



UNIVERSITY OF RWANDA
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SCHOOL OF LAW
LMM IN INT.CRIMINAL JUSTICE & IHLR

**IMMUNITIES FROM PROSECUTION OF INTERNATIONAL
CRIMES: A CRITICAL ANALYSIS OF THE POSITION OF AFRICAN
MEMBER STATES TO BOTH THE ROME STATUTE AND THE
MALABO PROTOCOL**

**A dissertation submitted in partial fulfilment of the requirement for the Award of the
Master Degree in Law (LLM) in International Criminal Justice and International Human
Rights**

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DECLARATION

I, Antoine MANISHIMWE, do hereby declare that his dissertation entitled *Immunities from prosecution of international crimes: A critical analysis of the position of African Member States to both the Rome Statute and the Malabo Protocol* is my original work and that it has not been submitted for any degree or examination in any other University. Whenever other sources were used or quoted, they have been duly acknowledged.

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Signature

Date

CERTIFICATION

This is to certify that MANSIMWE Antoine has carried out this research under my supervision.

Supervisor's Name: Dr. **Yves MUHIRE**

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Date: Januaryth, 2019

DEDICATION

I deeply dedicate this dissertation to my wife, who has been always available and gave me encouragement during the painful period of study. Without her, I could not have accomplished this work with success.

I also dedicate this dissertation to my children who always gave me hope for success and being close to me during the whole period of study.

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Antoine MANISHIMWE

LIST OF ACRONYMS

ACHPR	: African Charter on Human and Peoples' Rights
ACJ	: African Court of Justice
ACJHR Protocol	: The Protocol on the Statute of the African Court of Justice and Human Rights
ACJHR	: African Court of Justice and Human Rights
AU	: African Union
ICLS	: International criminal law section
DRC	: Democratic Republic of Congo
EJIL	: European Journal of International Law
ICC	: International Criminal Court
ILR	: International Law Review
ICTR	: International Criminal Tribunal for Rwanda (ICTR)
ICTY	: International Criminal Tribunal for Yugoslavia
ILC	: International Law Commission
IMT	: International Military Tribunal
IJRC	: International justice Resource Center
ICLR	: Incorporated Council of Law Reporting
KPTJ	: Kenya for Peace with Trust and Justice
LJIL	: Leiden Journal of International Law
P	: Page
RECs	: Region Economic Committees.

SCSL	: Special Court of Sierra Leone
STCJLA	: The Specialized Technical Committee on Justice and Legal Affairs
UN	: United Nations
UNSC	: United Nations Security Council
VCLT	: Vienna Convention on the Law of Treaties
WWW	: Word Wide Web

ABSTRACT

The rarely accountability of the perpetrators held responsible of serious crimes like genocide, crimes against humanity, war crimes, and other heinous crimes, were behind the creation of International Criminal Court and the African Court of Justice and Human Rights after its amendments.

Obviously, both IIC and International Criminal Section of the ACJHR have a common core objective that is to end impunity for international crimes. Nevertheless, as one may see, those bodies contrast in the ways to achieve this objective, as the article 46A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (“the Protocol on Amendments”) grant immunity to a senior officials of African Leaders while the article 27 supports the existing of customary international law norm that forbid the high States officials to stand behind personal immunities by seeking to avoid prosecution for international crimes they committed or supposed to commit.

As it has been proposed by some researchers, the Rome Statute would be revised by highlighting in term of complementarity, that the ICC shall be complementary to national and regional criminal jurisdictions, instead of being complementary to national criminal jurisdictions only. The ICC should be remained a court of last resort by allowing judicial proceedings of local courts to take place near to the allocation where crimes took place.

To end up such quarrel, the ICC and ACJHR have to cooperate as equals partners as they have the same main objective of ending impunity, possibly being governed by a treaty giving one or another primary jurisdiction, in order to avoid conflict. The ACJHR should in seeking the prosecution of high officials, to leave from the jurisdiction over the crimes within jurisdiction of the ICC and decline immunity provided for senior State officials. That alternatives shall facilitate and simplify prosecution of State officials that are suspected of having committed international crimes on one hand, and shall undoubtedly give satisfaction to the victims of gross violations of human rights.

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I. INTRODUCTION

1. Background and significance of the study

For a long period in previous years, women, men and children lost their lives as a result of serious atrocities like genocide, crimes against humanity, war crimes, and other heinous crimes from the inertia of international community. Perpetrators who ought to be prosecuted have only rarely been held accountable.¹

The lack of accountability is linked to culture of local judicial system, as State's court have usually power to hear cases related to the crimes perpetrated within its respective territory and against those crimes committed in foreign countries by its citizens, or against their inhabitants, or against its national profits.² In default of these interests and other connections, the court's State may however exercise jurisdiction under international law over offences of such exceptional gravity which violate the fundamental interests of the international community as a whole.³ It has been observed that a significant crimes are committed by States or have an element of State officials involvement therein are rarely punished.⁴

To put end those violence and to upgrade justice, the creation of a permanent international criminal court to investigate, to prosecute and adjudicate over cases of such character was deemed necessary.⁵ Thus, after hard discussions and many negotiations, the Rome Statute instituting the international criminal court has been adopted on July 17, 1998 by 120 States⁶. Later in July 1, 2002 the Rome Statute found legal force, and the institution of the first permanent international criminal court became a reality in the world.⁷ The idea to create this mechanism

¹Mary Robinson, *the Princeton principles on universal jurisdiction*, from https://lapa.princeton.edu/hosteddocs/unive_jur.pdf, visited on 17/04/2018.

² Cassese A, *International Criminal Justice*, the Oxford Companion to International Criminal Justice (Oxford University Press, 2009), pp 1-3.

³ *Ibid.*

⁴ Expert Workshop, Cooperation and the international criminal court, Nottingham, 18-19 September 2014, p3.

⁵ *Ibid.*

⁶ Rome Statute of international criminal court, UN Doc. N°. A/conf.183/9 (July 17, 1998), 37 L.L.M. 999; on line at: <http://www.un.org/law/icc/statute/rome.htm>. (The Rome Statute should enter into force, once sixty States have ratified it, and on 27 August 2001 thirty seven countries had done so)

⁷ Rome Statute of the international criminal court, July 17, 1998 enters into force on July 1, 2002.

was that the international community had long lacked a proper and permanent way to bring persons to justice for the world's most heinous crimes such as genocide, crimes against humanity, war crimes and crimes of aggression.⁸ Therefore, a strong judicial response was needed to put end that cycle of violence and to create a future era without impunity.⁹

The idea behind the creation of ICC as is said above, was that most perpetrators of such heinous atrocities have to believe that their crimes would go unpunished forever. Thus, their effective prosecution and deterrence were primary objectives of those working to establish the international criminal court¹⁰ in order to assign an appropriate punishment to those who were involved in those atrocities.¹¹

While the ICC was starting its activities, Africa leaders on the other side, had another agenda to create an African judicial institution that would deal with the prosecution and trial of international atrocities committed within the Africa's soil.¹²

The Assembly of the African union (AU) on twenty-seven June two thousand eighteen four, adopted a protocol entitled "Protocol on Amendments to the protocol on the statute of the African court of justice and human rights", commonly known as the "Malabo Protocol". This Protocol contains an annex entitled "Statute of the African Court of Justice and Human and Peoples Rights". The Protocol and the Statute annexed to it provide for the creation of an African regional court to be known as the 'African Court of Justice and Human Rights' (African Court).¹³ This Court will among others be competent over criminal cases related to international crimes that implicates the individual criminal responsibility and corporate criminal liability over

⁸ Anna Rosén and Veronica Jorméus Gruner, *article 98 agreements: legal or not?* University of Örebro, P.3. 2007.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *ibid.*

¹² Eden Matiyas, *What prospects for an African Court under the Malabo Protocol?* at <https://www.justiceinfo.net/en/other/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html>, accessed on 24th August, 2018

¹³ See Twenty-third ordinary session of the assembly, held in Malabo, Equatorial Guinea on 27th June 2014, *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights*, found on https://au.int/sites/default/files/treaties/7804-treaty-0045_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e-compressed.pdf, accessed on 14th August 2018.

