

## An Evaluation of the Impediments to the Establishment of the African Criminal Court & the Prospects for Justice and Peace in Africa



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**ABSTRACT:** When the Malabo Protocol was adopted in 2014, which, if ratified by at least 15 out of the 55 African Union (AU) Member States would lead to the creation of an African Criminal Court (ACC), it was received with great enthusiasm for a number of reasons. Notable among these were that the creation of the ACC would provide an avenue to address African challenges and crimes committed in the continent in an Africa way- echoing the notion of African solution to African problems. Yet, since it was adopted in June 2014 not even a single AU Member State has ratified the Malabo Protocol. Against this backdrop, the key question which this study seeks to answer is: What are the possible obstacles to the ratification of the Malabo Protocol and the inauguration of the ACC? The study reveals that there are seven primary possible obstacles to the ratification of the Malabo Protocol and inauguration of the ACC. These include: the contentious jurisdiction of the court, immunity for African Heads of State and senior government officials; the limited financial base which negatively affects the potential operationalization of the court; the contradictions and ambiguities regarding how the African Criminal Court will be operationalized

**KEYWORDS:** African Union, Malabo Protocol, African Criminal Court, International Criminal Court, Complementarity Principle.

### 1. INTRODUCTION

The cessation of the Organization of African Unity (OAU) in 2002, gave way to the establishment of the African Union (AU) with the mandate to ensure peace and security on the continent of Africa. The AU was formed to tackle the numerous security challenges confronting the continent and to minimize the continent's reliance on the international community for security support<sup>1</sup>. Consequently, the AU's peacebuilding mandate was anchored on the union's Peace and Security Council Protocol<sup>2</sup>. The Protocol lays out the architecture for peace and security in Africa in three distinct categories: (i) conflict prevention; (ii) peace-building and, (iii) post-conflict reconstruction and development. In addition, the union promotes democratic principles, good governance and respect for human rights<sup>3</sup>. As part of the mechanisms to maintain peace and security, the AU adopted a compliance mechanism through the establishment of the African Court of Justice and Human Rights (ACJHR) in 2004<sup>4</sup>. However, the ACJHR lacks the capability to deal with issues bordering on criminality and thus could not help the AU's mandate of maintaining peace and security to materialize. On 27 June 2014, through the Malabo Protocol<sup>5</sup> the AU agreed to establish a criminal section of the African Court of Human and Peoples' Rights. The Malabo Protocol provided that the African Court of Justice and Human and Peoples' Rights be divided into three sections: (i) International human rights section; (ii) The general matters section, and (iii) The International Criminal Law section<sup>6</sup>.

<sup>1</sup>Mystris, D. (2019). Why a regional criminal court for Africa is a good idea. Available at: <https://theconversation.com/why-a-regional-criminal-court-for-africa-is-a-good-idea-123650> (20 February 2020).

<sup>2</sup>Protocol Relating to the Establishment of the Peace and Security Council of the African Union. Available at: <https://au.int/en/treaties/protocol-relating-establishment-peace-and-security-council-african-union> (Accessed 10 December 2019).

<sup>3</sup>Mangu, A. M. (2014). The African Union and the promotion of democracy and good political governance under the African Peer-Review Mechanism: 10 years on. *Africa Review* 6(1), pp. 59-72

<sup>4</sup>Jalloh, C. C.; Clarke, K. M. and Nmehielle, V. O. (2019). *The African Court of Justice and Human and Peoples' Rights in Context Development and Challenges*, Cambridge: Cambridge University Press

<sup>5</sup>See the Malabo Protocol at: [https://au.int/sites/default/files/treaties/36398-treaty-0045\\_-\\_protocol\\_on\\_amendments\\_to\\_the\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e-compressed.pdf](https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf) (Accessed 10 December 2019).

<sup>6</sup>Malabo Protocol Annex, Art. 7.

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The move by the AU to create a regional criminal court was met with a great deal of criticism and scepticism by the ICC, some Western leaders and legal analysts. The argument posed by sceptics is that establishing the court will give the AU jurisdiction over international crimes<sup>7</sup>, without any guarantee of fairness in the prosecution process. However, proponents of the African Criminal Court (ACC) argue that establishing a functional criminal court with a wider jurisdiction, including corporate criminal liability<sup>8</sup> will help to address corruption on the continent<sup>9</sup>. Apart from that, the court would address some of the underlying causes of the numerous conflicts in Africa, which are not considered by the international criminal justice system, specifically the ICC. Additionally, establishing a regional criminal court will give Africa greater ownership of the justice process<sup>10</sup>. Notably, the court will not replace the ICC; rather, it will be a complementary regional mechanism to ensure that justice is upheld on the continent of Africa. Basically, the criminal law section will strengthen the AU's peace and security mandate, and promote justice and human rights<sup>11</sup>.

Apart from prosecuting matters (crimes) within the jurisdiction of the Rome Statute at the ICC which include: crimes of genocide, war crimes, crimes against humanity and the crime of aggression, the African criminal court will also prosecute treaty-based crimes including the crime of unconstitutional toppling of government, piracy, mercenaryism, terrorism, corruption, money laundering, human trafficking, drug trafficking, trafficking in hazardous waste, and the illicit exploitation of natural resources<sup>12</sup>. The afore-stated crimes speak to the continent's concerns, particularly the treaty-based crimes are recognized as pivotal to conflict escalation<sup>13</sup>. The criminal court therefore will hold perpetrators of such crimes accountable, and by so doing deter conflict on the continent and contribute towards the African Peace and Security Architecture's long-term goal of promoting stability and socio-economic development within the continent<sup>14</sup>. Besides, it is anticipated that the African criminal court can be a mechanism to ensure that corporate actors - organizations whose activities provide incentives for conflict across Africa are effectively prosecuted<sup>15</sup>. Thus, the criminal court will serve as a mechanism of justice and a deterrent to crimes in Africa<sup>16</sup>.

