habré has serious implications, not just for Senegal, but also for the AU’s commitment and ability to deal with impunity.

In terms of the Habré case effectively and immediately triggering the AU plan to amend the Statute of the preconceived ACJHR to confer international criminal jurisdiction to deal with ‘future cases’ of such nature, it is worthy of note that the AU did not actually accept the Committee of Eminent Jurists recommendation to that effect. The AU rather ignored that recommendation and did not implement it when the Protocol of the AfCHPR was amended by the merger Protocol on the Statute of the ACJHR that the AU adopted in 2008. There was no
provision according international criminal jurisdiction to the Court. Without any explicit stated reason by the AU, it is difficult to answer the question why the AU did not adopt the recommendation of the Committee of Eminent Jurists to amend the Statute of the ACJHR to incorporate an international criminal jurisdiction at the time. Could it be that the AU did not see the recommendation of the Committee of Eminent Jurists as a feasible idea? There is then the next query: what has now changed that warrants a change of mind by the AU” to empower the Human Rights Court with international criminal jurisdiction?

2.0.2 Adapting to Anti-Impunity 2002-8

In the 2002–8 period, the African State-parties to the Rome Statute, and the AU, mostly cooperated with the freshly-functional ICC. The “ICC’s first two cases were referred to the Prosecutor by Uganda in 2003 and the DRC in 2004, and they attracted very little adverse comment in Africa. Côte d’Ivoire in 2003, also officially granted the ICC limited jurisdiction. Most importantly, in 2004, an AU resolution urged its Member-States to sign and/or ratify the Rome Statute, and in 2005 the United Nations Security Council’s (UNSC’s) referral of the situation in Darfur to the ICC also attracted little controversy. Then, two notable events took place that were more suggestive of, in terms of Acharya’s multiple frameworks, ‘adaptation to’ rather than simple ‘acceptance of’ anti-impunity.

First, in 2003, Interpol issued an arrest warrant for Charles Taylor, the former President of Liberia. Nigeria declined to execute it without a request from Liberia, but when such came in 2006, Taylor was extradited to the ad hoc SCSL. Second, Senegalese courts had declined to try Hissène Habré- the former President of Chad, in the early 2000s, making reference to jurisdictional limitations, and Senegal’s government also declined to extradite Habré to Belgium pursuant to claims of universal jurisdiction. But in 2006, a ‘Committee of Eminent African
Jurists’ was set up by the AU to ascertain whether and if so, how and where Habré should be tried. The Committee determined that Habré should be tried, although it took significant pressure from the Economic Community of West African States (ECOWAS), the AU, and several AU Member-States, particularly Chad, to bring him to trial (which eventually began in 2015, in the AU-created ‘Extraordinary African Chamber’). These instances are suggestive that the anti-impunity norm was shaping the demeanour of several African State and non-State actors in the 2002–8 period.23

2.0.3 African Resistance to the Anti-Impunity Norm, 2008-2016

Soon after the declarations on universal jurisdiction by the AU Assembly of Heads of State and Government and the “PSC, the ICC Prosecutor, Luis Moreno-Ocampo, called for the issue of an arrest warrant against President Omar al-Bashir for crimes against humanity and war crimes.24 In reaction, the AU PSC petitioned the UNSC to defer the matter. The PSC contended that anti-impunity/universal jurisdiction was being discriminately applied against AU Member-States and leaders, and thereby abused—this depicted some of first protestation of what was to become a general perception that the ICC was a ‘Western tool’. Again, the PSC contended that, prosecuting al-Bashir by the ICC could sabotage the on-going peace process in Darfur.25 This episode provides early evidence that the AU was beginning to move towards resisting anti-impunity and the ICC.26

Subsequently, the AU Assembly of Heads of State and Government called for deferral, which was snubbed,27 and the PSC rehashed its posture after the arrest warrant which was issued against President al-Bashir by the ICC.28 Soon after, three African state-parties to the Rome Statute– Senegal (the first State to sign and ratify the Rome Statute), Comoros and Djibouti– and Libya, a non-state party– called on AU Member States to withdraw from the ICC. An assembly
of African ICC members rejected this proposal, although majority endorsed the deferral request. This was a clear case of tactical move – the threat of withdrawal.

In 2009, the AU Assembly of Heads of State and Government made various decisions that would structure future African resistance. First, the AU advocated for the creation of an African regional court that will have the jurisdiction to try crimes under international law, which represented another tactical move. Again, the AU directed its Member-States not to cooperate with the arrest and surrender orders of the ICC– a clear call to breach cardinal Rome Statute obligations, which was particularly shocking given a majority of African state-parties to the Rome Statute could have blocked it. Chad was the only State to have dissented, although Benin, Botswana, Uganda, and South Africa signaled unease and proclaimed to arrest al-Bashir if given the chance.

The AU’s High Level Panel on Darfur (AUPD) which was set up by the AU PSC then entered the fray. The PSC contended that justice was a critical element in addressing the conflict in Darfur to the extent that, the crimes perpetrated in Darfur must be dealt with by Sudan, and advocated for the rejection of the defence of immunity for State actors. This decision of the PSC” apparently demonstrated the anti-impunity norm. However, it added detail to another tactical resistance move by proposing the creation of a hybrid court manned by judges from Sudan and other African States to ‘Africanise’ international criminal justice; thus, constitutes the impression that African problems demand African solutions.

2.0.4 The AU Calls for Amendment of the Rome Statute

Before July 2009, the AU’s resistance had principally taken place vis-à-vis the “UNSC (and in the media). But thereafter, it shifted to the ICC’s Assembly of State Parties (ASP). However,
AU initiatives can only be brought before the ASP by dual ICC/AU members, and only they could engage directly in discussions, limiting the ambit of some African actors to resist. Before the ASP meeting in November 2009, 26 African state-parties to the Rome Statute and 15 non-members met in Addis Ababa. Four principal positions – essentially, demand for reform – emerged:

- The interests of peace be considered alongside the interests of justice in Prosecutorial guidelines for when to investigate, or not;
- The power of the UNSC to refer cases should remain;
- The UN General Assembly (UNGA) should be empowered to defer ICC proceedings when the UNSC fails to make a decision;
- There should be a discussion regarding whether or not the leaders of non-parties had their immunity removed by the Rome Statute.35

Four points are relevant here. First, a norm of peace was framed as against justice.36 Second, the role of UNSC was viewed as legitimate37. Third, the AU was creatively trying to empower the UNGA to defer; because it was dominated by developing countries, the UNGA would hopefully be a friendlier place for deferral.38 Fourth, the AU was not attempting to re-assert ‘blanket’ sovereign immunity; instead, it wanted to challenge the UNSC’s power to strip leaders of non-ICC members of sovereign immunity.39

Ultimately, only points 1 and 3 were put to the ASP. Enthusiasm to execute them was, however, limited. South Africa agreed to formally submit them but made it clear that it was up to each African ICC member to determine whether to support or not.40 Indeed, South Africa may have only concurred to take the lead to head off more drastic measures, such as non-cooperation or mass withdrawal.41 But only four African state-parties to the Rome Statute supported point 1 –
Burkina Faso, Namibia, Senegal, and South Africa – and only Senegal and Namibia supported point 3. Nevertheless, points 1 and 3 were presented to the ASP”. Point 1 (The interests of peace be considered alongside the interests of justice in Prosecutorial guidelines for when to investigate) represented yet again, another tactical move designed to weaken anti-impunity by providing a new reason not to prosecute, backed by the strategic justification (that is, applying anti-impunity might endanger peace). Point 3 (the attempt to empower the UNGA to defer matters) represented another tactical move. Ultimately, both proposals were rejected by the ASP.

2.0.5 Back to the AU

After the setback in the ASP, the AU’s Assembly again called for deferral of the al-Bashir matter and tried to muster a common African position. Then, after a separate arrest warrant was issued for Bashir (for genocide) in July 2010, more strenuous ICC-resistance commenced. At the AU summit that same month (July 2010), the AU Assembly called again for AU members to practice non-cooperation and rejected a proposal made at the November 2009 “ASP meeting to open an ICC-AU liaison office in Addis Ababa. According to the then AU Commission Chairperson Jean Ping, this proposal was part of a ‘plot’ against Africa. These formal positions did mask cracks in the perceived unison of the African position. ICC members like Ghana, South Africa, and Botswana contended strongly against efforts by non-members like Libya, Eritrea and Egypt to critique anti-impunity and the ICC. However, other ICC members supported the critics.

At the July 2010 AU summit, the President of Malawi Bingu wa Mutharika, who also chaired the AU, asserted that Heads of State and Government should not face ICC prosecution and should only be tried by African courts. This formal position did not completely repudiate anti-impunity but instead it drew on African solidarity norms to modify and circumscribe it. It did
reassert sovereignty, but an updated version of African sovereignty where African problems are addressed with African solutions in a similar manner to how the AUPD had suggested handling the al-Bashir matter a year earlier. Indeed, trying Bashir in Africa was discussed at the July 2010 summit, although the debate went nowhere after it became clear that no existing court had the competence to do so. Then, in October 2013, the AU reiterated that the ICC should have no jurisdiction over sitting African Heads of State and Government and it began to move forward on creating the ACJHR by merging the existing African Court of Justice and the AfCHPR. There is no provision in the Rome Statute for a regional criminal court to substitute for the ICC because the principle of complementarity only applies to state-parties (although Kenya has made such a proposal to the ASP). Yet, the move to establish the ACJHR obviously reflects the influence of the ‘African solutions for African problems’ and African solidarity norms.