legal persons excluding States¹⁴, which goes beyond the jurisdiction of any other international criminal court or hybrid tribunal.¹⁵

The genuine plan for the ACJHR was a court that had two sections, namely a general affairs section and a human rights section. The third section was introduced by Malabo Protocol called "the International Criminal Law Section". At the time the Malabo Protocol starts operating, the jurisdiction of ACJHR will be wider than before as it will adjudicate cases related to 14 crimes.¹⁶

The scrutiny reading of the Malabo Protocol reveals that other international courts and tribunals played a major role by inspiring its drafter, because the provisions from their respective status were incorporated within the ACJHR's protocol.¹⁷ In particular way, provisions from Rome statute are clearly invoked, the statutes of the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for Former Yugoslavia (ICTY), and that of Special Tribunal for Lebanon combined have been taken as model in drafting the statute of the protocol to the protocol of African Court of Justice and Human and People's Right.¹⁸

Among the above international courts, the more influential and famous and in Africa continent is the ICC, as a large number of Africa States actively participated in conference charged with preparation and drafting of the Rome Statute which took place in July 1998.¹⁹ The participation

¹⁴ Art. 28A of protocol on amendments to the protocol on the statute of the African court of justice and human rights.

¹⁵Manisuli Ssenyonjo and Saidat Nakitto, *international criminal law review*, Volume 16, issue1, pages 71-102, 2016.

¹⁶Art. 28A of protocol on amendments to the Protocol on the Statute of the African Court of Justice and Human Rights provides that « International Criminal Jurisdiction of the Court will try the following crimes: genocide, crimes against humanity, war crimes, 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, and the crime of aggression».

¹⁷ International Amnesty, legal and institutional implications of the merged and expanded African court, found on <https://www.amnesty.org/download/Documents/AFR0130632016ENGLISH.PDF>, accessed on 13rd August 2018.

¹⁸Compare for example, article 22C(1) and (2) of the Amended ACJHR Statute on the defense office closely reflect those of Article 13 of the Statute of the Special Tribunal for the Lebanon. Similarly, Articles 46B(3) and (4) of the Amended ACJHR Statute mirror Article 6(3) and (4) of the Statute of the ICTR; Article 31 of the Amended ACJHR Statute on applicable law with Article 38 of the Statute of the International Court of Justice....

¹⁹ Africa and international criminal Court, find on http://www.iccnw.org/documents/Africa_and_the_ICC.pdf, accessed on 13rd august, 2018.

was evidenced by that the 47 Africa countries involved in that Statute's drafting and the vast majority voted in favor,²⁰ even though not all African States are party to the Rome Statute.²¹

The ICC is mandated with investigating and prosecuting genocide, crimes against humanity, war crimes, and, upon the ratification of an amendment by 30 State parties, the crime of aggression.²² The court has jurisdiction to investigate and prosecute crimes that have been committed in the territories of its members States, in the case the UN Security Council refers the case to the ICC or where the Prosecutor has initiated an investigation in respect of such a crime on the basis of information on crimes within the jurisdiction of the court.²³

All those crimes as they are considered as a threat of peace and security around the World, in particular in Africa²⁴, the African leaders adopted Malabo Protocol as an alternative to International Criminal Court, to criminalise heinous crimes, after considering that those crimes are no longer a national issue, but international matter particularly on the context of the African mainland.²⁵

The adoption of Malabo protocol was not without problem. Many critics point out the issue of immunities which the protocol grants to the Heads of States and government and others senior State officials, which is considered as shielding perpetrators of international crimes.²⁶

Indeed, Article 46 A bis of the Protocol on the Statute of the African Court of Justice and Human Rights provides 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."

²⁰ Africa and international criminal Court, find on http://www.iccnw.org/documents/Africa_and_the_ICC.pdf, accessed on 13rd august, 2018.

²¹ KPTJ, *Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court*, <http://kptj.africog.org/wp-content/uploads/2016/11/Malabo-Report.pdf>, accessed on 13rd august 2018.

²² Rome Statute of the International Criminal Court, find on https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf, accessed on 14th, august 2018.

²³ Art 12-15 of Rome Statute.

²⁴ Anna Rosén and Veronica Jorméus Gruner, *supra* note 8, p.3

²⁵ Phil Williams, *transnational criminal organizations and international security*, pp.315-316 chapter 14, found at https://www.rand.org/content/dam/rand/pubs/monograph_reports/MR880/MR880.ch14.pdf, accessed on 26th August 2018.

²⁶ Eden Matiyas, *supra* note 12.

The above article provides immunity despite the pre-existence jurisprudences of international criminals tribunal established after the second world war where the prosecution of State officials was affirmed.²⁷ The non-recognition of the immunity of State officials for international crimes was born from the contemporary law and embodied in the Rome Statute, standing for prosecution of individuals for international crimes before international courts.²⁸ Furthermore, the Amnesty International is of the view that the immunity clause inserted in Malabo protocol will weaken the legitimacy of the court and the principle of fighting against impunity on the continent, as well as undermining the principles and objectives of the AU constitutive act.²⁹

Among the main objectives of the AU constitutive act is among other things, "to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments and to respect for the sanctity of human life."³⁰ Despite this objective, African leaders sought to create criminal court section where the immunity is largely accepted. In fact, the decision to create the ICLS within the ACJHR would go with the respect of human beings by providing the appropriate sanctions equally to all suspects responsible of committing international crimes.

2. Problem Statement

Indubitably, both IIC and International Criminal Section of the ACJHR have a common core objective that is to end impunity for international crimes.³¹ But as one may see, those bodies contrast in the ways to achieve this objective. In fact, article 46A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

²⁷ International Military Tribunal (Nuremberg) The United States of America, the French Republic, the United Kingdom Of Great Britain and Northern Ireland, and the Union Of Soviet Socialist Republics, against Hermann Wilhelm Göring, Rudolf Hess, Joachim von Ribbentrop, Robert Ley et al, Judgment of 1 October 1946, at https://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf, accessed on 6th December 2018.

See also discussions on inter-sessional meeting of legal experts to discuss matters relating to international law commission to be held on 10th April 2012 at Aalco Secretariat, New Delhi, Immunity of State Officials From Foreign Criminal Jurisdiction, found at <http://www.aalco.int/background%20paper%20ilc%2010%20april%202012.pdf>, accessed on 26th August 2018.

²⁸See Rome Statute article 27.

²⁹Amnesty International *supra* note 17.

³⁰ Art 3 (h) (o) of Constitutive Act of African Union, found on https://au.int/sites/default/files/pages/32020-file-constitutiveact_en.pdf. Accessed on 27th August 2018.

³¹See the preamble of Rome Statute and the preamble of the protocol on amendments to the protocol on the statute of the African Court of Justice and Human Rights.

(“the Protocol on Amendments”) grant immunity to a senior officials of African Leaders as it provides that:

No charges shall be commenced or continued before the Court against any serving African Union Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior State officials based on their functions, during their tenure of office.³²

As it said above, the content of this provision has been criticized as shielding senior State officials suspect of committing international crimes and leading to impunity, since it has not distinguished clearly the immunities and not envisage the real possibility that State senior officials who engage in the perpetration of international crimes may fail to voluntary cease to keep power for fear of prosecution, and neglected the rate of suffering of their respective citizens.³³

According to G. Abraham,

Amendments to the Protocol on the Statute of the African Court of Justice and Human Right represents a major setback in the advance of international criminal justice, because it can only be construed to be in the interest of those African leaders fearful of being prosecuted.³⁴

Contrary to Malabo Protocol, the Rome Statute specifically in its article 27 supports the existing of customary international law norm that forbid the high government officials to stand behind personal immunities by seeking to avoid prosecution for international crimes they committed or supposed to commit,³⁵ the article states that:

This Statute shall apply equally 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

³² Article 46 A bis of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

³³ Evelyne Owiye Asaala, *Rule of law or realpolitik? The role of the United Nations Security Council in the International Criminal Court processes in Africa*, Africa human rights Law Journal, 226-294, Volume 17No 1, 2017.