At the inception of the ICC, African countries pledged their full support to the Court and many considered it as a possible solution to the numerous intractable conflicts on the continent<sup>17</sup>. Accordingly, Africa became the largest single bloc to ratify the Rome Statute<sup>18</sup>, perhaps on the speculation that the ICC could be an arbiter to crimes in Africa. However, this initial enthusiasm and support for the court seemed to decline, as some African elites, and the African Union (AU) as a regional bloc started to express discontent for the ICC<sup>19</sup>. The bone of contention is the allegation that the ICC thus far has focused mainly on persecuting and

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<sup>7</sup>International Crime is a crime against international law. It occurs when three conditions are satisfied: (i) if there is a violation of a criminal norm derived out of an international treaty and other international customary law which is binding on individuals. (ii) the crime shows the characteristic of a crime that is punishable under the International law; and (iii) the treaty establishes a liability for the act done, and this must be binding on majority of countries. Specifically, international crimes include: war crimes; crime against humanity; crime against peace; and crimes coming under the international criminal law, such as drug trafficking, arm trafficking, money laundering among others.

<sup>8</sup>The Malabo Protocol in Article 46C provided for corporate criminal liability. Presently, no International criminal court has jurisdiction over corporate entities. For confirmation of the above, see the Rome Statute; ICTR Statute. Corporate criminal liability was debated during discussions for a permanent court in the 1950s, and also mooted during ICC negotiations in 1998. For more details, see Report of the Committee on International Criminal Jurisdiction, UN Doc. A/2136 (1952); Report of the 1953 Committee on International Criminal Jurisdiction, UN Doc. A/2645 (1953).

<sup>9</sup>Supra note 1

<sup>10</sup>Supra note 1.

<sup>11</sup>ibid

<sup>12</sup>Rodriguez, J. B. C. (2019). The proposed African criminal chamber: an effective tool to end impunity on African soil? *Revista Electrónica Cordobesa de Derecho Internacional Público (RECorDIP)* 1. Available at: file:///C:/Users/admin/Downloads/24992-Texto%20del%20art%C3%ADculo-73182-1-10-20190722.pdf (20 February 2020).

<sup>13</sup> ibid

<sup>14</sup> Supra note 1.

<sup>15</sup>Cooperate actors could be multinational and local organizations, particularly in the extractive industry (those exploring minerals and other forms of natural resources), whose activities triggers or sustains conflict.

<sup>16</sup> Supra note 1.

<sup>17</sup>See, Africa and the International Criminal Court, Strategic Comments 22(10), pp. vi-vii. Available at: <https://www.tandfonline.com/doi/full/10.1080/13567888.2016.1276368?scroll=top&needAccess=true> (10 February 2020).

<sup>18</sup>Of the 124 ICC member states, 34 are from Africa, 19 Asia-Pacific, 18 Eastern Europe, 27 Latin America and the Caribbean, and 25 from Western Europe and other states. See United Nations, 'Rome Statute of the International Criminal Court', United Nations Treaty Collection, XVIII (10), 17 July 1998. See also B.A. Simmons & A. Danner, 'Credible Commitments and the International Criminal Court', International Organization, Vol. 64, No. 2, 2010, pp. 225-256.

<sup>19</sup>Syenyonjo, M. (2013). 'The Rise of the African Union Opposition to the International Criminal Court's Investigations and Prosecutions of African Leaders', International Criminal Court Review, Vol. 13, No. 2, pp. 385-428.

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punishing Africans<sup>20</sup>. Consequently, the ICC is perceived by the AU as promoting factionalism and ethnic divisions<sup>21</sup> by administering systemic selective justice<sup>22</sup>, which invariably could complicate domestic reconciliation efforts on the continent<sup>23</sup>. Others alleged that the ICC has become a tool of political manipulation<sup>24</sup> in that it has turned a blind eye to the atrocities committed by powerful states such as the United States and China, while focusing on Africa<sup>25</sup>. Whilst some others have pushed the notion that the ICC is being used to perpetrate a neo-colonial agenda<sup>26</sup>, which undermines the original intention of the court as one of last resort rather than of first instance<sup>27</sup>. It is easy to understand why such claims have been made. To date, out of the 45 individuals who had been indicted by the ICC as of May 2019, 37 were from Africa<sup>28</sup>.

Due to concerns emanating from the above, African leaders started to re-evaluate the AU's relationship and loyalty with the ICC in respect of the Union's mission. When the African Union (AU), replaced the Organization of African Unity (OAU) in 2002, it was founded on a peace and security platform<sup>29</sup>. The AU was established with the mandate to tackle the continent's peace and security challenges<sup>30</sup>. In fulfilling this mandate, the AU has applied both judiciary and non-judiciary mechanisms. However, the issue of criminal liability has put the AU at odds with the international criminal justice system<sup>31</sup>. The AU holds the view that the international criminal proceedings are biased, and also, that the limited jurisdiction of the ICC undermines peace and reconciliation efforts on the African continent<sup>32</sup>. The AU's experience in conflict resolution and peacebuilding, accountability initiatives, and development seem to have cemented its view that justice is key to promoting reconciliation, peace, security and development, thus, favoring, the establishment of an International Criminal Law Section within the African Peace and Security architecture<sup>33</sup>.