2.0.6 Mass Withdrawal: Post July 2014

In January 2016, the AU Assembly passed a resolution that called for the preparation of a roadmap for mass African withdrawal from the Rome Statute “‘if necessary’ (that is, if AU demands for ‘reforms’, including recognising Head of State and Government immunity, were rejected). Then, in January 2017, the AU Assembly adopted an ICC ‘Withdrawal Strategy’, which symbolised a more nuanced approach to the ICC. The ‘Withdrawal Strategy’ notes that, the goals of the AU are to:

- Ensure that international justice is conducted in a fair and transparent manner devoid of any perception of double standards;
- Institution of legal and administrative reforms of the ICC;
- Enhance the regionalisation of ICL;
- Encourage the adoption of African Solutions for African problems;
Preserve the dignity, sovereignty and integrity of Member States.\textsuperscript{55}

This strategy does not really call for mass withdrawal. Instead, the strategy examines various legal issues related to potential withdrawal. It discusses proposed amendments to the Rome Statute (identified as ‘preconditions’ for non-withdrawal) the AU would like to see, including, most significantly, deferring prosecution for sitting Heads of State or Government, while also noting they ‘will not exempt them from criminal liability’.\textsuperscript{56} This symbolises an unresolved paradoxical position: paradoxical because anti-impunity as embodied in the Rome Statute makes little sense unless all are subject to the same laws; unresolved because fundamental disagreements remain among African state-parties to the Rome Statute. Senegal, Cape Verde, Nigeria and Liberia entered formal reservations about the strategy, while Tanzania, Tunisia, Malawi and Zambia wanted more time to study it.\textsuperscript{57} Resistance to the ICC wasn’t overwhelming, but neither is there overwhelming support for it. The decision should ‘be understood as a decision taken by individual African States with competing views, rather than a unitary collective body’’.\textsuperscript{58} Nonetheless, the withdrawal strategy represents a serious challenge to anti-impunity.

**2.0.7 Burundi**

Burundi was the first African state-party to the Rome Statute to formally indicate its intention to withdraw from the ICC in October 2016. The government was of the assertion that, the ICC was an instrument for the big powers to punish the smaller ones that do not do their bidding. Top government officials were facing an ICC investigation for post-election violence in 2015\textsuperscript{59} and thus, Burundi may have been trying to avoid the potential repercussions of an investigation, demonstrating the weakness of its commitment to anti-impunity and the self-interested nature of the withdrawal decision.\textsuperscript{60}
2.0.8 South Africa

In June 2015, South Africa joined the list of those states-parties to the Rome Statute receiving Bashir, as well as the “rebel camp against the ICC. This came as a surprise since South Africa, along with Lesotho, Botswana, Ghana and Senegal, had been one of the first supporters of the court.61 In 2002, it resisted American pressure to sign the Bush administration’s bilateral immunity agreement,62 when Botswana and Senegal capitulated. Its unconditional support for the ICC helped forged South Africa’s reputation as a progressive country and a promoter of human rights.63

President Jacob Zuma, elected in 2009, initially followed this line. In May 2009, he publicly recognized his obligation to arrest Bashir should the latter attend his inauguration, dissuading Bashir from coming.64 The year after, in a joint communique with the European Union (EU), South Africa declared that the ICC constituted ‘an important development for international justice and a basis to advance peace’,65 and at the AU summit in 2013, Pretoria urged other African countries not to leave the Rome Statute.66

However, in June 2015 Zuma welcomed Bashir for the AU’s 25th Summit, attracting sharp international criticism. Within South Africa, the South Gauteng High Court judged the government’s failure in arresting Al- Bashir to be a violation of its constitutional obligation. The court subsequently issued an arrest warrant, but before it could be executed, al-Bashir was spirited away from the conference to an air force base and flown home.

A political crisis ensued in which the opposition themselves attempted to impeach Zuma for helping a ‘mass murderer’ to escape justice. In his defence, Zuma invoked the immunity of serving Heads of State,67 contradicting his own position before his inauguration ceremony in
2009. To evade this contradiction, Zuma finally threatened to withdraw South Africa from the ICC. His party, the African National Congress (ANC), confirmed the intention to withdraw in October 2015, and at the end of the January 2016 AU summit, Zuma stated that ‘South Africa is seriously reviewing its participation in the Rome Statute and will announce its decision in due course.’

In October 2016, South Africa’s Minister of International Relations and Cooperation filed a ‘Notice of Withdrawal’ from the ICC with the UN Secretary-General. The notice of withdrawal was issued on 19th October 2016 without prior announcement by the Government, without any public consultation and most importantly, without a debate in South Africa’s Parliament. It fell to the third arm of Government, the Judiciary, to deal with the validity of the Executive’s attempt to withdraw South Africa from the ICC.

Ultimately, the High Court ruled on 22nd February 2017 that the move by the South African Government was unconstitutional and invalid. The Government was highly disappointed by the judgment, but did not appeal. Instead, on 7th March 2017, the South African Government deposited with the UN Secretary-General a document titled ‘South Africa: Withdrawal of Notification of Withdrawal’. In that document, South Africa informed the UN Secretary-General of the decision of the High Court and officially gave notice of its withdrawal of its initial notice of withdrawal in order to adhere to the said judgment.

Beside the procedural mistakes committed by the Government, what of its stated reasons for seeking to withdraw from the ICC in the first place? Its primary contention for leaving the court is that, South Africa was supposedly caught in a bind. On the one hand, South Africa had to observe diplomatic immunity for Heads of State, as per international customary law backed up
by AU pressure. Yet its membership of the ICC pulled it in another (apparently politically less attractive direction) towards demanding of it to arrest and surrender al-Bashir to the ICC. To evade this bind, the South African Government effectively opted out and favoured impunity over accountability.72

As further rendition for its actions, the Government raised the rather weak argument that there was no cause for concern for African victims of mass atrocities since the AfCHPR” would be recast through the AU’s Malabo Protocol in order to enable the African Court to prosecute international crimes as an African alternative to the ICC.73 That claim is undermined by the fact that, the 15 ratifications needed for such recasting have not been obtained. As at 26th July 2018, South Africa herself has not even signed the Malabo Protocol, let alone ratified it.74

2.0.9 Gambia

In late October 2016, Gambia also officially announced its intention to withdraw. It reiterated the accusation that the ICC was targeting Africans – calling the ICC the ‘International Caucasian Court for the persecution and humiliation of people of colour, especially Africans’.75 Gambia also argued that Western war criminals had not been prosecuted, and it had tried to get the ICC to prosecute EU states for migrants drowned in the Mediterranean. But it had also been accused of election related repression.76 Thus, while voicing wide normative themes – for example, discrimination against Africans – the main explanation for the withdrawal seems to be the government’s naked self-interest.77

To complicate matters, after the withdrawal from the ICC was announced, the incumbent President Yahya Jammeh lost an election, and the President-elect Adama Barrow vowed to reverse the withdrawal decision.78 Yahya Jammeh subsequently rejected the results and engaged
in further repression, but he was eventually forced by ECOWAS to step down and Barrow revoked the withdrawal on 10 February 2017,\textsuperscript{79} noting Gambia’s commitment to human rights and the ‘principles enshrined in the Rome Statute’.\textsuperscript{80} This incident shows how unstable some African States’ interests and normative commitments can be.\textsuperscript{81}

### 2.1.0 Kenya

Later 2009, the ICC opened an investigation into the post-election violence in 2007, resulting in the indictment of several Kenyans, including persons “(Kenyatta and Ruto) who would later become President and Vice-President. Kenyatta and Ruto both sought to delay proceedings and repeatedly denounced the ICC at political rallies (as a threat to Kenyan sovereignty, a destabilising force, and an insulter of African pride) and allegedly began to ‘eliminate, intimidate or bribe’ witnesses”.\textsuperscript{82} They eventually succeeded and charges were dropped (but ‘without prejudice’, meaning they could be refiled).\textsuperscript{83} Kenya has also taken actions contrary to the anti-impunity norm which are independent of – but are obviously connected to – its direct dealings with the ICC. In August 2010 al-Bashir travelled to Kenya.\textsuperscript{84}

In January 2011, the AU Assembly supported Kenya’s position not to arrest al-Bashir and called for deferral of the ICC proceedings in Kenya\textsuperscript{85} - although in November 2011, a Kenyan court directed that Bashir should be arrested if he travelled to Kenya again.\textsuperscript{86} In 2013, the Kenyan parliament voted to withdraw Kenya from the Rome Statute, although President Kenyatta did not act on this. Again, Kenya has been leading efforts to amend Article 27 of the Rome Statute to give sitting Heads of State and Government” immunity and has also backed preparations in the AU to secure a mass African withdrawal from the ICC if the amendment push fails.\textsuperscript{87} Thus, while Kenya rhetorically supports anti-impunity, it has actually worked hard to sabotage the fundamental aspects of the norm.
2.1.1 Uganda

Uganda was the first State-party to refer a matter to the ICC Prosecutor in 2003. But the reality is much more complicated since Uganda sought to use the ICC as a weapon against the rebel “Lord’s Resistance Army (LRA).” But by 2008, Uganda began to consider the ICC as an obstacle, not a resource, on the basis that the ICC investigation was obstructing peace negotiations with the LRA. President Museveni therefore began advocating an alternative norm to anti-impunity, the interests of peace over justice (an argument also deployed vis-à-vis al-Bashir case).

But the shift was not immediately a comprehensive one because Uganda argued for watering down the July 2010 AU statement on non-cooperation, and in 2009 it revoked an invitation to Bashir to attend a summit in Uganda. But over time Kampala’s resistance hardened: President Museveni subsequently called the ICC a Western ‘tool that is out to punish Africa’; in May 2016, Bashir visited Uganda to attend Museveni’s fifth Presidential inauguration and was not arrested; and President Museveni denounced the ICC as a ‘bunch of useless people’ - even though a year earlier, he allowed the LRA commander Dominic Ongwen to be transferred to the ICC.

Uganda has thus become a vocal critic of the ICC. The Ugandan government is seemingly not ‘committed to’ or truly ‘constituted by’ anti-impunity; it used the anti-impunity norm instrumentally when its interests suited doing so, but it invoked alternative norms – peace over justice and African solidarity – when doing so became expedient. And if that instrumentality is no longer compelling enough, it might withdraw from the court: in October 2016 a Ugandan cabinet Minister hinted that the withdrawal process had already begun, although in April 2017
the Ugandan attorney general, William Byaruhanga, stated that, while Uganda had concerns about the Court, it had ‘not considered withdrawing’.”