³⁴ G Abraham, *Africa's evolving continental court structures: At the crossroads?* South African Institute of International Affairs Occasional Paper 209 (2015) 14.

³⁵ Sukhija, Comment on the Arrest Question, human rights and international criminal law ICC forum, available on internet at: <http://iccforum.com/forum/permalink/93/4084>. Visited on 28th August , 2018.

criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence: 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».³⁶

This provision shows that the immunity before the ICC doesn't operate with respect to both party and no party to the Rome statute, and requires all States to act positively in response to a request for assistance or request for arrest and surrender from warrant issued by the Court.³⁷ The article above applies equally to all persons regardless their positions. Many people support that the Heads of States and government officials must respond to their conduct equally as others with regards to international crimes.³⁸

A close reading of the provisions of both the Malabo protocol and the Rome statute respectively reveals that they are conflicting in their application in relation to African countries which are States parties to these two instruments.³⁹

Indeed, the Malabo protocol instituting the International Criminal Law Section seeks to be the main judicial organ of the African continent and being predominant human rights court for the region.⁴⁰ In term of jurisdiction, one may see that the scope of the African Court of Justice and Human Rights mandate will be greater than of the AFCHPR, as it will go over inter-State disputes and State responsibility for human rights violations, to include individual's culpability for war crimes, genocide, and crimes against humanity.⁴¹

³⁶Article 27 (2) of Rome Statute.

³⁷ Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 *J. Int'l Crim. Just.* 333, 337-38 (2009).

³⁸ Badar Mohamed Elewa, *islamic law(Shari'a) and the jurisdiction of the international criminal Court*, 24 *LJIL* 2011, pp.430-431

³⁹ Evelyne Owiye Asaala, *supra* note 33.

⁴⁰International justice resource center (IJRC), African union approves immunity for government officials in amendment to African court of justice and human rights' statute, July 2, 2014, from <https://ijrcenter.org/2014/07/02/african-union-approves-immunity-for-heads-of-State-in-amendment-to-african-court-of-justice-and-human-rights-statute/>, accessed on 15th, August 2018.

⁴¹Article 28 A of Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human

The Protocol on the statute of the African court of justice and human rights show that at least the ICLS and the ICC will exercise the same subject matter jurisdiction⁴² with regard to crimes committed in States which have ratified both the Rome statute and Malabo protocol.⁴³

In terms of cooperation , the major issue is that the Malabo Protocol did make reference neither to ICC or to the Rome Statute, and didn't clarify how the two courts will work interchangeably.⁴⁴ Another challenge are related to immunity granted by Malabo protocol to Head of State, Head of Government, a member of a Government or parliament who explicitly will not be prosecuted by the ICLS of ACJHR, contrary to the mandate and objectives of the ICC which is to eradicate impunity by prosecuting all persons suspected of committing international crimes regardless of their statute.⁴⁵

Again, it needs to be noted that the legal conflict may occurs again since article 46 H of the Malabo Protocol, which deals with complementary jurisdiction, deals only with complementarity vis-à-vis national courts and the courts of the region without making any reference whatsoever to the ICC in term of complementarity and eventual cooperation,⁴⁶ while on the other side, the ICC uphold only the complementarity with national criminal jurisdiction.⁴⁷

In practice, tension may occur between ICC and ACJHR, as the ICC could refuse to accept competence of ACJHR on an individual it wishes to try. In such situation, it is not clear that the Rome Statute will still operating regardless of Malabo Protocol establishing a criminal section within ACJHR.⁴⁸ Another issue is related to the possibility of States party to both Malabo protocol and Rome Statute to satisfy in the same time some provisions of these two treaties without breaching obligations of one of them.⁴⁹

Given the absence of clear provision to handle those issues, it is crucial to analyse possible legal mechanisms to prosecute a senior State official from an African State party to those two treaties,

⁴²Twenty –third ordinary session of the assembly, held in Malabo, Equatorial Guinea on 27th June 2014.

⁴³See Malabo Protocol and its article 28A and Rome Statute in its article 5.

⁴⁴International Amnesty, *supra* note, 17.

⁴⁵G Abraham, *supra* note 34. P.5

⁴⁶Amnesty International, *supra* note 17, P.22.

⁴⁷Article 1 of the Rome Statute.

⁴⁸Amnesty International, *supra* note 17, P.20.

⁴⁹*ibid.*

who is suspected of perpetrating international crimes within jurisdiction of the international criminal law section without infringing other closer treaties namely the Rome statute.

3. Research question

The above problems Statement can be broken down into the following questions:

- 1) What would be the legal position of State party to both Malabo protocol and Rome Statute in relation to the prosecution of Senior State officials from Africa suspected to have committed international crimes?
- 2) How to reconcile a State's obligations under the Rome Statute, which exclude immunities, and that of the Malabo Protocol, which nurture immunities to hold accountable the responsible of heinous international crimes?
- 3) Does the international criminal law of ACJHR established by Malabo Protocol have a legal basis under article 53 of the Vienna Convention on the Law of Treaties and vis -à - vis the Rome Statute as well as United Nations Charter?

4. Objective of the research

This present dissertation pursues the following objectives:

- To analyse in details, the immunities and see if the immunities provided by international customary law comply with the objectives and mandate of international criminal law section, the AU constitutive Act as well as with the Rome statute.
- To identify if the African States party both to Rome Statute and Malabo Protocol may legally fulfil their obligations under these instruments in terms of prosecution.
- To examine the issue of concurrent jurisdiction between ACJHR and Rome Statute and their legal perspective by revealing the role of complementarity principle as solution.

5. Research hypothesis

This study is based on the hypothesis that African States party both to Rome Statute and Malabo protocol may not comply legally with the two instruments without infringing one of them.

6. Research methodology

Since the thesis focuses on the analysis of immunities of State senior officials suspected of committing international crimes, reference has been made to Rome Statute, Malabo protocol to ACJHR, Vienna Convention on the Law of Treaties ect... These sources set out clearly the different positions that States should take or avoid in the case of immunities issue.

The exploitation of information from, reports, legal journals, internet sources and textbooks was useful to achieve in proper way the objectives of this study.

7. Delimitation and outline of the study

This thesis is focused essentially to the analysis of immunity recognized by international customary law, as well as those provided by both the Rome statute and ACJHR. In this regard the art 27 and 98 of Rome Statute will be compared with article 46 A of Malabo protocol to find if they are compatible, before examining the concurrent jurisdiction of ICC and ACJHR over African officials and the legal challenges and perspectives they may have.

8. Structure of study

This study consists with three chapters. Apart from the general introduction the first chapter discusses the immunities under international law, the second chapter focuses on immunities provided both by ICC and ACJHR and the last chapter discusses the concurrent jurisdiction of ICC and ACJHR over African officials and sets out legal challenges and perspectives before coming to the conclusion.

CHAPTER I: THE IMMUNITIES UNDER INTERNATIONAL LAW IN NUTSHELL

Dating back to the divine right of kings, the immunity of State officials has been talked, at the time the kings was being regarded as infallible, representing God, consequently being no subject of indicted, accused, or tried by a court.⁵⁰

By definition, immunity is usually considered as the exception or exclusion of the entity, individual, or property enjoying it from the jurisdiction of the State, an exception to the exercise of jurisdiction; narrow of jurisdiction;⁵¹ a shield used to prevent the exercise of jurisdiction over individual, property or entities.⁵²

Under international law, two core categories of immunity are known. The first one is immunity *ratione personae* and the second one is immunity *ratione materiae*, also known as ‘functional’ immunity.⁵³ Several theories have been developed in supporting acceptance of such immunities, basing their opinion on the sovereignty and equality of States and the common view that normally no State should claim jurisdiction over another.⁵⁴ This chapter analyses the types of immunities, their rationale and Scope.