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<sup>20</sup>Murithi, T. (2013). 'The African Union and the International Criminal Court: An Embattled Relationship?' The Institute for Justice and Reconciliation, Policy Brief No. 8, 2013. See also Mamdani, M. (2008). 'Darfur, ICC and the New Humanitarian Order', Pambazuka News, Nairobi.

<sup>21</sup>Adjami, M. and Mushiata, G. (2010) 'Democratic Republic of Congo: Impact of the Rome Statute and the International Criminal Court', ICJT Briefing, The Rome Statute Review Conference, Kampala, 2010. Available at: <[https:// ictj. org/ sites/ default/ files/ ICTJ -DRC -Impact -ICC -2010 -English. pdf](https://ictj.org/sites/default/files/ICTJ-DRC-Impact-ICC-2010-English.pdf)> (accessed 12 April 2020).

<sup>22</sup>BBC, 'ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence', BBC, 5 December 2014. Available at: [www. bbc. com/ news/ world -africa -30347019](http://www.bbc.com/news/world-africa-30347019) (accessed 12 April 2019). See also O.Imoedemhe, 'Unpacking the Tension Between the African Union and the International Criminal Court: The Way Forward', African Journal of International and Comparative Law, Vol. 23, No. 1, 2015, pp. 74-105, at 74.

<sup>23</sup>Clark, N.J. (2011). 'Peace, Justice and the International Criminal Court: Possibilities and Limitations', *Journal of International Criminal Justice*, Vol. 9, No. 3, pp. 521-545.

<sup>24</sup>Mwangi, K.S. (2013). 'Can the International Criminal Court Play Fair in Africa?' Africa in Focus, The Brookings Institute. Available at: <[www. brookings. edu/ blogs/ africa -in -focus/ posts/ 2013/ 10/ 17 -africa -international -criminal -court -kimanyi](http://www.brookings.edu/blogs/africa-in-focus/posts/2013/10/17-africa-international-criminal-court-kimanyi)> (Accessed 12 January 2020).

<sup>25</sup>Akande, D. (2003). 'The Jurisdiction of International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits', *Journal of International Criminal Justice*, Vol. 1, No. 3, pp. 618-650.

<sup>26</sup>African Union, (2013). 'Extraordinary session of the Assembly of the African Union 12 October, Addis Ababa', in Decisions and Declarations, Addis Ababa, African Union, 2013, p. 2. Available at: <[www. au. int/ en/ sites/ default/ files/ decisions/ 9655 -ext\\_ assembly\\_ au\\_ dec\\_ decl\\_ e\\_ 0. pdf](http://www.au.int/en/sites/default/files/decisions/9655-ext_assembly_au_dec_decl_e_0.pdf)> (Accessed 12 April 2019).

<sup>27</sup>Olugbuo, B. (2011). 'Positive Complementarity and the Fight against Impunity in Africa'. In C. Murungu and J. Biegon (Eds.), *Prosecuting International Crimes in Africa*, Pretoria, Pretoria University Law Press.

<sup>28</sup>According to Tjitske Lingsma (27 May 2019), Op cit, p.1, the 37 individuals who had been indicted by the ICC by May 2019 and the countries of their origins, include 5 from Uganda - Joseph Kony, Dominic Ongwen, Vincent Otti, Raska Lukwiya, and Okot Odhiambo; 6 from the Democratic Republic of Congo - Thomas Lubanga Dyilo, Germain Katanga, Mathieu Ngudjolo Chui, Bosco Ntaganda, Callixte Mbarushimana, and Sylvestre Mudacumura; 1 from the Central African Republic - Jean-Pierre Bemba Gombo; 3 from Ivory Coast - Laurent Gbagbo, Charles Blé Goudé, and Simone Gbagbo; 6 from Kenya - William Samoei Ruto, Joshua Arap Sang, Henry Kiprono Kosgey, Uhuru Muigai Kenyatta, Francis Kirimi Muthaura, and Mohammed Hussein Ali; 7 from Sudan - Omar Hassan Ahmad Al Bashir, Ahmad Muhammad Harun, Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), Abdel Raheem Muhammad Hussein, Bahr Idriss Abu Garda, Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamus; 5 from Libya - Mouammar Mohammed Abuminyar Kadhafi, Saif Al-Islam Kadhafi, Abdullah Al-Senussi, Al-Tuhamy Mohamed Khaled, and Mahmoud Mustafa Busayf Al-Werfalli; 2 from Mali - Ahmad Al Faqi Al Mahdi, and Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud; and 2 from the Central African Republic - Alfred Yekatom, and Patrice-Edouard Ngaïssona.

<sup>29</sup>Mystris, D. (2018). Why a regional criminal court for Africa is a good idea. Available at: <https://theconversation.com/why-a-regional-criminal-court-for-africa-is-a-good-idea-123650> (Accessed 20 February 2020).

<sup>30</sup>ibid. The role of AU is conflict prevention, peace-building, and post-conflict reconstruction and development. It also promotes democratic practices, good governance and respect for human rights.

<sup>31</sup>Ibid, supra note 1.

<sup>32</sup>ibid, supra note 1.