2.1.2 Namibia

The Namibian government announced in 2015 and 2016 that it intended to withdraw from the Rome Statute, although it hasn’t yet. Its stated reasons are similar to the other States’, namely; that the ICC is biased against Africa and it essentially pursues regime change in Africa. In February 2017, the government pointed out that, it supported what it described as the AU Assembly’s decision for a collective withdrawal from the ICC (thus miscasting the actual decision). The Namibian government cited the demand for sitting presidents to be allowed to serve their terms in office before being tried by the ICC, tying this directly to the issue of peace and stability (although this contradicts a subsequent statement).

Thus, while none of these six African States have entirely repudiated the anti-impunity norm – they are certainly creative resisters of the ICC (with perhaps the exception of Gambia after its government changed), trying to at least partially hollow out the anti-impunity norm, including by putting forth alternative proposals for how it might be implemented, while essentially defending the status quo sovereign immunity norm.

2.1.3 The Supporters

There is still substantial support for the ICC in Africa. Four African States have joined since 2010 (Seychelles, Tunisia, Cape Verde, and Côte d’Ivoire). Botswana remains a vocal ICC-supporter, challenging anti-ICC statements from the AU, declaring that it would arrest Bashir if given an opportunity, and stating in 2010 – somewhat ironically given the AU’s preference for invoking sovereignty concerns – that ‘we have not surrendered [our] sovereignty…to the AU’.
In July 2017, Botswana formally domesticated the Rome Statute, which, the Minister for Defense, Justice, and Security Shaw Kgathi said ‘lifts’ diplomatic immunity. And in July 2016, Botswana, Senegal, Nigeria, Tunisia, Algeria, and Côte d’Ivoire pushed back against calls for mass withdrawal at the 27th African Union Summit, preventing the proposal from being included on the agenda.

After the withdrawal announcements in late 2016, numerous African CSOs protested, and Botswana, Côte d’Ivoire, Malawi, Senegal, Nigeria, Sierra Leone, Tanzania, and Zambia reiterated their support for the ICC. At the 2016 ASP in December, other African States also reiterated their support for the ICC (including both Uganda and Namibia, seemingly contradicting their statements about withdrawing). Even after it had initiated its withdrawal, South Africa had ‘expressed hope for dialogue that could forestall … withdrawal’ and also pointed out that, it would continue to cooperate with the ICC until its withdrawal was completed. Senegal has also seemingly modified its stance (recall it had called for withdrawal in 2009, after having been a strong early supporter). And after the AU approved the Withdrawal Strategy in early 2017 a number of AU Member-States expressed significant reservations.

2.2 Critique of the ICC- Reality or Propaganda?

The assessment of the role of the ICC has mostly been detached from an objective review of its performance as an “international justice body. As an observer put it, the ICC is neither good as proponents think it is, nor nearly as bad as critics believe it to be. It is surely not as potent as either side of the debate insists. Instead, it is the different actor’s narratives and perceptions of its role that have significantly shaped the debate on the role of the court.
Critics maintain that, the ICC’s focus appears to be restricted to Africa and this has created a feeling among many Africans and African leaders that it has deliberately targeted African leaders, considering the fact that it appears not to show as much interest in abuses going on elsewhere, as in Africa. Jean Ping, then- President of the AU Commission, asserted that ‘the international justice system seems to fight impunity only in Africa, as if there was nothing happening also in Iraq, Gaza, Columbia, or the Caucasus’.

Like all criticisms of ‘double standards’, the post-colonialist critique of the ICC appears to apply the principle of ‘all or nothing’, presuming that as the ICC does nothing elsewhere, it should do nothing in Africa. Yet, just because other mass crimes are committed elsewhere, it clearly does not imply that crimes in Africa should go unpunished.

The more pertinent question, then, is less why African cases have been investigated and more why non-African ones have not? Admittedly, with the exception of Georgia, which came under ICC formal investigation in January 2016, all cases (Uganda, DRC, Sudan, Central African Republic, Kenya, Libya, Cote d’Ivoire, Mali and Burundi) currently under investigation by the ICC prosecutor are located in Africa, and all individuals targeted by the ICC are Africans.

However, it is imperative to note that four of these situations- Uganda, the DRC, Central African Republic (CAR), and Mali- have been triggered through self-referral under Article 14 of the Rome Statute, meaning that a state-party to the Rome Statute writes an invitation letter to the ICC asking for an investigation and eventual prosecution. The Cote d’Ivoire situation is an instance where a non-party State lodges an ad-hoc request to the ICC, accepting its jurisdiction and inviting the prosecutor to investigate a case under article 12(3) of the Rome Statute. This means that in all these situations, the State where the Office of The Prosecutor (OTP) has opened
an investigation took extra steps to request the investigation of events that have occurred in its territory.

Also, the Prosecutor has so far referred only one case to the ICC, that of Kenya, and then only after the Trial Chamber had established that Kenya had failed to prosecute the perpetrators of the crimes in its national judicial mechanism. In October 2008, the Kenyan Inquiry Commission recommended the establishment of a domestic tribunal. It is only because the Kenyan parliament failed to apply that recommendation that the Commission sent the names of six individuals to the ICC’s Prosecutor in July 2009. Again, there were domestic calls by political figures for an ICC investigation. Hence, even though technically the investigation was opened *proprío motu*, it was triggered by Kenya itself.\(^\text{114}\) Either way, States such as Mali, DRC, CAR, Uganda, and Cote d’Ivoire have sent ‘invitation letters’ to the ICC and have used the court to their advantage.

Oumar\(^\text{115}\) contends that, the OTP’s eagerness to take up those cases, coupled with one-sided investigations and selective prosecutions, undermine the credibility of the institution. In his work, Hazan\(^\text{116}\) provides a counter-argument by articulating that: in the middle of the 19\(^{\text{th}}\) century, the German writer and politician Ludwig von Rochau invented the term “Realpolitik” to depict a telescoping of the aspirations for progress represented by the Age of Enlightenment and the power games between nascent States. A century and half later, we can talk of ‘Realjustice’ to describe a new reality in which human rights discourse, the development of international justice and inter-state power struggles jostle for primacy. ‘Realjustice’ reflects States’ determination to legitimate their political and moral version of history while preserving their own interests in a conflict.\(^\text{117}\)
When conducted successfully, ‘Realjustice’ provides political legitimacy, enabling States to impose their version of events in the public space by distributing roles between victims and war criminals using the discourse of International Humanitarian Law (IHL). A number of African governments have used this judicial weapon to their own benefit. Taking advantage of their public’s hunger for justice and the seduction of a fight against impunity, they invited the ICC in order to criminalize their opponents and enemies while avoiding any sanctions themselves.

The ICC’s first three cases (CAR, DRC, and Uganda) were African because of a convergence of interests. The Prosecutor, Moreno Ocampo, needed swiftly to find cases to establish the new Court’s legitimacy, as well as his own. Of the three ways of bringing cases to the Court (by a State-party, by the Prosecutor or by the UNSC), the first option seemed the easiest and most legitimate, respecting State sovereignty, while the other two options would prove to be vulnerable to the post-colonialist critique.

The Prosecutor therefore found states-parties to the Rome Statute ready to provide cases. The respective African Heads of State, Bozize, Kabila and Museveni, saw in the ICC a way to weaken their opposition and consolidate their power while concurrently cultivating their images as champions of the fight against impunity.

African States’ motives in joining and using the Court are complex. An intention to use the ICC against their political opponents was not the only reason, since they risk exposing themselves in the process, and do not need the Court to prosecute rebels. However, because domestic prosecutions will always be denounced as biased and untrustworthy by rebels, they do need the Court to give credibility to their declared commitment to fighting violence. These States (CAR, DRC and Uganda) therefore brought the cases against rebel groups to the ICC.
themselves, beginning a practice of ‘self-referral’ which, while compatible with the Rome Statute, is not expressly provided for in the text, where states-parties referring cases of other states-parties was envisaged.\textsuperscript{122}

The first Prosecutor, Moreno Ocampo, nevertheless encouraged these self-referrals, as they were a part of his strategy.\textsuperscript{123} He played along with the Heads of State by agreeing to prosecute only the rebels and to disregard crimes committed by the regimes’ forces,\textsuperscript{124} taking care not to investigate leads which would subject the regimes to scrutiny.\textsuperscript{125} In the DRC, for example, the decision to focus on the Ituri region rather than Kivu was probably taken to reduce the evidence implicating Kabila.\textsuperscript{126} This strategy served the interests of the Prosecutor, the Heads of State and even the ICC itself, which was able to demonstrate the ability to cooperate closely with state-parties that is crucial if it is to function effectively.\textsuperscript{127}

This political instrumentalisation of the ICC was not limited to the first three cases. According to Pierre Hazan, in the Cote d’Ivoire case, the Prosecutor, Fatou Bensouda chose similarly to investigate only ex-President Gbagbo, not President Ouattara and his troops.\textsuperscript{128} The essential problem thus, is not the desire of certain African leaders to free themselves from an adversarial Court, but rather the strategy of the Prosecutor’s office, which ‘played the African governments’ game of ‘realjustice’, only indicting opposition leaders and heads of armed groups’.\textsuperscript{129}

In other words, the African Heads of State initially supported the ICC as a means to defeat their rebels. When the ICC subsequently escaped their control, with cases brought either by the UNSC (Darfur, Sudan and Libya) or by the Prosecutor himself (Kenya), and began to take an interest in leaders, they immediately opposed it.\textsuperscript{130} Until then, the Court already had a number of suspects in custody, among them Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui and
Jean Pierre Bemba, and had issued arrest warrants against others- all Africans. Yet, neither the AU nor individual African States protested. The fact that the anti-ICC sentiment was triggered only by the arrest warrant against Bashir confirms that the AU has no problem with the ICC targeting Africans, only powerful ones, especially Heads of State and senior State official.