I.1: Types of immunities

As it has been said above, under customary international law there are two types of immunity which allows the officials of one State to be out of prosecution from another State's jurisdiction. Those immunities complies the personal immunity or immunity *ratione personae*, and functional immunity or immunity *ratione materiae*.⁵⁵

⁵⁰ Chacha Murungu , *immunity of State officials and the prosecution of international crimes* in Chacha Murungu and Japhet Biegon (Eds.) *prosecuting international crimes in Africa*. Cape Town: Pretoria University Law Press: 33–59

⁵¹ Asian- African legal consultative Organization, Inter-sessional meeting of legal experts to discuss matters relating to international law commission to be held on 10th April 2012 at Aalco secretariat, new Delhi. at <http://www.aalco.int/background%20paper%20ilc%2010%20april%202012.pdf>

⁵² *Ibid.*

⁵³ Joanne Foakes, *immunity of international crimes? Developments in the law on prosecuting heads of State in foreign Courts* , at [https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International Law/bp1111_foakes.pdf](https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp1111_foakes.pdf)

⁵⁴ *Ibid.*

⁵⁵ Joanne Foakes *supra* note 53.

I.1.1 Immunities *ratione personae* or personal immunities

The immunities which are conferred State official's during they remains in office, are usually described as “personal immunity” or “immunity *ratione personae*.” Internationally are attached to the office or status of those officials. For a long time, it has been clear that under customary international law the Head of State and diplomats accredited to a foreign State possess such immunities from the jurisdiction of foreign States,⁵⁶ in line of acts performed by them in their competence as State officials.⁵⁷

As that immunity cover all acts of the officials, they are performed whether done in a public or private capacity, whether done while on an official or private visit, and whether done while in, or previous from taking office, it is considered by some it is absolute from foreign jurisdiction.⁵⁸

I.1.2 Rationale of the immunity *ratione personae*

This type of immunity looks for covering both public and private acts, including inviolability and immunity from criminal jurisdiction. It is derived from the office of the individual concerned as it has confirmed by ICJ that such immunity is enjoyed by heads of State, heads of government, foreign ministers and, possibly, a limited category of other very high-ranking State representatives.⁵⁹

Although broad in its substantive application, this type of immunity is limited both temporally and as to the category office-holders to whom it may apply. Once the individual leaves office, he ceases at the time to be vested by a such immunity.⁶⁰

Nevertheless, over the last years, several officials in office and former senior State officials have been indicted and, in some cases, prosecuted and convicted by international courts for crimes they were suspected to commit. The former president of Liberia Charles Taylor, was convicted

⁵⁶ Dapo Akande Sangeeta Shah, *immunities of State officials, international crimes and foreign domestic courts*, European Journal of International Law, Volume 21, Issue 4, 1 November 2010, Pages 815–852, <https://doi.org/10.1093/ejil/chq080>, published on 01 November 2010.

⁵⁷ Roger O' Keefe, *immunity ratione materiae from foreign criminal jurisdiction and the concept of “acts performed in an official capacity*, p.1, at: <https://rm.coe.int/1680097836.pdf>, accessed on 6th, December 2018.

⁵⁸ Hugh King, *immunities and bilateral immunity agreements: issues arising from articles 27 and 98 of the Rome statute*, 2006, P. 271-272

⁵⁹See Arrest warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium) [2002] ICJ

⁶⁰ Joanne Foakes, *supra* note 53.

by the Special Court for Sierra Leone, for several crimes namely war crimes and crimes against humanity committed during the conflict in Sierra Leone⁶¹, the former Prime Minister of Rwanda Jean Kambanda, also was convicted of international crimes by the International Criminal Tribunal for Rwanda for the crimes he perpetrated during the genocide against Tutsi.⁶²

The position adopted by International Court above established by UN security Council is different from ICJ in the *Arrest Warrant* issued by Belgium,⁶³ the ICJ held that:

Foreign Ministers are entitled to immunity *ratione personae*, and further held that the absolute nature of the immunity from criminal process recognized to a serving Foreign Minister *ratione personae* subsists even when it is alleged that has committed an international crime and applies even when the Foreign Minister is abroad on a private visit.⁶⁴

Some have criticized the position of ICJ by saying that the Court had been unclear to show if under customary international law they exist any form of exception to the rule of prosecution of all suspects of having committed genocide, war crimes or crimes against humanity, by accepting and granting immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs.⁶⁵

Despite those criticisms, its position has been embodied in Kaddafi case before the Supreme Court of French as decided that: «*International customary law prohibits the exercise of criminal jurisdiction over foreign Heads of State in office*»⁶⁶, and the House of Lords in the First Pinochet Case accepted that the Head of State in office should not be a subject of prosecution, and it held that:

The Former Chilean President who was accused of torture, which is international crimes, would have been vested to immunity as he had been still in office, and that theImmunity of serving of Sate should not be denied

⁶¹ SCSL, *Prosecutor V. Charles Ghankay Taylor*, Case No SCSL-03-1-T, 26 April 2012.

⁶² ICTR, *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

⁶³ ICJ, Arrest Warrant of 11 April 2000 *Democratic Republic of the Congo v. Belgium*, Judgment, ICJ Reports 2002, p. 3

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Cour de Cassation of France, Gaddaf Case, Cass, Mar, 12, 2001 N° 1414, 125 IIR. See also Salvatore Zappalà, Do Heads of State in Office Enjoy Immunity from Jurisdiction for International crimes? 2001, P.597.

whether in respect of his public acts or private affairs. His personal is inviolable; he is not liable to be arrested or detained on any ground whatever.⁶⁷ This shows us that the way the immunities are applied are not similar with regard to international crimes.

I.1.3 The scope of immunity *Ratione Personae*

Obviously senior officials who are granted with immunity *ratione personae* are protected when exercising their international functions in case they are arrested or detained while in a foreign State.⁶⁸ For this reason, this kind of immunity, where applicable, is commonly regarded as prohibiting absolutely the use of criminal jurisdiction by States to foreign officials.⁶⁹ The absolute nature of the immunity *ratione personae* reached the level of prohibiting the use of criminal jurisdiction not only in cases involving the acts of these officials in their official capacity but also in cases involving private acts.⁷⁰

I.2 Immunity *rationae materiae*

Immunity *rationae materiae* or functional immunity as its name says, it first focuses on the ‘what’ ‘act’, rather than the ‘who’, ‘person’.⁷¹ A *rationae materiae* immunity of State official means any individual who represents the State or who occupied State functions.⁷² This category of immunity is more attached to the official act rather than to status of the official⁷³, it may be relied on by all who have acted on behalf of the State with respect to their official acts without going beyond their mission. Thus, the former officials in respect of official acts performed while in office as well as by serving State officials may be relied on immunity by showing that the acts performed were under their respective competence.⁷⁴

⁶⁷ R v Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte (N° 3) [1999] 2. Cited by Kayitana Evode in thesis of Jurisdiction Problems of South African Court in respect of international crimes, P.120.

⁶⁸ Arrest Warrant case, *supra* note 63, at para. 54

⁶⁹ *ibid*

⁷⁰ Dapo Akande and Sangeeta Shah, *supra* note 56, pp 815–852

⁷¹ Chimène Keitner, functional immunity of State officials before the international law commission: The ‘who’ and the ‘what’, <http://www.qil-qdi.org/forthcoming/> visited on 14 may,2018

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Dapo Akande and Sangeeta Shah, *supra* note 56. Pages 815–852

I.2.1 Rationale of immunity *rationae materiae*

The importance of immunity of State officials is crucial as it enable the holder to act as organs of the State.⁷⁵ However, even if States can act only through its agents, this does not necessarily mean that individuals enjoy functional immunity for all acts they perform.⁷⁶ In the case the individual performs his activities simply as an organ of the State; he cannot bear personal responsibility for particular acts.⁷⁷ The commercial transactions they carry out on behalf of States, the officials are not personally liable, even though States themselves are subject to suit under the restrictive theory of immunity.⁷⁸ This illustrate how, the individuals are merely a stand-in for the State; the State, not the individuals, namely the act they perform is imputable to a State, because the agent's official acts are not imputable to them but they are imputable only to the State for which they are representing.⁷⁹ This theory of representation was endorsed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Blaškić*, where it held that:

«States officials are mere instruments of a State and their official action can only be attributed to the State. They cannot be the subject of sanctions or penalties for conduct that is not private but undertaken on behalf of the State. In other words, State officials cannot suffer the consequences of wrongful acts which are not attributable to them personally but to the State on whose behalf they act: they enjoy so-called 'functional immunity'. This is a well-established rule of customary international law going back to the eighteenth and nineteenth centuries.»⁸⁰

⁷⁵ Chimène Keitner, *supra* note 71.