<sup>33</sup>Van der Merwe, B. (2014). *International Criminal Justice in Africa Challenges and Opportunities*, Nairobi: Lino Typesetters (K) LTD

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## 2. THE PRINCIPLE OF COMPLEMENTARITY

One of the contentious issues about the proposed African Criminal Court is where the court draws its power from since there is no international treaty providing for the establishment of a regional international criminal court. The AU leaders and other proponents of the court hold that the court is well situated within the principles of complementarity, which is a legal theory that came to the forefront with the adoption of the Rome Statute in 1998. It is a fundamental principle upon which the International Criminal Court (ICC) is premised<sup>34</sup>. The complementarity principle governs the relationship between the ICC and national legal frameworks. Article 17 of the Rome Statute allows the ICC to step in and exercise jurisdiction where states are unable or unwilling to investigate or prosecute a crime committed within its legal jurisdiction<sup>35</sup>. Basically, the complementarity principle holds the idea that states, rather than the ICC, will have a primary responsibility in the prosecution of cases within their jurisdiction<sup>36</sup>. This principle implies that the ICC will only complement, but not supersede, national jurisdiction. In this case, national courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, while the ICC will act when national courts are “unable” or “unwilling” to perform or prosecute certain crimes<sup>37</sup>, particularly crimes against humanity. The fundamental assumption of complementarity is the idea that the courts at the national level should primarily deal with cases of serious violations, whilst the ICC, according to the Rome Statute, is complementary to those national jurisdictions.

Similar to the Rome Statute, AU leaders argue that the principle of complementarity gives the union the authority to extend the jurisdiction of the African Court of Human and People’s Rights to cover international and transnational crimes, including those that currently falls under the jurisdiction of the ICC<sup>38</sup>. Therefore, the principle of complementarity is considered the corner stone for the establishment and operation of the ACC by the AU. This implies that the ACC recognizes the primary jurisdiction of States as efficient, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings<sup>39</sup>. The ACC role therefore will be to compliment the national judiciary, but not supersede national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions, but the ACC will wield the “big stick” when national courts are ‘unable or unwilling’ to perform their tasks<sup>40</sup>. Thus, it will serve as a watch dog to national judiciary malfeasance and as well, handle transnational crimes that are considered cumbersome for national judiciary to handle. However, how complementarity works and its impact on the functionality of the ICC and national judiciary is a question of critical debate.

The AU claims that the establishment of the ACC is premised on complementarity principle, it is however important to note that complementarity as defined in the Rome Statute made no reference to the prosecution of international crimes by a regional or continental court. This, therefore, seems to put the complementarity arguments advanced by the AU as the basis for establishing an international criminal court in a legal limbo. However, the Rome Statute in which the ICC is premised did not forbid the establishment of any other international criminal court on the basis of the principle of complementarity. Notably, the Rome Statute may not have anticipated the duplication of the principle of complementarity, but also did not condemn same. Therefore, the AU's decision to establish an international criminal court cannot be seen as acting beyond the limits of the law. The adoption of the Malabo Protocol, albeit with reservations, intends to address some of the underlying causes of conflicts and human rights violations on the continent by establishing an African Criminal Court that will address the continent’s challenges in an African way.

## 3. LITERATURE REVIEW

The Malabo Protocol, which provides an Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights is one of eight legal instruments adopted by African Union (AU) leaders on 27 June 2014, but undoubtedly one of its most

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<sup>34</sup>Bekou, O. (2013). Complementarity Principle. Oxford Biographies. Available at. <https://www.oxfordbiographies.com/view/document/obo-9780199796953/obo-9780199796953-0071.xml> (accessed 12/03/2019).

<sup>35</sup>ibid

<sup>36</sup>Roy S.L. (2002). Introduction, in the International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results 27

<sup>37</sup>ibid

<sup>38</sup> See, Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi, ICC-01/11-01/11-28. Pre-Trial Chamber I Decision, 22 November 2011. Available at. <https://www.icc-cpi.int/pages/record.aspx?uri=1274559> (Accessed 17 June 2020).

<sup>39</sup> Kleffner, J. (2003). The Impact of Complementarity on National Implementation of Substantive International Criminal Law. *Journal of International Criminal Justice* 1, pp. 86-113. See also, Holmes, J. T. (2001). “Jurisdiction and Admissibility”, in Lee (ed.), *International Criminal Court: Elements of Crimes & Rules of Procedure*, pp. 321-348; Nimigan, S. (2019). The Malabo Protocol, the ICC, and the Idea of ‘Regional Complementarity’, *Journal of International Criminal Justice*, 17(5), pp. 1005–1029.

<sup>40</sup> Lee, R. S. (2002). *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results*, (2nd eds.). Zuid-Holland: Kluwer Law International.

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significant<sup>41</sup>. The significance stems, partly, from the consideration and addition of a third section (a criminal court section) to the proposed African Court of Justice and Human Rights (ACJHR)<sup>42</sup>. The African criminal court will, once its statute enters into force upon achievement of the 15 required ratifications will investigate and prosecute both international, transnational and other crimes in a tribunal with three separate chambers and jurisdictions: (i) the General Affairs Section, (ii) the Human and Peoples' Rights Section and (iii) the International Criminal Law Section<sup>43</sup>. The formation of these three chambers into a single court with a common set of judges represents a novelty development in the international legal system and in wider regional institution building and law making<sup>44</sup>.