Furthermore, observers tend to conflate the failings of the UNSC with those of the ICC. In addition to State referrals and the Court’s Prosecutor’s using her own initiative to open an investigation, the Court may gain jurisdiction over a situation only after a UNSC referral. This has the potential of bringing all States, including those who are not parties to the Rome Statute, under its jurisdiction.

It is through that trigger mechanism that the Court acquired jurisdiction over Libya and Sudan. Libya was referred by UN Resolution 1970 and South Africa, Nigeria and Gabon voted in favour of the resolution. Sudan was referred to the Court by UN Resolution 1593, on 31 March 2005, with a vote from Benin, while Algeria abstained.

The UNSC, being the highest international lawmaking institution, is an eminently political body. When the UNSC fails to refer a situation to the ICC, as in Syria, for instance, critics often point a finger at the Court, outlining its eagerness to go after Africans while failing to act when heinous acts are committed elsewhere. Quite simply, the Court does not have jurisdiction over Syria, Sri Lanka, Myanmar, or North Korea, and can act, only through a UNSC resolution. Therefore, its inaction regarding those cases is a clear reflection of the politics of the UNSC. These states have been shielded from Court referral by the permanent Members, usually the United States, China and Russia.
Having explained arguably the objective reasons, such as the jurisdictional limits of the ICC, it is also possible, and necessary, to nuance it. First, the Court has already shown an interest in other cases outside the African continent: The OTP is conducting preliminary examinations in Afghanistan, Colombia, Palestine, Venezuela, The Philippines, Ukraine, on the British military intervention in Iraq, on registered vessels of Greece and Cambodia, and it has opened an investigation regarding a situation in Georgia. Therefore, one can no longer say that all the Courts’ cases are African.

2.3 Peace vs Justice

ICL refers to the entirety of norms that define and or regulate conduct that breaches the fundamental values of the “international community as defined under international law." Hence, international justice is not merely a function of legislation and adjudication. It also depends on the extent to which it is viewed as legitimate by litigants and others based on perceptions of the relationships of the operations of existing regimes of dispensation of justice. This is a reflection of the operations of the institutions of justice and those of the international order including but not limited to the actions of judicial authorities and other judicial auxiliaries and intermediaries who give effect to justice through their rendition and application of the law.

International justice has social ends that are easily sabotaged by self-interested attempts to delegitimize judicial institutions- a charge often levelled at the AU- but also by the desire of others to preserve, as a matter of political inherency, their own sovereign spaces. Most importantly, the social ends of social justice, which is the end of international justice, is undermined by elevating judicial or punitive justice over larger social goals. Both the PSC of the AU and the ICC have a mandate to fight impunity. However, the PSC is a political body while the ICC is an international judicial body. This is the major area of divergence in how they
deal with fighting impunity. The PSC will opt for a political solution focused on peacemaking and reconciliation, while the ICC will focus on the prosecution of cases.\(^{139}\)

One strong view argues that there cannot be peace without justice and vice versa.\(^{140}\) Put otherwise, justice, peace, national reconciliation are closely interrelated in spite of the tensions which exists among them. The question therefore is what should precede what? A number of arguments have been advanced to justify the prosecution of those responsible for the ‘most serious’ human rights violations.

First, it is argued that authors of these violations must be prosecuted in order to bring them to justice. Clearly, there is a delicate balance between seeking vengeance and desiring suitable punishment. However, some have argued that, punishment of some sort is a component of justice. Second, prosecutions are reckoned to be supporting the rule of law. This view maintains that, failure to prosecute past human rights violations will not provide a firm basis for building the rule of law in future.\(^{141}\) The rule of law necessitates that all persons and institutions are equal before and under the law. No one is above the law. Hence, when grave crimes are not prosecuted, the rule of law will be discounted. Third, support for prosecutions is based on the imperative to protect society. Thus, as long as perpetrators remain at large, they continue to be a threat to the society in which they live. Fourth, the perpetrators of human rights violations must be prosecuted to deter further abuses.\(^{142}\)

The ICC Prosecutor, Fatau Bensouda, mentioned in 2013 that ‘history has taught us that the peace achieved by ignoring justice has mostly been short-lived, and the cycle of violence has continued unabated’.\(^{143}\) She argued that, ‘justice can have a positive impact on peace and security’ through the ‘shadow of the court’.\(^{144}\) In Uganda, for example, where the ICC was
mobilized by the Ugandan Government to prosecute the leaders of the LRA, the ICC arrest warrants against Joseph Kony and his top commanders are widely acknowledged to have played a major role in bringing the rebels to the negotiating table in the Juba Peace Process.\textsuperscript{145}

The opposite view is that peace and reconciliation should be preferred in States that just emerged from wars or armed conflicts. Those who share this view contend that African societies in conflict need peace and national reconciliation first, and not justice or revenge as they advocate that one should be careful not to go too far the other way and fall into judicial romanticism (\textit{fiat justitia et pereat mundus}: let there be justice though the world perish), which is not only naïve but potentially dangerous as well.\textsuperscript{146}

According to this view, international justice may endanger peace and national reconciliation. Former South African President and AU Mediator in Sudan, Thabo Mbeki summed up this narrative (Justice cannot trump peace) as follows:

> These charges against people- like Omar al-Bashir in Sudan or Uhuru Kenyatta in Kenya- they arise out of situations of conflict. Our first response as Africans is that here are Africans who are dying, so we need to end this conflict. Our first task is to stop the killing of these Africans. But the challenge that arises is when someone says that the issue of justice trumps the issue of peace.\textsuperscript{147}

This argument gives precedence to peace. It holds that, while not dismissing the need to tackle impunity (exemption from punishment), ‘‘temporary’’ immunity should be guaranteed for key actors in order to secure their engagement in peace negotiations.\textsuperscript{148} Proponents of this view further argue that, ‘‘Peace vs Justice’’ is a false dichotomy. Both can be served through political solution. They contend that there are no ideal solutions in the field of transnational justice; there are always tensions between the desire and need to prosecute the perpetrators of crimes so that full accountability is achieved, and the reality that, in order to end conflict, there will need to be multiple compromises in which justice can only be imperfectly implemented. Hence, ‘‘the
creation of the ICC’ is seen as problematic as potentially, it obstructs efforts to reach peace accord, and is regarded with active suspicion by local people who are most concerned to get peace.\textsuperscript{149}

Advocates of this argument, particularly the AU have questioned whether processes led by the ICC would result in justice for the victims of a given conflict.\textsuperscript{150} There is much history and logic in favour of the AU’s argument. Historically speaking, efforts by outsiders to resolve African problems with total disregard for their socio-political contexts have backfired. One recent case is the rejection by the UNSC in 2011 of the AU proposal for political transition in Libya.\textsuperscript{151} Neither the mandate of the UNSC, nor NATO intervention, nor ICC indictments have stabilized Libya after the fall of Gaddafi.\textsuperscript{152}

The impulse of these organisations was, of course to rectify the situation in Libya, but it is now clear that their actions lacked foresight and pragmatism.\textsuperscript{153} Hence, it is not a minor point to ask whether there is a historical pattern that sets Africa apart, wherein political experimentation is allowed to proceed without full consideration of the aftermaths where it would not have been the case elsewhere. The Congo Free State Experiment, the Mandate and Trusteeships systems, the Responsibility to Protect (R2P) as practiced in Libya have all been political experimentation that failed the people in the relevant spaces miserably.\textsuperscript{154}

Murithi suggests that, both the AU and the ICC, both of which have in fact been practicing a variant of “political justice” and “judicial politics”, need to re-orient their stances.\textsuperscript{155} The AU needs to move away from its exclusively political posture towards embracing international jurisprudence and the ICC’s limited interventions.\textsuperscript{156}
Indeed, Article 17 of the Rome Statute stipulates that the ICC has jurisdiction over a case only if the State is unwilling or unable to investigate and prosecute it. Thus, any state-party may challenge the ICC’s jurisdiction if it shows that it is willing and able to prosecute cases in its territory. In that sense, the ICC merely does the work that state-parties have failed to do.\textsuperscript{157}

Conversely, the Court needs to move away from its unilateral prosecutorial fundamentalism and recognize that there might be a need to arrange its interventions in order to give political reconciliation an opportunity to stabilize a State.\textsuperscript{158}

With respect to the ‘Peace vs. Justice’” debate, I hold the view that, peace deals that do not allow for the punishment of the perpetrators of the ‘most serious’ crimes of international concern are fragile, that they do not establish a true peace. Rather, they create situations where stable development is impeded, human rights are not firmly entrenched and ultimately, rather than ending conflict, divisions remain and fester.

\textbf{2.4 Conclusion}

Doubts abound regarding the ‘true’ intentions behind the extension of criminal jurisdiction to the preconceived ACJHR at this point in time. In this regard, the Malabo Protocol may well be obstructive to the ideals of addressing and ending impunity within the framework of existing mechanisms. In terms of the supposed obstructive character of the Malabo Protocol, the AU may not have a \textit{bona fide} purpose in establishing a Criminal Chamber other than trying to shield some of its leaders who are known for a culture of impunity regardless of the AU’s claims that the ACJHR is aimed at fighting impunity in Africa.
ENDNOTES

2 Ibid.
3 Ibid.
5 Ibid.
6 Ibid.
7 Ibid.
8 Report of the Committee of Eminent African Jurists on the Case of Hissene Habre, paras. 27-33
9 Ibid., paras 34-42
10 Decision of the African Union on the Hissene Habre Case, paras. 1-5
11 Ibid., para. 5
17 Ibid.
22 Ibid.
23 Ibid.
25 Report of the implementation of communique of 142nd meeting of the peace and security council held on 21st July 2008 on the Sudan
31 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
56 Ibid.
66 Ibid.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 See, Status List of the Malabo Protocol
98 Ibid.
102 Ibid.
116 Ibid.
117 Ibid.


S/RES/1593(2005)


Ibid.


Ibid.


Ibid.

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Ibid.