⁷⁶ *ibid*

⁷⁷ Chimène Keitner, *supra* note 71

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Prosecutor v. Blaškić* (Objection to the Issue of Subpoena duces Tecum) IT-95-14-AR108 (1997), 110 ILR (1997) 607, at 707, para. 38

I.2.2 Consequences of immunity *ratione materiae*

By this type of immunity, the official would be immune not only in proceedings relating to non-sovereign acts but also with respect to sovereign acts for which the State is immune. In general, the State officials who act on behalf of the State in foreign State, they are immune from the foreign courts through proceedings brought against all those who act on behalf of the State. The idea behind was expressed by the English Court of Appeal in *Zoernsch v. Waldock* case and stated as follow:

*A foreign sovereign government, apart from personal sovereigns, can only act through agents, and the immunity to which it is entitled in respect of its acts would be illusory unless it extended also to its agents in respect of acts done by them on its behalf. To sue a delegate in respect of acts done in his official capacity would be, in effect, to sue his government irrespective of whether the envoy had ceased to be 'en poste' at the date of his suit.*⁸¹

In this way, the immunity operates as a jurisdictional, or procedural, forbid and prevents courts from indirectly exercising control over the acts of the foreign State through proceedings against the official who accomplish the act⁸². In reverse way, when an individual official take part in conduct for which he may carry personal responsibility, he should not invoke the State official's immunity, but he or she bears his responsibility,⁸³ as he or her has an obligation to respect the laws and regulations of the foreign State, and called to be impartial and avoid to interfere in the internal affairs of that receiving State.⁸⁴ Thus, it is crucial in the following subsection to point out the individuals who are vested with those immunities.

I.3 The officials entitled with immunity *ratione personae* and *ratione materiae*

If it happens that a State arrest a person who is vested with immunity, this behavior may discomfort the sending State. The arrest may also be considered as an abuse and a provocation to the dignity of the sending State, and may complicate international cooperation. For this reason,

⁸¹ *Zoernsch v. Waldock* [1964] 1 WLR 675, at 692 (England: CA, per Diplock L J).

⁸² Dapo Akande and Sangeeta Shah, *supra* note 56. Pages 815–852.

⁸³ Chimène Keitner, *supra* note 71. P. 96

⁸⁴ United Nations, Vienna Convention on diplomatic relations adopted in 1961 entered into force on 24 April 1964. vol. 500, p. 95.

it is indispensable to identify who is entitled with immunity in order to avoid the useless conflict between States.

Indeed, there are several beneficiaries of immunity from the jurisdiction of a foreign court recognized by customary international law. The first category is the State itself, followed by head of State and number of ministers from the central government, diplomats and diplomatic staff, armed forces and international organizations.⁸⁵ Another category of beneficiaries encompasses all the natural persons who are authorized to represent the State in all its manifestations like heads of ministerial departments, heads of mission, ambassadors, diplomatic agents and consular officers, in their respective capacity.⁸⁶

Geneva Convention provides that the diplomatic immunity is granted to:

Those persons who are diplomatic missions and consular posts, and members of such missions and posts, heads of State, special envoys and certain representatives, United Nations, specialized agencies and other international organizations, international conferences or meetings convened in Republic.⁸⁷

The immunity *ratione materiae* in particular way may be relied on by all State representative notwithstanding of their rank hierarchy they posse in sending State, and does not cease to exist when the official leaves his office. Which means that it protects also former agents with respect to their official acts performed during their term of office.⁸⁸ In fact, immunity *ratione materiae* has the same characteristics whether it protects low-ranking official or a head of State. Its scope is determined only by the scope of the exercise of official functions of the State concerned, without considering the hierarchy of the official within the State.⁸⁹

⁸⁵ Zachary Douglas, *State immunity for the acts of State officials*, British Yearbook of International Law, Volume 82, Issue 1, 1 January 2012, Pages 281–348, <https://doi.org/10.1093/bybil/brs002>.

⁸⁶ See art. 1 of Vienna Convention on Diplomatic Relations adopted in 1961 entered into force on 24 April 1964.vol.

⁸⁷ Diplomatic immunities and privileges amendment act 35 of 2008 [w.e.f. 30 October 2009 - Proc 70 / GG 32655 / 20091030]

⁸⁸ Pavel Caban, *immunity of State officials from foreign criminal jurisdiction – exceptions to immunity ratione materiae*, P. 309.at: <https://poseidon01.ssrn.com/delivery.php?ID=pdf>, visited on 16 may 2018.

⁸⁹ *ibid.* P.310.

CHAPTER II: IMMUNITIES BEFORE THE INTERNATIONAL CRIMINAL COURT AND AFRICAN COURT OF JUSTICE AND HUMAN RIGHTS

Under rule of international law, heads of State and other State officials are entitled with a full personal immunity before the domestic jurisdiction of other States during their mandate.⁹⁰ As it has been said above, this form of immunity has been endorsed by the International Court of Justice in the arrest warrant case.⁹¹ Before discussing the immunities provided in two courts (ICC and ACJHR) , it is crucial to overview the rationale of their establishment as well as their jurisdiction.

II.1 Overview of establishment of ICC and international criminal law section

The core objective and mission of the establishment of International Criminal Court (ICC) was to put to end the culture of impunity for the commission of heinous crimes, which subsist from the past century.⁹² Despite that basic objective, it must be observed that the ICC itself , is not able to deter all and criminalize all crimes.⁹³ In fact, the ICC must be seen as part of a framework of measures to sustain a culture of accountability, helped by increasing domestic prosecution of international crimes and greater use of international cooperation in suppressing such crimes.⁹⁴

The African Union on its side, was determined to establish an International criminal law section within the African Court of Justice and Human Rights (the Criminal Chamber), with mission to fight the culture of impunity on the African continent, promote and protect human and people's rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law.⁹⁵ Recognizing that the ACJHR would not have jurisdiction over individuals suspected of committing international crimes,⁹⁶ the African Union adopted in Malabo the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and

⁹⁰ Robert Uerpman-Wittzack, *prosecuting international crimes*, Bartłomiej Krzaz, Leiden / Boston, 2016, p.1

⁹¹ Arrest Warrant case, *supra* note 63, at para. 54

⁹² Philippe Kirsch, the international criminal court: Current issues and perspectives, p.3 found at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1199&context=lcp>, accessed on 7th, December 2018.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ Preamble of constitutive act of the African Union adopted by the thirty-sixth ordinary session of the assembly of heads of State and Government 11 July, 2000 – Lome, Togo

⁹⁶ Chacha Bhoke Murungu, *towards a criminal chamber in the African court of justice and human rights*, published in 2011, P 1.

Human Rights), commonly known as the Malabo protocol,⁹⁷ with objective to ensure among other things the respect of the sanctity of human life, condemnation, rejection and fighting impunity.⁹⁸

II.1.1 Overview of establishment of ICC

The United Nations first recognized the need to establish an international criminal court, to prosecute international crimes like genocide at the mid of the 20th century.⁹⁹ By separate resolution United Nations General Assembly broadly endorsed the Nuremberg principles as reflected in the IMT judgment, and approved genocide as crime. The adoption of the resolution relating to genocide accelerated the drafting and adoption of convention on genocide. The adoption of that convention was achieved on 9 December 1948, the convention entered into effect in 1951 with sufficient ratifications.¹⁰⁰

General Assembly of UN, through resolution 260 of 9 December 1948, recognized that in each generation of history, genocide inflicted great losses on humanity, it was satisfied that in order to liberate mankind from such an odious crime, international co-operation was required. Through that resolution, the General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁰¹ Following the adoption of the convention, the international law commission was invited to study the desirability and possibility of establishing an international judicial organ with mission to trial persons charged with genocide.¹⁰² The Commission concluded that the creation of international criminal court was necessary.¹⁰³

After hard discussions, 120 States adopted in Rome, treaty known as the Rome Statute of International Criminal Court on 17 July 1998, For the first time in the history of human beings, States engaged to accept the jurisdiction of a permanent international criminal court for the

⁹⁷ Art 4 (0) of the constitutive act of the African Union *supra* note 154. See also the preamble of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

⁹⁸ *Ibid.*

⁹⁹ Henry T. King Jr, Benjamin B. Ferencz, Whitney R, Harris, origins of the genocide convention, the case western reserve journal of international ILaw, vo. 40, 2007, p.17

¹⁰⁰ Henry T. King Jr, Benjamin B. Ferencz, Whitney R, Harris, *supra* note 99, p.17

¹⁰¹ *Ibid.*

¹⁰² U.N, general assembly, A/RES/3/260 B, 179th plenary meeting 9 December 1948.