The proposed establishment of an African criminal court has raised diverse opinion in the literature. The literature on the relationship between the ICC and the ACC can be summed up in two perspectives: (i) the ICC's functionality<sup>45</sup>, and (ii) the ICC's capability to impact positively on peace processes<sup>46</sup>. Along these lines are scholars who argue in support or against the establishment of the ACC. Scholars in favor of the decision to establish the ACC<sup>47</sup> stress on the potential contributions it could make in remedying the challenges of a lack of viable mechanisms to comprehensively address human rights and criminal law issues in Africa. Also, it is argued that establishing the ACC will provide an African solution to African problems by addressing crimes committed in Africa via an African legal institution<sup>48</sup>. Another argument in support of the proposed African criminal court is the 'presumed innovative legal standard' it will set in international law, whereby a regional court will be able to prosecute serious international crimes in line with the complementary principles of the ICC<sup>49</sup>. On the other hand, those with opposing view<sup>50</sup> perceive the Malabo Protocol as a rebel or protest court created by the AU to undermine the ICC. The latter argument is usually anchored on sections of the Malabo Protocol perceived to contradict the ICC Statute such as the 'immunity protection' for heads of states<sup>51</sup>.

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<sup>41</sup> Jalloh, C. C.; Clarke, K. M. and Nmehielle, V. O. (2019). *The African Court of Justice and Human and Peoples' Rights in Context Development and Challenges*, Cambridge: Cambridge University Press.

<sup>42</sup> *ibid*

<sup>43</sup> See the African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014. Available at: [www.africancourtcoalition.org/images/docs/legal-texts/Protocol\\_on\\_amendments\\_to\\_the\\_Protocol\\_on\\_the\\_Statute\\_of\\_the\\_African\\_Court\\_of\\_Justice\\_and\\_Human\\_Rights%20.pdf](http://www.africancourtcoalition.org/images/docs/legal-texts/Protocol_on_amendments_to_the_Protocol_on_the_Statute_of_the_African_Court_of_Justice_and_Human_Rights%20.pdf) (Accessed 02 February 2020).

<sup>44</sup> Abraham, G. (2015). Africa's Evolving Continental Court Structures: At the Crossroads? South African Institute of International Affairs (SAIIA), *Occasional Paper* 209. Available online at: [www.saiia.org.za/cat\\_view/2-occasionalpapers?dir=DESC&limit=10&order=name&start=220](http://www.saiia.org.za/cat_view/2-occasionalpapers?dir=DESC&limit=10&order=name&start=220) (Accessed 02 February 2020), at 7. Also see, Clarke, K. M.; Jalloh, C. C. and Nmehielle, V. O. (2019). *The African Court of Justice and Human and Peoples' Rights in Context. Development and Challenges*. New York: Cambridge University Press.

<sup>45</sup> Nissel, A. (2004). Continuing Crimes in the Rome Statute. *Michigan Journal of International Law* 25, pp. 653-689.

<sup>46</sup> Grovogui, S. (2015). Intrinsic Entanglement: The International Criminal Court and the Pursuit of Peace, Reconciliation and Justice in Libya, Guinea, and Mali". *Africa Development* 2, pp. 99- 122. See also, Clarke, K. M. (2015). Refiguring the Perpetrator: Culpability, History and International Criminal Law's Impunity Gap". *The International Journal of Human Rights*, Vol. 19, pp. 592-614.

<sup>47</sup> See Tiba, F. K. (2016). Regional International Criminal Courts: An Idea Whose Time Has Come? *Cardozo Journal of Conflict Resolution* 17, pp. 521- 549; Sirleaf, M. (2016). The African Justice Cascade and the Malabo Protocol, *International Journal of Transitional Justice*, Vol. 11, No.1, pp. 1-35; Nimigan, S. (2019). The Malabo Protocol, the ICC, and the Idea of 'Regional Complementarity, *Journal of International Criminal Justice*, Vol. 17, No. 5, pp. 1005-1029. Van der Wilt, H. (2016). Expanding Criminal Responsibility in Transnational and International Organised Crime, *Groningen Journal of International Law*, Vol. 4, No. 1, pp. 1-9.

<sup>48</sup> Grovogui, S. (2015). Intrinsic Entanglement: The International Criminal Court and the Pursuit of Peace, Reconciliation and Justice in Libya, Guinea, and Mali". *Africa Development*, Vol. 2, pp. 99- 122.

<sup>49</sup> *Supra* note 71

<sup>50</sup> See Deya, D. (2012). Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes, Open Society Initiative for Southern Africa (OSISA). Available at: [www.osisa.org/openspace/regional/african-court-worth-wait](http://www.osisa.org/openspace/regional/african-court-worth-wait) (Accessed 14 February 2020); Abass, A. (2013). Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges, *European Journal of International Law*, Vol. 24, No. 3, pp. 933-946, at pp. 933; Abass, A. (2013). The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects, *Netherlands International Law Review*, Vol. 60, No.27, pp. 33-46; Du Plessis, M. (2012). Implications of the AU decision to give the African Court jurisdiction over international crimes, Institute for Security Studies (ISS), ISS Paper 235. Available at: [www.issafrica.org/publications/papers/implications-of-the-au-decision-to-give-the-african-court-jurisdiction-over-international-crimes](http://www.issafrica.org/publications/papers/implications-of-the-au-decision-to-give-the-african-court-jurisdiction-over-international-crimes) (Accessed 14 February 2020); Rau, K. (2012). Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights, *Minnesota Law Review* 97, pp. 669-708; Nmehielle, V. O. (2014). "Saddling" the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient? *African Journal of Legal Studies* 7, pp. 7-42, at p. 7. Tladi, D. (2015). The Immunity Provision in the AU Amendment Protocol, *Journal of International Criminal Justice* 13, pp. 3-17, at 5.

<sup>51</sup> *Supra* note 68.

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Matiangai Sirleaf in *The African Justice Cascade and the Malabo Protocol*<sup>52</sup>, argues that the establishment of the ACC is premised solely on the need to address the legacy of abuse within the continent of Africa. She contends that against the notion held by some analysts that the purpose of establishing the ACC is to circumvent the ICC, the ACC is a transitional justice mechanism that encompasses regional and transnational efforts to respond to mass human rights violations. Also, that the Protocol establishing the ACC seeks to correct perceived bias in international criminal justice.