151 Ibid.
154 Ibid.
156 Ibid.
CHAPTER THREE

JUSTIFICATION OF THE IMMUNITY CLAUSE IN THE MALABO PROTOCOL

3.0 Introduction

The first part of this chapter aims at identifying the justification for the immunity clause contained under Article 46A bis of the Malabo Protocol. In doing so, I trace the development of the law on the immunity of State officials in international law. In discussing the developments of immunity, customary international law is discussed as the root of immunity of State officials. It is then followed by the discussion on immunity provisions of the Charters of the International Military Tribunals at Nuremberg and Tokyo; Statutes of international criminal tribunals and hybrid courts; the Rome Statute; and codified international law treaties. The second part discusses the relevance of the unaccustomed ‘international’ crimes to the ACJHR.

3.0.1 Immunity of State Officials under Customary International Law

Customary international law consists of the rules which become legally binding through the practice of States. The rules concerning customary international law are codified in Article 38(1) of the Statute of the ICJ which stipulates that customary international law is constituted through “evidence of a general practice accepted as law”. Hence, two elements go into the making of international custom: the material facts (State practice) and opinio juris ac sive necessitatis (an opinion of law or necessity). The material fact (State practice) must be concordant, uniform, repetitive and must be accompanied by opinio juris ac sive necessitatis. In other words, State practice must be accompanied by a mental framework as a matter of law.¹
Immunity of State officials has been defined as emanating from customary international law.\(^2\) State practice indicates that State officials were historically not subject to criminal responsibility for their actions, because of a merger of the sovereign and the sovereignty of the State.\(^3\) Sovereign immunity followed in the first place from the divine right of kings: you could not put an infallible ruler on trial since, if you did, the verdict must always go in his favour.\(^4\)

The rule of immunity of State officials was derived from the doctrine that the King can do no wrong.\(^5\) There is therefore a customary international law basis that a State cannot exercise its jurisdiction over another’s sovereign, at least in ordinary crimes. Nevertheless, it is important to note that in contemporary international law”, sovereign equality of States does not prevent State officials from prosecution before an international criminal court, provided that such court has jurisdiction over former or serving State officials.

Having set the customary international law nature of the immunity of State officials, it is necessary to discuss the doctrine of immunity in conventional international law.

3.0.2 Immunity in the Charter of the International Military Tribunal

The defence of official capacity has been rejected at least since the Nuremberg trials.\(^6\) On 8\(^{th}\) August 1945, at London, the Governments of the United States, the French Republics, Great Britain and Northern Ireland and the Union of Soviet Socialist Republics (USSR) signed an Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis.\(^7\) Article 1 of the Agreement\(^8\) provides as follows:

There shall be established after consultation with Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.
The Charter of the International Military Tribunal was annexed to the London Agreement signed on 8th August 1945. The Charter lays down laws and procedures by which the Nuremberg trials were to be carried out. Article 6 of the Charter of the International Military Tribunal provided for the international crimes namely: crimes against peace, war crimes and crimes against humanity for which the tribunal was to exercise jurisdiction. Of particular importance to this thesis is article 7 (on Jurisdiction and General Principles) of the Charter of the International Military Tribunal which provides as follows:

The official position of the defendants, whether Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 7 of the Charter of the International Military Tribunal served as a basis for the prosecution and punishment of Heads of State for international crimes.

3.0.3 Immunity under the Control Council Law No. 10

The Allied Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity later followed the Charter of the International Military Tribunal. Article 2(1) of the Control Council Law No. 10 made provision for crimes against peace, war crimes and crimes against humanity. Article 2(4a) of the same Law prohibited the granting of immunity to persons who committed international crimes in the following terms:

The official position of any person whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.
3.0.4 Immunity in the Charter of the International Military Tribunal for the Far East

After the attempts to prosecute State officials in Germany, equal measures were followed in the Far East after World War II (WWII). Article 1 of the Proclamation by the Supreme Commander for the Allied Powers issued on 19th January 1946 at Tokyo provides that:

There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organisations, or in both capacities, with offenses which include crimes against peace.

With respect to immunity from prosecution for international crimes, article 6 of the Charter of the International Military Tribunal for the Far East provides as follows:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

3.0.5 Immunity in the Statutes of International Criminal Tribunals

The Statutes of the ICTY and the ICTR which deal with international crimes contain provisions outlawing immunity of State officials.

Acting on the powers of Chapter 7 of the UN Charter, the UNSC established the ICTY to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. The ICTY deals with the prosecution and punishment of individuals responsible for war crimes, genocide and crimes against humanity.

With respect to immunity of State officials, the Statute of the ICTY provides as follows:

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
As a result of the immunity provision in the Statute of the ICTY, former State officials with the likes of Milošević, Karadžić and Kunarač were prosecuted before the tribunal. Suffice here to say that immunity is not a recognised defence before the ICTY.

The ICTR which was also established by the UNSC in 1994\(^\text{13}\) for the prosecution of persons responsible for genocide and other serious violations of IHL committed in the territory of Rwanda between 1\(^{\text{st}}\) January 1994 and 31\(^{\text{st}}\) December 1994. With regards to immunity of State officials, Article 6(2) of the Statute of the ICTR provides that:

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

Due to the immunity provision in the Statute of the ICTR, the Tribunal has been able to prosecute individuals including former Rwandan State officials such as Jean Kambanda for genocide, war crimes and crimes against humanity.

### 3.0.6 Immunity in the Rome Statute of the ICC

After the establishment of the ICTR and the ICTY, a permanent international criminal court for the prosecution of international crimes was established. On 17\(^{\text{th}}\) July 1998, at Rome, the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court adopted the Rome Statute.

The Rome Statute of the ICC was adopted against the background of putting an end to impunity for the perpetrators of the most serious crimes of international concern on the ground that such crimes threaten the peace, security and well-being of the world. The ICC is a contemporary and permanent forum for prosecuting and punishing individuals who commit international crimes. It complements national criminal jurisdictions.\(^\text{14}\)
Genocide, crimes against humanity, war crimes and the crime of aggression are the crimes within the jurisdiction of the ICC. The ICC has jurisdiction over such crimes only after the date (1st July 2002) the Rome Statute entered into force.

Regarding immunity, Article 27 of the Rome Statute provides as follows:

1. This Statute shall apply to all persons without any distinction based on official capacity. In particular, 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, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Article 27(1) of the Rome Statute effectively guarantees that, norms of international criminal responsibility apply without any distinction for officials based on official capacity. By specifically making reference to national or international law, Article 27(2) guarantees that the consequences of the responsibility recognised by Article 27(1) are not frustrated by claims of immunity or other procedures.

3.0.7 Immunity in the Statutes of Hybrid Courts

The SCSL was established by an agreement between the UN and the Government of Sierra Leone following the adoption of the UNSC Resolution 1315 of 2000. The aim of the SCSL is to prosecute persons who bear the greatest responsibility for serious violation of IHL and Sierra Leonean Law committed in the territory of Sierra Leone since 30th November 1996.

The SCSL is a hybrid Court composed of international judges and judges appointed by the Government of Sierra Leone. Regarding immunity of state officials, the Statute of the SCSL provides as follows:
The official position of any accused persons, whether as Head of State or Government or a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.\textsuperscript{20}

The Extra-ordinary Chambers in the Courts of Cambodia (ECCC) were established in 2004 to try senior leaders of the Democratic Kampuchea for international crimes perpetrated by the Khmer Rouge regime in Cambodia from 17\textsuperscript{th} April 1975 to 6\textsuperscript{th} January 1979.\textsuperscript{21} Article 29 of the Law establishing the ECCC provides that:

Any suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in articles 3, 4, 5, 6, 7 and 8 (genocide, torture, war crimes and crimes against humanity) of this law shall be individually responsible for the crime. The position of or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.\textsuperscript{22}

### 3.0.8 Immunity as Covered Under Treaties

It is imperative to comprehend that there are many treaties outlawing the immunity of State officials from prosecution for international crimes. Such treaties include the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity; the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter: the Genocide Convention); the Convention on the Suppression and Punishment of the Crime of Apartheid; and the Convention Against Torture.

The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 was adopted by the UNGA in the spirit that crimes against humanity and war crimes are among the gravest crimes in international law.\textsuperscript{23} With respect to immunity of State officials, the Convention provides that:

If any of the crimes mentioned in article 1 (crimes against humanity and war crimes) is committed, the provisions of this Convention shall apply to representatives of the State authority and private individuals who as principals or accomplices, participate in or who directly incite others to the commission of any of those crimes, or who conspire to commit them, irrespective of the degree of completion, and to representatives of the State authority who tolerate their commission.\textsuperscript{24}
Thus, article 2 of the Convention effectively rejects immunity of State officials as defence for prosecution and punishment of war crimes and crimes against humanity.

The Genocide Convention is another treaty which outlaws immunity of State officials with respect to genocide. Article 1 of the Genocide Convention provides that genocide, whether committed in time of peace or in time of war, is a crime under international law which the contracting parties undertake to prevent and to punish.25 Article 4 of the same Convention recognises that persons committing genocide or any of the other acts prohibited under the Convention shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.26

Article 4 of the Genocide Convention rejects the immunity of State officials as a defence for acts of genocide hence, State officials cannot invoke a defence of their status if charged with genocide.

Apart from the preceding treaties, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter: the Convention against Torture) which was adopted by the UNGA on 10th December 1984 is another treaty outlawing immunity. Of particular importance is the provision that an order from a superior officer or a public authority may not be invoked as a justification for torture.27 From this, it suffices to say that ‘a public authority’ would mean and include State officials. Thus, immunity is not available for State officials who commit or order commission of torture as an international crime.

Again, the International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted by the UNGA on 30th November 1973) which declares that apartheid is a crime against humanity and violates the principles of international law does not recognize
immunity for the crime of apartheid.\textsuperscript{28} With respect to immunity, article 3 of the same Convention provides that:

> International criminal responsibility shall apply, irrespective of the motive involved, the individuals, members of organisations and institutions and representatives of the State, whenever they commit, participate in, directly incite or conspire in the commission of the acts mentioned in article 2 of the Convention; or directly abet, encourage or co-operate in the commission of the crime of apartheid.