¹⁰³ *Ibid.*

prosecution of the responsible of the most serious crimes.¹⁰⁴ After a period of time the statute entered into force on 2nd July 2002 with 60th ratifications.

As it has been pointed out before, the idea to create this mechanism was due to lack of appropriate way by international community to bring on permanent legal basis suspect to justice for the most heinous crimes perpetrated such as genocide, crimes against humanity, war crimes and crimes of aggression. As many States have been sceptic to act when coming upon to prosecute such crimes, the strong way to end such situation by international community, was to recognize first of all that a strong judicial response was needed, before opting to create the international criminal court with mission to eradicate impunity.¹⁰⁵ Nevertheless, the creation of ICC was without obstacles, as several problems and issues have been raised.

The first problem relates to the low of number States parties to the Rome statute. Actually the ICC is based upon its statute which is itself a treaty and therefore depends on the States that have signed up to, and ratified it. This means that out of its States members cooperation and commitment, the jurisdiction of the ICC to prosecute is limited and its power decrease.¹⁰⁶ Out of that, the Court has only jurisdiction to prosecute crimes that have been perpetrated on the territories of its member States, or by persons from non-member States, under the condition that the ICC receive the case referred therein by UN Security Council.¹⁰⁷

II.1.2 The jurisdiction and repression regime of ICC

Respecting or violating the rules is more closed to the human being. From that reality, the international law set out certain rules of behavior for States, and it belong to those State to establish on practical measures either penal or administrative to ensure that its citizens comply with those rules.¹⁰⁸ With regard to the ICC, it has jurisdiction to impose penalties against convicted, but the punishment should not exceed the maximum of 30 years¹⁰⁹, or a penalty of

¹⁰⁴Miroslav Baros, *the establishment of the international criminal court: institutionalizing expedience?* Hertford shire law journal, 1(1), 58-72 see also International Criminal Court, Understanding the international criminal court, <https://www.icc-cpi.int/iccdocs/pids/publications/uicceng.pdf>, accessed on 28th August 2018.

¹⁰⁵ Anna Rosén and Veronica Jorméus Gruner, *supra* note 8, P.3

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ International comity of Red Cross, <https://casebook.icrc.org/law/criminal-repression>, visited on 18/4/2018.

¹⁰⁹ Art. 77 of Rome Statute.

life imprisonment when justified by the circumstances of extreme gravity of the crime and the circumstances of the convicted person.¹¹⁰ In addition, the Court may order a fine under the criteria provided for in the Rules of procedure and evidence, without prejudice to the rights of bona fide third parties.¹¹¹

The crimes like genocide, war crimes, crimes against humanity and the crime of aggression as they are serious crimes of concern to the international community as a whole, are under jurisdiction of ICC as it is provided in Rome Statute.¹¹² The statute states that: The court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

And shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.¹¹³

The Court will have also the jurisdiction on crimes perpetrated after the entry into force of its Statute, the jurisdiction "*ratione temporis*",¹¹⁴ as the crimes committed before are not within its jurisdiction unless a State has made a clear declaration of acceptance the exercise of jurisdiction by the Court with respect to those crimes.¹¹⁵

The ICC has jurisdiction to proceed when crimes under its article 5 like genocide, crimes against humanity and war crimes are committed either in the territory of a member State,¹¹⁶ by nationals

¹¹⁰ Article 77 of Rome statute.

¹¹¹ Article 77 of Rome statute.

¹¹² Article 5 of the Rome statute.

¹¹³ Article 5 of the Rome statute.

¹¹⁴ Article 11 (1) of Rome statute

¹¹⁵ Article 11 (2) of Rome statute and article 12 (3).

¹¹⁶ Article 12 (2(a))

of a member State.¹¹⁷ When a State that has not ratified the Statute has made a clear declaration accepting the Court's jurisdiction over the crime committed within its territory, such declaration enable the Court to prosecute.¹¹⁸ The ICC has also jurisdiction when the United Nations Security Council (UNSC) acting under Chapter VII of the United Nations Charter refers a specific situation to the ICC irrespective of countries consent or membership to the ICC,¹¹⁹ or in case the prosecutor may initiate a case *proprio motu*, if the pre-trial chamber believes that there is a reasonable ground to proceed investigation.¹²⁰

II.2.1 Overview of establishment of the ACJHR

The idea to create the International Criminal Law Section within the ACJHR, begun in February 2009 in Addis Ababa, Ethiopia at the 12th ordinary Session of the Assembly of the African Union. During that session, the Commission of the African Union in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, was requested the Assembly of the Africa Union to examine the implications of the Court being empowered to proceed with the international crimes such as war crimes, crimes against humanity and crimes of genocide.¹²¹

Since the commission gave its opinion, the African Union (AU) has often adopted several resolutions to establish an international court, or more precisely, multilateral criminal jurisdiction for Africa.¹²² Precisely in June 2014, the 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 «*Malabo protocol*», and invited all AU member States to sign and ratify it.¹²³ The yet to be established African Court of Justice and Human Rights (ACJHR) has extent jurisdiction to try crimes under international law and transnational crimes.¹²⁴ The genesis competence for the ACJHR was

¹¹⁷ Article 12(2)(b)

¹¹⁸ Article 12(3)

¹¹⁹ Article 13 (b) of Rome statute

¹²⁰ Article 13 (c), article 15(4)

¹²¹ Moritz Vormbaum, *the search for alternatives: The African criminal court*, found available on <https://www.ispionline.it/it/pubblicazione/search-alternatives-african-criminal-court-16451>, accessed on 14th, August, 2018.

¹²² Amnesty international, *supra* note 17.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

limited to two sections namely a general affairs section and a human rights section. The third section has been empowered with jurisdiction over international crimes as it is stipulated by the Malabo Protocol.¹²⁵

II.2.1.1 Fundamental ground of the existence of Malabo Protocol

The idea to establish a section within the ACJHR susceptible to prosecute international crimes by an African regional court was based on several grounds among them the five pillars, which are the judicial necessities to prosecute international crimes, the implementation of the Constitutive Act of African Union, the prosecution of special crimes committed in Africa, to impede the ICC with its intention to prosecute only the African leaders and to encounter the misuse of universal jurisdiction principle.¹²⁶

II.2.1.1.1 Judicial necessities to prosecute international crimes

The desire to prosecute international crimes in Africa was first expressed in the 1970s during the discussion on the African Charter on Human and Peoples' Rights, as it has been reported.¹²⁷ At the time, the proposal to include a court with international criminal jurisdiction was rejected by the committee of experts responsible for drafting the Charter.¹²⁸ Accurately, as the crime of apartheid was being committed in South Africa at a large scale, the international convention on the suppression and punishment of the crime of apartheid was adopted by the Assembly of United Nations.¹²⁹

Despite that apartheid existed as an international crime until 1990, there was no international criminal court that had jurisdiction to prosecute it. Even the special penal court proposed by the United Nations in the 1980s to try the crime of apartheid had ever operated. Instead, on basis of universal jurisdiction principle, it was left to States to enact legislation to enable them to

¹²⁵ Ricarda Rösch, thinking globally, acting regionally <https://voelkerrechtsblog.org/thinking-globally-acting-regionally/>, accessed on 14th August 2018.

¹²⁶ Ademola Abass, *the Africa Criminal Court, a commentary on the Malabo Protocol, Historical and Political Background to the Malabo Protocol*, P.11-28.