Kamari Clarke in *Ethics of Scale: Relocating Politics after Liberation. Rethinking Africa thought its Exclusions: The Politics of Naming Criminal Responsibility*<sup>53</sup>, argues that the African criminal court will enhance a criminal liability mechanism that will incorporate both retributive and restorative approach, a system that reflects more of the African tradition, unlike the ICC approach which does not consider forgiveness or transition but focuses solely on arrest and punishment<sup>54</sup>. He added that the ICC draws on Western legal thought and its construction of concepts of justice and freedom, which does not take into consideration the root causes of violence<sup>55</sup>. According to Clarke, the ICC emphasizes on judicial process that assumes that law is the sole way to achieve justice, while the ACC will address crimes from the perspective of both justice and peacebuilding<sup>56</sup>. Clarke argues that the proposed ACC will provide what he termed *African Ecologies of Justice* - a comprehensive transitional justice process that will address both the immediate and root causes of present and past conflicts and by so doing, secure a sustainable justice and peacebuilding framework for the continent going forward. Others scholars<sup>57</sup> in support of the establishment of the ACC queries the ICC's ability to deter crimes, given that it lacks the legal mandate and enforcement capabilities to capture and arrest wanted individuals.

Catherine Gegout in *The International Criminal Court: limits, potential and conditions for the promotion of justice and peace*<sup>58</sup> argues that the ICC created a vacuum in the prosecution of international crimes as it lacks legitimacy, and its operation can be vulnerable to power politics. She argues that the ICC appears to be selective in its prosecution, which goes against the principle of universal justice. Furthermore, she contends that the ICC is unreliable to address crimes under its jurisdiction, because its institutional autonomy is conditioned by the goodwill of states parties and non-party states to the ICC Statute, making its operation inefficient and its actions potentially counterproductive in peace negotiations, which the African continent pertinently need.

Contrarily to the above studies that supports the establishment of the ACC, Charles Chernor Jalloh in the article titled: *The Nature of the Crimes in the African Criminal Court*<sup>59</sup> argues that the protocol establishing the ACC is controversial, because it is among other things an outcome of Africa's backlash against the International Criminal Court and for its temporary immunity provision shielding sitting government officials from prosecutions. He added that the merits of the AU instrument establishing the ACC must be assessed on criteria other than whether it retains the conventional distinction between transnational and international crimes.

In response to the argument that the ICCs cannot deter crimes, Benjamin J. Appel in a study titled, *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?*<sup>60</sup> Highlights that the ICC can deter ratifiers from committing violations because it imposes costs on them which include imprisonment. Thus, the threat of ICC's involvement lowers the expected payoffs for engaging in repression, making ratifiers to play along with humanity principles. Furthermore, that the ICC inflicts various costs on governments once they start an investigation represents an important advance on existing arguments, given that the primary criticism of the ICC is that it is not a credible deterrent to crime due to its limited ability to arrest wanted suspects<sup>61</sup>. Thus, Appel's submission is that the ICC is efficient in curbing crimes and the establishment of the ACC will only serve one purpose, which is to weaken and undermine its credibility and efficiency.

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<sup>52</sup> Sirleaf, M. (2016). The African Justice Cascade and the Malabo Protocol, *International Journal of Transitional Justice* 11(1), pp. 1-35

<sup>53</sup> Clarke, K. M. (2010). Ethics of Scale: Relocating Politics after Liberation. Rethinking Africa thought its Exclusions: The Politics of Naming Criminal Responsibility. *Anthropological Quarterly* 83, pp. 625-652.

<sup>54</sup> *ibid*

<sup>55</sup> Clifford, C. (2019). *Justice Beyond the International Criminal Court: Towards a Regional Framework in Africa*, Master's Thesis, University of the Witwatersrand, Johannesburg. The argument is that ICCs sole focus on retributive judgement, and not addressing the underlying causes of violence, does not offer a wholesome remedy to the violence and institutionalization of peace in the continent

<sup>56</sup> *ibid*

<sup>57</sup> Ku, J., and Nzelibe, J. (2006). Do International Criminal Tribunals Deter or Exacerbate Atrocities? *Washington University Law Review* 84, pp. 777-833. See also, Drumbl, M. (2007). *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press

<sup>58</sup> Gegout, C. (2013). The International Criminal Court: limits, potential and conditions for the promotion of justice and peace, *Third World Quarterly* 34(5), pp. 800-818.

<sup>59</sup> Jalloh, C. C. (2017). The Nature of the Crimes in the African Criminal Court, *Journal of International Criminal Justice*, 15(4): 799-826.

<sup>60</sup> Appel, B. J. (2018). In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations? *Journal of Conflict Resolution* 62(1), pp. 3-28

<sup>61</sup> *ibid*

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In the study titled *African efforts to close the impunity gap: Lessons for complementarity from national and regional actions*<sup>62</sup>, Du Plessis et.al. Argues that the establishment of the ACC is ‘negative complementarity’, an attempt to create a regional exceptionalism in the face of the ICC’s currently directed investigations’ on the African continent. The authors contend that the notion of an African criminal court is premised on shielding African leaders from criminal prosecutions devoid of interference. Thus, instead of serving justice, the ACC will be an instrument of impunity for African Leaders. In another study titled *The African Court of Justice and Human and Peoples’ Rights in Context Development and Challenges*<sup>63</sup>, Charles C. Jalloh et.al., argues that the ACC cannot be more efficient than the ICC by replicating the conditions that led the ICC into difficulties. It argues that the ACC will be an international court on a domestic model, which lacks a clear enforcement mechanism; it has jurisdiction over crimes, but has no formalized mechanisms for accountability to the people to whom it is supposed to bring justice. In essence, the ACC’s procedural arrangements do not guarantee transparency, which raises concerns over issues of credibility in dealing with criminal procedures.