Thus, State officials are not exempted from bearing responsibility for the crime of apartheid as an international crime.

\textbf{3.1.0 Other ‘Unaccustomed’ International Crimes}

Some scholars have suggested that, a definition of an international crime remains a matter of controversy.\textsuperscript{29} Probably, the best way is to note the difference between domestic crimes from international crimes. Balint notes that:

> The first stage is to distinguish crime from international crime and thus, make a distinction between criminal justice and international criminal justice. The foundation for this argument is that any system of criminal justice must take into consideration the context within which the crime occurs and that the context, factors and outcomes of international crime are different from that which may be termed domestic crime.\textsuperscript{30}

Thus, an international crime may be referred to as –such crime which is prohibited by international law –and to which international law attaches legal consequences –criminal proceedings and punishment.\textsuperscript{31} International crimes are contrary to international law as opposed to domestic crimes which are contrary to national laws of a particular State. International crimes are committed against the international community as a whole and therefore create obligations on all States “\textit{(erga omnes)} to punish the perpetrators of such crimes. Nonetheless, when recognized by law at a national level, international crimes may also be contrary to the national laws of a State. Hence, international crimes may be punished both at international and national courts.
It is necessary to have a doctrinal basis for determining what constitutes an international crime and when in the historical legal evolution of a given crime it can be said to attain the status of *jus cogens*. Certain crimes affect the interests of the international community of States as a whole because they threaten the peace and security of humankind and also, because they shock the conscience of humanity. If both elements are present in a given crime, it can be resolved that it is part of *jus cogens*.

The term ‘*jus cogens*’ means ‘the compelling law’” and, as such, a *jus cogens* norm maintain the highest hierarchical position among all other norms and principles. As a result of that standing, a *jus cogens* norm is deemed to be ‘peremptory’ and non-derogable. Hence, *jus cogens* can be referred to as the legal status that certain international crimes reach.

Jus cogens is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The characterization of certain crimes as “*jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.” The legal literature has it that the following crimes are *jus cogens*: crime of aggression, genocide, war crimes, crimes against humanity, piracy, slavery and torture. Sufficient legal basis exist to arrive at the conclusion that all these crimes are part of *jus cogens*. These legal bases consist of the following:

- International pronouncements reflecting the recognition that these crimes are deemed part of general customary law;
- Language in preambles or other provisions of treaties applicable to these crimes which indicates the higher status of these crimes in international law;
- The substantial number of states which have ratified treaties related to these crimes;
- The *ad hoc* international investigations and prosecutions of culprits of these crimes.
Each of these *jus cogens* crimes, however, does not necessarily signal the co-existence of all the elements i.e. (threat to international peace and security; shock the conscience of mankind). Aggression is on its face a threat to peace and security, but not all acts of aggression really threaten the peace and security of humankind.\(^{43}\) While crimes against humanity and genocide shock humankind’s conscience, specific instances of such actions may not threaten international peace and security.\(^ {44}\) Similarly, slavery and torture also shock the conscience of humanity, although they rarely threaten the peace and security.\(^ {45}\) Piracy, almost non-existence nowadays\(^ {46}\) neither shocks the conscience of humanity nor threatens international peace and security, although it may have at one time.\(^ {47}\) War crimes may threaten peace and security, however, the extent to which war crimes shock the conscience of humankind may depend on the context of their occurrence and the quantitative and qualitative nature of crimes committed.\(^ {48}\)

The historical evolution of *jus cogens* international crimes (crimes of aggression, genocide, war crimes, crimes against humanity, piracy, slavery and torture) from their recognition as being offensive to certain values to their universal condemnation and finally to their universal proscription developed in diverse ways.\(^ {49}\) Although the developments and drafting history of the *jus cogens* international crimes may be important, it is not the concern of the present study because the purpose here is not to describe the crimes as such, but rather, to determine whether the other categories of crimes stipulated under Article 28A of the Malabo Protocol live up to the standard of the ‘most serious concern’ threshold and their relevance to the preconceived ACJHR which the protocol seeks to establish. The drafting history of the *jus cogens* international crimes is well captured by other scholars and the ILC.\(^ {50}\)

While the Malabo Protocol incorporates *jus cogens* international crimes such as war crimes, genocide, crimes against humanity and aggression, it also contains such arguably unaccustomed,
arguably ‘international’ crimes such as money laundering, mercenarism, corruption, illicit exploitation of natural resources, trafficking in hazardous wastes, trafficki
3.1.2 The Crime of Unconstitutional Change of Government

UCG is considered as one of the major causes of instability, insecurity and violent conflict in Africa. The examples of Zimbabwe’s Mugabe, Ivory Coast’s Gbagbo and Kenya’s Kibaki readily come into mind. The menace of the unconstitutional takeover of government and its direct negative impact on the peace and stability of African countries gave a greater impetus to the adoption of the “African Charter on Democracy, Elections, and Governance by the AU in 2007. UCG is one of the few norms in Africa that gradually evolved through custom, climaxing in its codification by the African Charter on Democracy, Election, and Governance.

The rejection of UCG in Africa dates back to the era of the defunct OAU, which, after several pronouncements and a major decision in 1999 against the practice, adopted the Lomé Declaration in 2000, which was shortly followed by the 2001 New Partnership for Africa Development (NEPAD). Within NEPAD, African leaders adopted the Declaration on Democracy, Political, Economic and Corporate Governance, and affirmed democratic governance. As a result of the pervasiveness of the crime of UCG in Africa and in recognition of the ineffectuality of responses by the defunct OAU and the AU, the AU Assembly adopted the African Charter on Democracy, Election and Governance on 30th January 2007 which subsequently entered into force in February 2012.

The crime of UCG listed under Article 28E of the Malabo Protocol (election rigging, refusal by an incumbent government to relinquish power to a winning party, military coup d’états, and so on) have been practices which have been consistently rejected by the majority of African States as shown by myriad treaties and declarations adopted over several decades to outlaw them. Suffice to say that Article 28E of the Malabo Protocol is merely a codification of what has arguably become a custom in Africa, that is: the rejection of UCG.
Hence, the crime of UCG may be an example of a crime that meets the criteria of *jus cogens*, bearing in mind: International pronouncements reflecting the recognition that UCG” is deemed part of general customary law; Preambles or other provisions applicable to the crime of UCG; and the substantial number of States which have ratified treaties related to the crime of UCG.

### 3.1.3 Trafficking in Persons

Developing a working definition for trafficking in persons was a laborious process that began in the 1990’s.\(^6\) The challenge was to find an appropriate definition that differentiated trafficking in persons or, as used interchangeably, “human trafficking from other related issues such as illegal migration and migrant smuggling.\(^6\) The history of trafficking in persons can be traced to the First Convention against White Slavery of 1904 which was aimed at suppressing the criminal traffic of white women or girls compulsively secured for ‘immoral purposes’.\(^6\)

Africa through the AU had adopted a couple of policy documents on trafficking in persons. The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children is an example of such policy documents.\(^6\) The development of the Action Plan was influenced by the acknowledgement that effective actions to forestall and combat trafficking in persons, require comprehensive regional and international approaches.\(^6\)

The essential actions to be undertaken fall into four main categories, that is:

- Prevention and awareness
- Victim protection and assistance
- Legislative framework, policy development, and law enforcement
- Cooperation and coordination.\(^6\)
With respect to the development of legislative and policy frameworks, the Action Plan calls on States to ratify and fully apply the United Nations Convention against Transnational Organised Crime (UNTOC) and the Trafficking in Persons Protocol. Hence, the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children echoes the importance of domestic mechanisms in prevention and prosecution of trafficking offences.

Another recent policy framework on trafficking in persons is the Khartoum Declaration on the African Union- Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants. It reiterates the principles enshrined in the Ouagadougou Action Plan although it was focused exclusively on States from the Horn of Africa i.e. Sudan, Eritrea, Djibouti, Egypt, Ethiopia, Libya, Tunisia and South Sudan which have seen an increase in human smuggling and trafficking in persons in recent years. These States agreed inter alia to ratify and implement instruments that address trafficking in persons and also to address socio-economic, security, and political factors that make people in the Horn of Africa susceptible to human trafficking and migrant smuggling.

Other policy frameworks at a sub-regional level include the ECOWAS Declaration on the Fight against Trafficking in Persons and the Southern African Development Community (SADC) Regional Plan of Action on Trafficking in Persons.

Empirical evidence points to the imperative to prioritize national legal frameworks on trafficking in persons. The UNDOC Global Report for Trafficking in Persons (2014) suggests that, in terms of flows, domestic trafficking accounts for 75% of the total number of discovered victims and is the main type of trafficking in Sub-Saharan Africa.
Hence, in the case of cross-border trafficking, the flows are primarily between States in the same sub-region. For instance, most Southern African victims are detected in Southern Africa, whereas most West African victims are detected in West Africa. The nature of these flows explicitly shows that the most effective measure in tackling trafficking in persons in Africa would be to combat the problem at the domestic level. Secondly, there is no international consensus on the paramount importance and relevance of the crime of trafficking in persons to the international community” of States as a whole. Hence, it is not convincing enough to tag ‘trafficking in persons’ as a *jus cogens* international crime as opposed to transnational crime.

### 3.1.4 Trafficking in Hazardous Waste

The pollution of the natural environment is one of humankind’s oldest problems. But for a very long time, this issue was pushed aside and ignored, both on national and international level. The situation changed in the North American States and Western Europe during the 1970s. The African continent became the place to deposit the hazardous waste industrialized countries needed to rid themselves of.