¹²⁷ Ademola Abass, *supra* note 126.

¹²⁸ *Ibid.*

¹²⁹ International convention on the suppression and punishment of the crime of apartheid, adopted by general assembly of UN on 30 November 1973.

prosecute the crime of apartheid but in vain.¹³⁰ As the deception of Africans significantly increased, the conclusion was that all crime committed in Africa would not be of prosecutorial interest to the rest of humanity, and Africans were called and obliged to find the solution without expecting the outside solution. Thus, the Africans accelerated the creation of a competent judicial organ that may try suspects having committed international crime on Africa territories.¹³¹

11.2.1.1.2 The implementation of constitutive act of African Union

The AU under its Constitutive Act and other African treaties embodied a clear legal basis for prosecuting international crimes in Africa.¹³²

In fact, the Constitutive Act States that:

The Union shall have the right of the Union to intervene in a member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.¹³³

In addition, the Constitutive Act provides certain guarantees to the people of African continent in terms of human rights as it states among its objectives that shall « *promote peace, security, and stability on the continent, and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.*»¹³⁴

In line with fighting against impunity and ensuring security and peace of African people, the article 4 (h) was amended by the Protocol on Amendments to the Constitutive Act, which was adopted in February 2003 and is not yet in force, by adding at the end of the sub-paragraph the words “*as well as a serious threat to legitimate order to restore peace and stability to the Member State of the Union upon the recommendation of the Peace and Security Council.*”¹³⁵

¹³⁰ Ademola Abass, *supra* note 126, p.16.

¹³¹ *Ibid.*

¹³² *Ibid.*

¹³³ Article 4(h) of the Constitutive Act of the African Union

¹³⁴ Preamble (f, g) of the Constitutive Act of the African Union

¹³⁵ Art. 4(H) of the Protocol on Amendments to the Constitutive Act of the African Union, adopted by the 1st Extra-Ordinary Session of the Assembly of the African Union, Addis Ababa (Ethiopia), 3 February 2003. Not yet enter into force.

Furthermore, the article 4(o) calls for, among other things, the rejection of impunity as it calls for : *«respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.»*¹³⁶

The perpetration of international crimes like genocide, crimes against humanity, war crimes normally implies the obligation of all stakeholders to take measures to redress them. The establishment of international criminal law section has been seen as response and of a great necessity, as it is not easy for the national courts to prosecute such crimes when responsible are senior officials of their own governments, or to use the universal jurisdiction principle which is contested in several corner of the world when perpetrators are not nationals.¹³⁷

The former president of Chad Hissène Habré Case's may serve us as an example. At the beginning, Belgium issued an arrest warrant against Habré, who was at that time in Senegal as refugee. And the Senegal under the blessing of AU refused to extradite him to Belgium and the AU opted to prosecute him before an extraordinary African Chambers.¹³⁸ In May 2015 the Habré has been convicted for crimes against humanity, torture and war crimes during his 1982-1990 rules, and chamber sentenced him to life imprisonment.¹³⁹ Before deciding on that case, there was conflict between Chad and Senegal as both claimed to have jurisdiction to try suspect, finally Senegal was reluctant to extradite Habré invoking that he enjoyed absolute immunity for crimes he committed while he was in office¹⁴⁰.

This case shows that it is not very relaxed to national courts neither to the courts of other African States, to provide justice especially to government officials' suspect of committing international crimes. Consequently, due to that issues, it was an obligation to the African leaders to seek how the ACJHR would be emended in order to deal with a similar situation once occurs again in the future.¹⁴¹

¹³⁶ Art. 4(O) of the Protocol on Amendments to the Constitutive Act of the African Union.

¹³⁷ Ademola Abass, *supra* note 126, p.17

¹³⁸ *Ibid.*

¹³⁹ Chambre Africaine extraordinaire d'Assise d'Appel,,Procureur General vs Hissein Habré on 27th april 2017.

¹⁴⁰ Amnesty international, Senegal land of impunity, at http://www.amnesty.sn/IMG/pdf/Senegal_terre_d_impunite.pdf, accessed on 4th January 2019.

¹⁴¹ Ademola Abass, *supra* note,126.p.18.

II.2.1.1.3 Prosecution of particular crimes in Africa

The additional crimes under the jurisdiction of the ICLS of ACJHR was justified by the crimes that are more specific and relevant to Africa's political and economic context than those of the Rome Statute.¹⁴² Among those crimes, the unconstitutional changes of government is considered as the most common sources of conflict in Africa,¹⁴³ as well as corporate liability considered as appropriate to Africa.

II.2.1.1.3.1 Unconstitutional changes of government

The crime of unconstitutional change of government is considered as one of the most interesting and controversial crimes under the protocol on the amendment of the protocol on ACJHR that is under jurisdiction of the newly to be established International Criminal Court Section.¹⁴⁴

In fact, according to the article 28 A of Malabo protocol «*Unconstitutional changes of government constitute a crime under jurisdiction of international criminal court section*» of ACJHR.¹⁴⁵ This crime is particular to the African continent since the main causes of political instability include frequent shifts from one type of government to another as well as irregular changes of the government. While the Rome Statute is limited to the most serious international crimes, which have been often committed in the aftermath of the infringement of law and order, the African Union undertaken to prevent such crime by limiting unconstitutional changes particularly in AU's Constitutive act, as it provides that «*Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.*»¹⁴⁶ By considering it as a core crime which causes instability in Africa, it was estimated that such crime should be tried and examined along with other crimes under jurisdiction of

¹⁴² KPTJ, *supra* note 21.

¹⁴³ Ademola Abass, *supra* note 126, p.18

¹⁴⁴ Article 28 A (4) of protocol on the amendment of the protocol on ACJHR, see also the Harmen Van Der Wilt, Unconstitutional Change of Government: A New Crime within the Jurisdiction of the African Criminal Court, *Leiden Journal of International Law*, Volume 30, pp. 967-986, 2017.

¹⁴⁵ Article 28 A (4) of protocol on the amendment of the protocol on ACJHR

¹⁴⁶ Article 30 of Constitutive Act

ACJHR,¹⁴⁷ hoping that it will promote a high respect for the rule of law and inducing a connected reduction of armed conflicts.¹⁴⁸

In reality, unconstitutional changes of government do not only impact on one State, but also it impacts almost on the entire continent since it may create an enormous growth in the number of refugees in many African States.¹⁴⁹

Furthermore, unconstitutional change of governments may also create various forms of instability and undermine a solid consolidation of democracy in Africa, and impinge the objectives and principle of AU Constitutive Act in terms of democracy and security of human being,¹⁵⁰ which are to promote security, stability and peace, on the African continent as well as to stimulate democratic principles and stable institutions, good governance and full participation of citizens.¹⁵¹

Generally, conflicts have proved to be contagious specifically in Africa, thus, from that experience, the African States have a common interest in suppressing any form of unconstitutional change of government.¹⁵² Then, the suitable legal way to respond adequately to those concerns is to impose sanctions on an unconstitutional government by international criminal section established by Africans themselves,¹⁵³ in light to promote in Africa greater respect for the rule of law and democracy.¹⁵⁴

II.2.1.1.3.2 Corporate liability

Another specific crime provided by Malabo Protocol in its article 46C is the corporate liability or legal liability provide in its article 46(C). The origin of providing that crime, is that the Africa suffered not only from the hands of individuals acts, but also from corporations activities.¹⁵⁵ The

¹⁴⁷ Ademola Abass, *supra* note 126, p.19.

¹⁴⁸ Ademola Abass, *supra* note 126, p.19.

¹⁴⁹ J. Shola Omotola, *unconstitutional changes of government in Africa, what Implications for Democratic Consolidation*, <http://www.diva-portal.org/smash/get/diva2:478511/FULLTEXT01.pdf> accessed on 18 August 2018.

¹⁵⁰ J. Shola Omotola, *supra* note, 149.

¹⁵¹ Art.3 of Constitutive Act of AU.

¹⁵² Harmen Van Der Wilt, *unconstitutional change of government: A new crime within the jurisdiction of the African criminal court*, *Leiden Journal of International Law*, Volume 30, pp. 967-986, 2017.