### **4. POSSIBLE REASONS WHY THE RATIFICATION OF THE MALABO PROTOCOL AND THE INAUGURATION OF THE AFRICAN CRIMINAL COURT HAVE NOT MATERIALIZED.**

In view of the preamble and overview, the possible reasons why the ratification of the Malabo Protocol and the inauguration of the African Criminal Court have to date not materialized are discussed below.

#### **4.1 Shortcomings Associated with the Proposed Immunity for Africa’s Heads of State/Government and other Senior Government Officials**

Article 46A of the Malabo Protocol states that “No charges shall be commenced or continued before the court against any serving AU Head of State or Government, or anybody acting or entitled to act in such a capacity, or other senior State officials based on their functions, during their tenure in office.”<sup>64</sup> By implication, under the Malabo Protocol, Heads of State/ Government and other senior government officials cannot be indicted for commission of any crimes as long as they are still in power. This immunity clause has two major shortcomings, which ostensibly have tended to impede or delay the ratification of the Malabo Protocol.

First of all, albeit that the Malabo Protocol guarantees immunity to sitting Heads of State/Government and other senior officials, such immunity is only applicable when they are still in power. By implication, after leaving power/office, Heads of State/Government and other senior officials would be liable for indictment for any crimes they had committed while still in office. Therefore, such Heads of State/Government and other senior officials ostensibly think that signing and eventually ratifying the Malabo Protocol would be likened to signing their own arrest and prosecution warrants, which would eventually be used against them once they have left power. It is therefore not surprising that many of Africa’s Member States in which human rights violations are taking or previously took place, like Somalia, Burundi, Rwanda, the Democratic Republic of Congo (DRC), the Central Africa Republic (CAR), South Sudan, Sudan, Zimbabwe, Nigeria, Mali, Libya, Tunisia, and Egypt, among others, have not yet signed and ratified the Malabo Protocol.<sup>65</sup> Besides, even though the proposed immunity is only limited to when the Heads of State/Government and other senior officials’ immunity are still in power/office, the whole idea of immunity has not been well-received by human rights defenders/organizations. A case in point is Amnesty International which observes that, considering that many, if not most, human rights violations in Africa are perpetuated by individuals or State institutions administered by Heads of State and senior government officials, the creation of such a Court where Presidents and senior government officials are insulated from prosecution, would be tantamount to the violation of human rights with impunity<sup>66</sup>.

#### **4.2 Contention Over the Jurisdiction of the Proposed African Criminal Court**

The Malabo Protocol provides that when established, the African Criminal Court would cover 14 categories of grave crimes. These include; “genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenaryism,

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<sup>62</sup> Du Plessis, M.; Louw, A. and Maunganidze, O. A. (2012) ‘African efforts to close the impunity gap: Lessons for complementarity from national and regional actions. Available at. <https://www.africaportal.org/publications/african-efforts-to-close-the-impunity-gap-lessons-for-complementarity-from-national-and-regional-actions/> (Accessed 12, May 2020).

<sup>63</sup> Jalloh, C. C.; Clarke, K. M. and Nmehielle, V. O. (2019). *The African Court of Justice and Human and Peoples’ Rights in Context Development and Challenges*, Cambridge: Cambridge University Press, pp. 198-220.

<sup>64</sup> Matiyas, E. (2018). What Prospects for an African Court under the Malabo Protocol? [https://www.justiceinfo.net/en/other/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html#:~:text=Rights%20\(ACJHR\).-As%20of%20May%202018%2C%20the%20Protocol%20has%20only%20been%20signed,Tome%20and%20Principe%20and%20Uganda](https://www.justiceinfo.net/en/other/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html#:~:text=Rights%20(ACJHR).-As%20of%20May%202018%2C%20the%20Protocol%20has%20only%20been%20signed,Tome%20and%20Principe%20and%20Uganda) (Accessed 20 August 2020).

<sup>65</sup> African Union. (2019). List of countries which have signed the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. Available at. <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>(Accessed 19 August 2020), at.pp.1.

<sup>66</sup> Amnesty International. (2017, p.11). Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. Available at. <https://www.amnesty.org/download/Documents/AFR0161372017ENGLISH.PDF>(Accessed 19 August 2021).

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corruption, money laundering, trafficking in persons, drugs and hazardous waste, illicit exploitation of natural resources and aggression.”<sup>67</sup> This wide coverage is good for a number of reasons. For instance, it broadens the list of cases for which criminals can be tried and brought to justice in Africa. Besides, it leaves limited, if any, room for commission of crimes with impunity. However, considering that many, if not most, human rights violations in Africa are perpetuated by individuals or State institutions administered by Heads of State and senior government officials, the broadening of the jurisdiction of the crimes to be administered by the African Criminal Court seem to actually make many Africa Heads of State hesitant to signing and ratifying the Malabo Protocol. This is because they may fear that by ratifying the Malabo Protocol, they will be indicted and possibly tried for the crimes committed by themselves and/or their close associates once their immunity ceases