The “1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (hereafter: the Basel Convention) finally turned trafficking in hazardous wastes without permission into a punishable offence. The adoption of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (hereafter: the Bamako Convention), which was negotiated in 1991 and entered into force in 1998 may be viewed as the reaction of several OAU Member States to the realization that less developed countries had become the ‘trash bin’ of rich industrialized nations in the Northern hemisphere.
The list of hazardous wastes under Article 28L of the Malabo Protocol is similar to the list contained in the Bamako Convention.\textsuperscript{79} While there is no objection to penalizing illegal trafficking of hazardous wastes as defined in international agreements,\textsuperscript{80} it is problematic that Article 28L (2b)” of the Malabo Protocol bases an international criminal offence on a definition of hazardous waste that lies at the discretion of each national legislator.

Article 28L (2b) of the Malabo Protocol provides as follows:

\begin{quote}
Wastes that are not covered under paragraph (a) above but are defined as, or are considered to be, hazardous wastes by the domestic legislation of the State of export, import or transit.
\end{quote}

Such an extension of criminalization should only be incorporated into an international offence after every State Party has given its consent. Otherwise, the criminalization of trafficking in hazardous waste under international law in Africa may run the risk of differing from State to State.\textsuperscript{81}

Hence, the crime of trafficking in hazardous waste does not meet the ‘most serious’ concern threshold. The AU should rather ensure that its Member States take the prevention and prosecution of the crime more seriously.

\textbf{3.1.5 Mercenarism}

Africa’s experience with mercenarism has been ambiguous and long lasting.\textsuperscript{82} During the colonial era, mercenaries were employed by the colonial powers to suppress national liberation struggles. In recent times, weak governments have sought assistance from mercenaries in order to maintain power, with Sierra Leone being the most prominent example.\textsuperscript{83} In the contemporary international system, many States, including the United States in Iraq and Afghanistan, turn to mercenaries to execute functions traditionally performed by the armed forces of a State, thereby making Mercenarism a multi-billion dollar business.\textsuperscript{84}

Mercenaries could emanate both from outside and within the country of their activity. They can be regarded as amorphous entities whose shadowy existence may prove intractable to domestic legislation alone. Nonetheless, it is difficult to see how the activities of people paid to fight in foreign States generates international criminal prosecution any more than hiring contract killers to assassinate political opponents abroad. In either case, unless there is some sort of complicity by the national government of the culprits, in which case the law of State responsibility will apply, criminal prosecution should be undertaken under the domestic laws of the affected State on the basis of, at least territoriality principle.

3.1.6 Trafficking in Drugs

The first attempt to regulate and establish a framework of procedural cooperation in drug trafficking was under the “1936 Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, which unfortunately, failed to come into force. Subsequent instruments were initiated at the level of the UN and aimed at regulating illicit cultivation, manufacturing, trade and use in narcotic drugs. They include the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; and the Protocol Amending the 1961 Single Convention on Narcotic Drugs. These instruments use what is regarded as a ‘control approach’ itemizing potentially ruinous products and distinguishing their illicit use, cultivation, and distribution of the itemizing drugs.
It is fascinating to note that although trafficking in drugs is not a crime under the Rome Statute, the establishment of the ICC was precipitated by the petition of Trinidad and Tobago to establish an international court with jurisdiction over drug-related offences.\textsuperscript{89} The 1991 International Law Commission (ILC) Draft Code incorporated a drug trafficking offence but it was dropped in the subsequent drafts and in the Rome Statute.\textsuperscript{90}

Africa does not have a specified convention on drug.\textsuperscript{91} However, there have been various policies on trafficking in drugs such as the Declaration and Plan of Action on Drug Abuse and Illicit Drug Trafficking in Africa as well as the Declaration on Control of Illicit Drug Trafficking and Abuse in Africa.

Critically examining Article 28K of the Malabo Protocol, there is no gravity threshold as to the level of drug-related offences falling in the jurisdiction of the preconceived ACJHR” as opposed to that of courts at the domestic level.\textsuperscript{92} Secondly, the empirical evidence show that, the crime of trafficking in drugs neither shock the conscience of mankind nor threaten international peace and security and as such, the jurisdiction of the crime of trafficking in drugs should be exercised at the domestic level, thus ensuring that only the most serious crimes with an impact at the regional level will fall within the jurisdiction of the yet to be established ACJHR.

3.1.7 Money Laundering

Money laundering is variously defined. Basically, it is the process of “disguising the proceeds of a crime in order to make them look lawful.\textsuperscript{93} Money laundering is not targeted at a victim or a State, yet, it can have a devastating effect on economies, undermine democratic institutions, subvert the rule of law and destroy livelihoods of people of a State or a region.
Laundering is typically a transnational crime, with criminals able to move their ‘dirty’ money across various jurisdictions at the click of a computer mouse.\(^4\)

The crime of money laundering is regulated at the international level by various conventions such as: the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; the 2001 United Nations Convention against Transnational Organized Crime; and the 2005 United Nations Convention against Corruption. The soft law is embodied in the 40 + 9 Recommendations of Financial Action Task Force (FATF), an inter-governmental body which was set up by the Group of Seven (G7) countries in 1989 to develop and promote national and international policies directed against money laundering.\(^5\) While the three international conventions are legally binding on State Parties, the FATF Recommendations are not legally binding, although many States in the world have implemented them to indicate their political will to combat money laundering.\(^6\)

In Africa, the FATF is reinforced in its work by three so-called FATF-style bodies, namely: the Inter-Governmental Action Group against Money Laundering in West Africa; the Eastern and Southern Africa Anti-Money Laundering Group; and the Middle East and North Africa Financial Action Task Force against Money Laundering and Terrorist Financing.

The FATF-style bodies are meant to ensure that their respective State Parties abide by the FATF’s standards against money laundering and the terrorist financing, and they do this through a system of peer reviews of each Member State on an on-going basis.\(^7\)

The international criminalization of money laundering in the Malabo Protocol appears to have taken place without due regard to both substantive law and practical challenges that the ACJHR will have to surmount to fulfill its mandate. The foremost obstacle that the ACJHR will have to
overcome is how to assert its jurisdiction across a heterogeneous anti-money laundering legal landscape. Although, many African States have in contemporary times made considerable progress in bringing their respective anti-money laundering laws in tandem with the FATF standards, their efforts are seriously undermined by the lack of adequate regulating systems.98 Two major studies published in 2015, one by the Global Center on Cooperative Security and the other, the Joint African Union Commission/United Nations Economic Commission for Africa Conference of Africa Ministers of Finance, Planning and Economic Development”, point to several weaknesses which continue to undermine efforts to combat money laundering.99 These include *inter alia* corruption; lack of awareness of money laundering and terrorism financing threats; insufficient allocation of resources to address country-specific problems; lack of information sharing among institutions.

Hence, the crime of money laundering cannot constitute a jus cogens international crime at this point in time bearing in mind the historical legal evolution of the crime of money laundering.

### 3.1.8 Illicit Exploitation of Natural Resources

Clearly, the illegal exploitation of natural resources is a problem with long historical antecedents and multiple negative impacts in Africa. The nexus between illicit exploitation of natural resources (mainly minerals such as diamond, gold, bauxite, oil, etc.) and African conflicts is well documented. For instance, a number of multinational and national corporations compete over these resources, some of which will do anything to acquire concessions over these resources, even if it means fueling wars in Africa.100 Illicit exploitation of natural resources was a defining characteristic of the conflicts in the DRC, CAR, Angola, Liberia as well as Sierra Leone.101
African States have developed comparable criminal offences through regional agreements to deal with the illicit exploitation of natural resources, particularly within the model of the “International Conference on the Great Lakes Region (ICGLR). Again, a Specialized Protocol against the Illegal Exploitation of Natural Resources was adopted in 2006 as part of the Pact on Security, Stability and Development which forms the blueprint for cooperation between the ICGLR Member States. The African Convention on the Conservation of Nature and Natural Resources was also adopted in 2003 which was later revised and the revised version adopted in 2017.

At the global level, sanctions regimes imposed by the UNSC seek to sever the link between illegal trade in natural resources on one hand and conflict financing on the other hand. The UNSC has imposed sanctions in a number of instances, including diamond sanctions against Liberia, Angola and Sierra Leone, as well as financial and travel bans against persons and entities involved in illicit trade of natural resources in CAR and DRC.

The crime of illicit exploitation of natural resources as contained in the Malabo Protocol is highly innovative. It renders new opportunities to address grave injustices associated with the exploitation of natural resources. However, the crime of illicit exploitation of natural resources cannot constitute a *jus cogens* norm at this point in time bearing in mind: the historical legal evolution of the crime of illicit exploitation of natural resources; the number of States that have proscribed the crime in their national laws; and the number of international and national prosecutions for the crime of illicit exploitation of natural resources and how they have been characterized.
3.1.9 Corruption

Corruption is very difficult to prosecute, for it involves public officials who wield great power and influence and who are capable of thwarting an investigation. Most often, corruption takes place in secret and there are usually no witnesses. Investigations can last for several years and are heavily dependent on undercover investigations, “whistle-blowers or informers who unless they are assured that they will be protected from any sort of harm, are mostly reluctant to cooperate.

As corruption is not a crime subject to universal jurisdiction, the ACJHR’s ability to exert jurisdiction over the crime of corruption will ultimately depend on whether a State has domesticated either the African Union Convention on Preventing and Combating Corruption (AUCPCC) or the United Nations Convention against Corruption. For only then will it be able to exercise representative or derivative jurisdiction.

However, the opinio juris teaches that African States domesticated OAU/AU foundational instruments and institutions selectively. For example, at the time of writing this dissertation, 38 out of 55 African States have ratified the AUCPCC, that is, twelve years into its entry into force, but only ten African States have incorporated its most basic provisions into their national laws.

While there is no doubt that corruption has a debilitating impact on the economies and people of the African continent, it is certainly ambitious to elevate the vice to the level of jus cogens international crime” as corruption neither shock the conscience of human nor threatens international peace and security.
3.2 Conclusion

That international tribunals have the jurisdiction to try Heads of States and other senior officials of States for international crimes is today not in doubt as illustrated in the trials before the ICTR and the ICTY. The Charters of the Tokyo and Nuremberg Tribunals, the two ad hoc Tribunals for the former Yugoslavia and Rwanda, the SCSL as well as the permanent ICC all contain provisions which make it very clear that the official position of any accused individual, even as a sitting Head of State shall not relieve such individual of criminal responsibility nor mitigate punishment.