### **4.3 Limited Financial Base to Effectively Finance the Operationalization of the Court**

Starting, operationalizing and maintaining a Criminal Court is a very expensive venture in terms of both finances and human resources. For instance, in 2016, the ICC had to maintain a workforce of 1309 personnel to effectively execute its mandate<sup>68</sup>. To effectively run its operations, the proposed annual budget for the ICC in 2020 was €150.52 million<sup>69</sup>. Similarly, in Africa, running an African Criminal Court under the ACJHR is also envisaged to be very expensive. For instance, “the trial of former Chadian president Hissène Habré at the Extraordinary African Chambers cost about USD 9.7 million in 2015”, while running the Special Court for Sierra Leone on average costs USD30 million per year<sup>70</sup>. In view of the above-mentioned, it is uncertain how and whether the AU will raise the funds required to operationalize the African Criminal Court. Considering that the AU continues to suffer with the burden of funding its operations, funding only less than 25% of its annual budget (and depending entirely on donors for the rest of the funding). Apparently, many AU Member States could be thinking that signing and ratifying the Malabo Protocol will increase their financial obligations amidst their financial predicaments at home.

Besides, as Amnesty International reports, the above-mentioned financial predicament is compounded by the resolve of the donors, such as France, Germany, Sweden, Denmark, Netherlands, Spain, Italy and Poland, among others, under their umbrella grouping – the European Union, who have traditionally funded the AU’s operations, to explicitly indicate that they will not be in position to finance the operationalization of the African Criminal Court, as long as the immunity clause for the Heads of State/Government and other senior government officials still exists in the Malabo Protocol. The shunning of funding for the operationalization of the African Criminal Court by the donors is premised on the belief that not only will the court fail to pursue Africa’s leaders whom the donors honestly believe should be pursued but the court’s operationalization would promote human rights violations with impunity<sup>71</sup>. The most disturbing scenario is the fact that none of the leading economies/AU Member States in Africa such as Nigeria, South Africa, Egypt, Algeria, Angola, Sudan, Morocco, and Ethiopia, among others<sup>72</sup>, have either signed or ratified the Malabo Protocol. As such, a lack of a clear and guaranteed source of funds has been, and continues to be, one of the greatest impediments to the ratification of the Malabo Protocol and operationalization of the African Criminal Court.

### **4.4 Contradictions and Ambiguities Regarding how the African Criminal Court will be Operationalized**

There are contradictions, anxieties and ambiguities with regard to how the African Criminal Court will operate. Many, if not most, AU member states could be wondering what implications would their ratification of the Malabo Protocol bring to them. For instance, although 34 AU Members ratified the Rome Statute that created the ICC, ratifying the Malabo Protocol means that such countries will have potentially competing obligations to the ICC and ACJHR.<sup>73</sup> In view of this, ambiguities abound as to what will happen if the African Criminal Court and the ICC indict the same individual and issue a warrant for his or his arrest and surrender. A State which is a signatory to both Rome Statue and Malabo Protocol will be in breach of its Rome Statute legal obligations if it chooses to surrender the inductee to the latter and it will breach its obligations under the Malabo Protocol if it chooses to surrender the

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<sup>67</sup>See details of the(se) crimes under the International Criminal Jurisdiction of the proposed African Criminal Court under Article 28(A-N) of Annex to the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (June 27, 2014).

<sup>68</sup> See Amnesty International. (2017, p.9). Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court Snapshots. Available at: <https://www.amnesty.org/download/Documents/AFR0161372017ENGLISH.PDF>, (Accessed 19 August 2020)

<sup>69</sup> See Mahdi, M. (2019). Africa’s international crimes court is still a pipe dream. *Transnational Threats and International Crime News and Press Release*. Pretoria: Institute for Security Studies. Available at: [https://issafrica.org/iss-today/africas-international-crimes-court-is-still-a-pipe-dream?utm\\_source=BenchmarkEmail&utm\\_campaign=ISS\\_Today&utm\\_medium=email](https://issafrica.org/iss-today/africas-international-crimes-court-is-still-a-pipe-dream?utm_source=BenchmarkEmail&utm_campaign=ISS_Today&utm_medium=email) (Accessed 19 August 2020).

<sup>70</sup>Amnesty International. (2017). Op cit, p.9.

<sup>71</sup> Ibid, p.11

<sup>72</sup>Trademark East Africa (2019). Largest economies in Africa in terms of GDP. Available at: <https://www.trademarka.com/news/largest-economies-in-africa-in-terms-of-gdp/> (Accessed 19 August 2020)

<sup>73</sup> See Amnesty International. (2017). Op cit, p.9.



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inductee to the former. The above scenario raises growing contradictions and ambiguities regarding how the proposed African Criminal Court will be operationalized, as it may fuel competition between the regional court and the ICC.

### 5. CONCLUSIONS

The adoption of the Malabo Protocol, albeit with reservations, intends to address some of the underlying causes of conflicts and human rights violations on the continent by establishing an African criminal court that will address the continent's challenges in an African way. However, the proposal to establish a regional criminal court has been criticized on the basis that the Rome Statute does not allow for a regional prosecution of international crimes, and that such jurisdiction as proposed in the Malabo Protocol is inconsistent with the ICC Statute. Given that the Protocol has not received any ratification since it was adopted in 2014, the study identified some possible inhibitions to the establishment of the regional criminal court. The factors identified include: the contentious jurisdiction of the court, immunity for African Heads of State and senior government officials; the limited financial base which negatively affects the potential operationalization of the court; the contradictions and ambiguities regarding how the African Criminal Court will be operationalized, and the changes in the political leadership of some AU Member States since 2014

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