Also, apart from the regular international crimes of genocide, crimes against humanity, crime of aggression, war crimes, and other serious violations of IHL, which are the usual crimes that international mechanisms such as the ad hoc tribunals and the ICC have jurisdiction over, the Malabo Protocol provides eight other new crimes that have never been part of an international criminal justice mechanism- the crime of UCG, Money Laundering, Corruption, Trafficking in Persons, Trafficking in Drugs, Trafficking in Hazardous Wastes, Mercenarism, and Illicit Exploitation of Natural Resources.

It is likely that the AU decided to pad the ACJHR with these crimes in other not to appear to be supplanting the ICC.
ENDNOTES

8. Ibid.
10. See, UNSC Resolution 808 (1993)
11. See, Articles 2,3,4 and 5 of the Statute of the ICTY
12. See, Article 7(2) of the Statute of the ICTY
14. See, Preamble to the Rome Statute, Articles 1 and 17.
15. See, Articles 5(1), 6, 7 and 8 of the Rome Statute
18. UN.Doc.S/RES/1315
19. See, Article 1(1) of the Statute of the Special Court for Sierra Leone
20. See, Article 6(2) of the Statute of the SCSL
22. See, Article 29 of the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea
27. See, Article 2 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
41 Ibid.
44 Ibid.
45 Ibid.
51 See, Article 39 of the UN Charter.
52 See, Preamble of African Charter on Democracy, Elections and Governance
54 See, Assembly/AU/Dec.147(VIII)
56 See, OAU Doc.AHG/Dec.141(XXXV)
57 See, OAU Doc.AHG/Dec.5(XXXVI)
58 See, OAU Doc.AHG/Dec.1(XXXVII)
59 See, AU Doc.AHG/Dec.235(XXXVIII)
61 See, the African Charters on Democracy, Elections and Governance
62 See, UN Doc.A/RES/49/166
64 Ibid.
65 See, The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children
66 See, Preamble of The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children
68 Ibid.
69 Ibid.
70 See, Horn of Africa Initiative on Human Trafficking and Smuggling of Migrants
72 Ibid.
73 See, UNDOC Global Report on Trafficking in Persons (2014)


See, Article 2 of the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.

Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.


Jeßberger, Florian. "Piracy (Article 28f), Terrorism (Article 28g) and Mercenarism (Article 28h)." Ibid, pp. 71-88.

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See, LNTS 300 (1936)


Ibid.


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Fernandez, Lovell D. "Corruption (Article 28i) and Money Laundering (Article 28i bis)." Ibid, pp. 89-107.

Ibid.

Ibid.

Ibid.

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Ibid.

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Dam, Daniëlla and James G Stewart. "Illicit Exploitation of Natural Resources-Art. 28l Bis of the Malabo Protocol." 2017.

Ibid.


CHAPTER FOUR

SUMMARY OF FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

4.0 Introduction

The study assessed the effect of the Malabo Protocol on justice and accountability in Africa. The Neo-institutionalism theory was used as the theoretical lens through which the study was undertaken. The theoretical framework enabled the study to make a critical analysis of how the AU has become a central maker in the process of preference formation.

The works of scholars like Appiagyei-Atua, Sirleaf, Abass, Mangu, Nmehielle and du Plessis were reviewed. The qualitative method of research was employed. In addition to expert interviews, several sources of secondary data were also used.

The overall objective of the study was to critically assess the Malabo Protocol on impunity in Africa. This was done within the purview of the undermentioned objectives:

- To assess the motivation(s) that led to the drafting of the Malabo Protocol.
- To assess the justification for the immunity clause (Article 46A bis) contained in the Malabo Protocol.
- To assess the relevance of the unaccustomed ‘international’ crimes provided in the Malabo Protocol.
- To assess the implication of the Malabo Protocol on justice and accountability.
This Chapter presents a summary of findings and draws conclusions. The Chapter also proffers some recommendations in the proceeding paragraphs.

4.1 Summary of Findings

The study showed that while those involved in the drafting of the “Malabo Protocol claim that the Protocol is motivated by reasons other than anti-ICC sentiment, this explanation rings hollow when considering the recent tension between the AU governing body and some African States on one hand, and the ICC and the UNSC on the other hand. The Malabo Protocol may well be a protest reaction to the ICC’s prosecution of AU leaders. The study also revealed that, the criticism levelled against the ICC by individual African leaders or collectively within the AU is unfounded from an international law perspective.

In an attempt to identify the justification for the immunity clause (Article 46A *bis*) contained in the Malabo Protocol, the study revealed that, the principal source of international law regarding immunity of Heads of State or Government and senior State officials from prosecution for international crimes in domestic and international courts is international custom. Notwithstanding, the rejection of the defence of immunity has also been characterized as having attained customary international law status as exemplified in the practices of the Nuremberg and Tokyo Tribunals, the ICTR and ICTY, the SCSL as well as the permanent ICC.

Contemporary international law therefore limits the enjoyment of such immunities. An unconditional defence of immunity of Heads of State or Government and senior State officials can hardly be justified nowadays particularly, in this modern era of human rights agenda and protection of humanity from heinous crimes. The immunity clause enshrined in Article 46A *bis* may as well emanate from the political targeting of African leaders in a political context.
The study established that *jus cogens* rules are meant to protect the interest of the international community of States as a whole. *Jus cogens* rules create obligation *erga omnes* to all States not breach such rules. It is accepted in international law that the prohibition and punishment of international crimes (the most serious crime of international concern) is an obligation *erga omnes* emanating from jus cogens nature of crimes.

The study further showed that, considerations that must be taken into account in ascertaining whether a given international crime has attained the status of *jus cogens* include;

- The historical legal evolution of the crime i.e. the more legal instruments that exist to show the condemnation and prohibition of a particular crime, the better founded the position that the crime has risen to the status of jus cogens.
- The number of States that have incorporated the given proscription in their national laws
- The number of international and national prosecutions for the given crime and how they have been characterized.

Among the crimes of UCG; Mercenarism; Corruption; Money Laundering; Trafficking in Persons; Trafficking in Drugs; Trafficking in Hazardous Wastes; and Illicit Exploitation of Natural Resources which the preconceived ACJHR will have jurisdiction over, the study identified the crime of UCG” as the only crime that satisfies the ‘most serious’ crime of international concern threshold and therefore, may constitute a *jus cogens* international crime.

**4.2 Conclusions**

By implication, the Malabo Protocol poses some major problems and cannot constitute a better instrument to judge and prosecute the authors of the most serious crimes of international concern.
First, the immunity clause “(Article 46A bis) will have serious implications for the fight against impunity for international crimes in Africa. The AU does not want the ICC to exercise jurisdiction over African leaders and so attempts to set up a court to exclude this category of persons from its jurisdiction. Who then is the ICL section of the ACJHR being set up for? Opposition leaders or ordinary citizens? But the whole point of international criminal justice is to hold those with the greatest responsibility of power accountable for certain actions. The immunity provision (Article 46A bis) effectively undermines the essence of the ACJHR.

Second, the crimes of Mercenarism; Corruption; Money Laundering; Trafficking in Persons; Trafficking in Drugs; Trafficking in Hazardous Wastes; and Illicit Exploitation of Natural Resources contained under Article 28A of the Malabo Protocol may well be a means to puff up the importance of the ACJHR” and deflect criticisms from potential funders of the Court when the real reason for setting up the Court is to exclude sitting AU Heads of State and Government from prosecution. Therefore, the hypothesis that, “The Malabo Protocol is an effort by the AU to fight impunity in Africa” is not supported by research data.

4.3 Recommendations

The study proposes the following recommendations:

- It is imperative that the ACJHR is equipped well enough for the task of prosecuting international crimes if the AU does not wish the ICC to do it for us. Situations could arise where the ACJHR could lack jurisdiction such as cases involving sitting Heads of State and Government. Hence, where the ACJHR does not prosecute, the ICC could still come into the picture as a default alternative. Future amendment of the Protocol establishing
the ACJHR should therefore get rid of the immunity provision (Article 46A bis) enshrined in the Malabo Protocol.

- Future amendment of the Malabo Protocol as presently constituted should prune down the fourteen crimes within the jurisdiction of the ACJHR to four i.e. War Crimes; Crimes against Humanity; Genocide; and crime of UGC to be specific.

- Critically evaluating the Malabo Protocol, it does not seem to me that the ACJHR will want to have any cooperation with the ICC because nowhere in the Protocol does it say so. Future amendment of the Protocol should establish a relationship between the ACJHR and the permanent ICC.

- Individual AU Member-States should critically assess the financial and reporting obligations and comprehend these obligations before ratifying the Malabo Protocol.

- The ICL section of the ACJHR once established should from the outset trigger investigations into alleged committed international crimes and prosecute accordingly without hesitation at national levels more than what the ICC did in its primal years.

- Future amendment of the Malabo Protocol should empower the PSC to refer cases involving an AU Member State which has not made a declaration accepting the competence of the ACJHR.
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APPENDIX

An Assessment of the Malabo Protocol on Impunity in Africa

A Semi-Structured Interview Guide

Research questions

1. What are the possible motivations that may have led to the drafting of the Malabo Protocol?
2. What is the justification for the immunity clause (Article 46A bis) contained in the Malabo Protocol?
3. What is the relevance of the unaccustomed ‘international crimes’ contained in the Malabo Protocol?
4. To what extent does the ACJHR as conceived represents an alternative that can avoid many of the critiques levelled against the ICC?
5. What are the implications of the Malabo Protocol as presently constituted on justice and accountability in Africa?
6. To what extent do you support or oppose the Malabo Protocol?
7. What are your recommendations/suggestions with respect to the Malabo Protocol?