¹⁵³ J. Shola Omotola, *supra* note 218.

¹⁵⁴ *Ibid*

¹⁵⁵ KPTJ, *supra* note 21, p.9

example of human rights violations of mining companies happened in the Democratic Republic of Congo, where the crimes committed in the context of natural resource exploitation reflects the broader absence of justice and create impunity in the county.¹⁵⁶ Indeed, foreign international companies may particularly damage to African economies. A recent study, showed that Africa loses billions of US dollars every year to tax avoidance and illicit financial discharge.¹⁵⁷ In recognition of this, the Malabo Protocol instituting a criminal section, that shall have also jurisdiction over corporate liability.¹⁵⁸

The Protocol gives jurisdiction over both natural persons and entities based on consent, territorial, nationality, passive personality and protective principles. This option represents a significant advancement of international criminal law.¹⁵⁹ The destructive impact of corporate wrongdoing in Africa explains this development. The Protocol could enable African States to respond more effectively to challenges created by corporations, thereby transforming the justice by holding corporate criminally accountable for their illegal acts.¹⁶⁰

Apart from that legal motivation to create an international criminal law section, there are other reason behind the institution of such body, notably the consideration of ICC as an instrument of Western to prosecute African leaders and abuse of application of Universal Jurisdiction.

II.2.1.1.4 Ascertainment of lack of impartiality by the ICC

Apart from crimes that are appropriate to African, another reason behind the creation of African criminal court section with jurisdiction over international crimes, was that African leaders considered themselves as the most targeted by the ICC¹⁶¹. Since its inception, critics towards

¹⁵⁶ UN mapping report, Democratic Republic of the Congo 1993-2003, at https://www.ohchr.org/Documents/Countries/CD/FS-5_Natural_Resources_FINAL.pdf, accessed on 10th, December 2018.

¹⁵⁷ Global financial integrity, illicit financial flows from Africa: hidden resource for development, at https://www.gfintegrity.org/storage/gfip/documents/reports/gfi_aficareport_web.pdf

¹⁵⁸ Jalloh, K. Clarke, V. Nmehielle, article 46C: corporate Criminal Liability at the African Criminal Court, African court of justice and human and people's rights in context, c. p.42, 2017.

¹⁵⁹ KPTJ, *supra* note 21.P.9

¹⁶⁰ Matiangai Sirleaf, *the African justice cascade and the Malabo protocol* 11 int'l. j. transitional just. (forthcoming March 2017) (peer-review).

¹⁶¹ Benedict Abrahamson Chigara & , Chidebe Matthew Nwankwo, *member States parties' participation as high contracting States parties to the Rome Statute of the international criminal court* (1998) Nordic Journal of Human Rights, p. 264, 2015.

ICC have often designated it to be biased towards African, as it exclusively target to prosecute and investigate the African cases.¹⁶²

Today, the objection that the Africa States are unfairly the only targeted are losing power, because now, the prosecutor of the ICC conducting preliminary investigations in many corners of the world, like in Georgia, Guinea, Colombia, Honduras, Korea, Afghanistan and in Nigeria¹⁶³.

Another ground that may contrast the argument that African leaders are only targeted by ICC, is that the governments of Africa States decided to refer the case to ICC , as 4 of the 8 African countries under investigation referred by Africans, those government are DRC, Uganda, CAR, and Mali.¹⁶⁴ In addition, with full cooperation of Kenya and Côte d'Ivoire, the prosecutor of the ICC opened investigations on her own initiative in those countries., and the UN Security Council had referred two cases to the court (Sudan and Libya).¹⁶⁵ From that situation, it is not the ICC that taking the first step to prosecute the crimes under its jurisdiction but it is clear that the African leaders went to the ICC first to request prosecution for their citizens.

As a matter of law, it must be recalled that the UN under Chapter VII of the UN Charter is final organ with regard to the international peace and security matters.¹⁶⁶ Focusing only on the legality of the AU's position to not co-operate with the ICC over its indictments against African leaders on ground that they are the only one targeted, such position risks to arise contradiction with the UN's pan for peace and security which is summarised by the discretionary competent that have been attributed to the organisation,¹⁶⁷ particularly in the field of human rights protection as a means of ensuring international peace and security.¹⁶⁸ Indeed, the AU member States are required to comply with the decisions of the UN and to respect decisions of international tribunals as appropriate, because UN possesses discretionary powers under both the UN Charter

¹⁶² Alexandra Zavis and Robyn Dixon, Los Angeles times , *only Africans have been tried at the court for the worst crimes on earth*, 2016. at <http://www.latimes.com/world/africa/la-fg-icc-africa-snap-story.html>, visited on 27th, September 2018.

¹⁶³ Benedict Abrahamson Chigara & , Chidebe Matthew Nwankwo, *supra* note, 230.

¹⁶⁴ Désiré Assogbavi, The ICC or the AU: who can ensure justice for African victims?, <http://www.coalitionfortheicc.org/news/20170216/icc-or-au-who-can-ensure-justice-african-victims>, visited on 24th September 2018.

¹⁶⁵ Désiré Assogbavi, *supra* note 233.

¹⁶⁶ Benedict Abrahamson Chigara & Chidebe Matthew Nwankwo, *supra* note 230

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

and the Rome Statute,¹⁶⁹ by affording mutual assistance and respecting the measures decided upon by U.N Security Council.¹⁷⁰ Thus, there is no legal ground for the Africa leaders to complain that the ICC targets them in inappropriate way.

II.2.1.1.5 The abuse of applicability of universal jurisdiction

Since a former Chilean dictator Augusto Pinochet was arrested in London early 1988, from that moment the principle of universal jurisdiction has attracted global attention.¹⁷¹ However, this principle is not a new , as for more than three centuries, States have used to exercise it over piratical acts on the high seas, regardless of the nationality of the offender or victims.¹⁷²

International law has established principles for determining when a State may exercise authority over offenses that also affect or has a link with the interests of another States.¹⁷³ The universal jurisdiction allows any nation to prosecute suspects responsible of committing some crimes even in the case prosecuting lacks a genuine connection with the victim, crimes or offenders.¹⁷⁴

Crimes under international law that involve the exercise of universal jurisdiction, is highly discussed, still and requires a certain number of legal and political commitment in its implementation. When taking into account the interests of justice, the national interest and other criteria, the State leaders that intervene to enforce international prohibitions, must take the decisions of high importance that are expected to reflect domestic decisions and able to change the mind of their citizens with regard to universal jurisdiction principle.¹⁷⁵

¹⁶⁹ *Ibid.*

¹⁷⁰ Charter of the United Nations, Chapter VII, articles 39-51.

¹⁷¹ Human Rights Watch, universal jurisdiction in Europe, the State of the art volume 18, No. 5(D) June 2006, at <https://www.hrw.org/sites/default/files/reports/ij0606web.pdf>, accessed on 29th September 2018.

¹⁷² Dalila V. Hoover, universal jurisdiction not so universal: A time to delegate to the international criminal court,p.4,2011 Student Conference Papers, 2011 at

https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?referer=https://www.google.rw/&httpsredir=1&article=1081&context=lps_clacp, accessed on 27th September 2018.

¹⁷³ Kenneth C. Randall, *universal jurisdiction under international law*, text L. Rev. 785 (1987-1988),P. 785.

¹⁷⁴ *Ibid.*

¹⁷⁵ Dalila V. Hoover, *supra* note 172.

II.2.1.1.5.1 The use of universal jurisdiction against Africans

The legitimacy of international criminal justice mechanisms has been criticized by some on the African continent following the indictment and trials of heads of State and senior government officials, carried out by both European courts and the International Criminal Court (ICC).¹⁷⁶

The famous case is that of Mr. Yerodia. Indeed, the Belgium magistrate issued an arrest warrant in absentia against Congo Minister for the foreign affairs Mr. Yerodia accusing him of grave breaches of the 1949 Geneva Conventions for perpetrating war crimes and crimes against humanity.¹⁷⁷ Later the ICJ ruled that the arrest warrant filed by Belgium authority against Abdulaye Yerodia Ndombasi the foreign Minister of DRC was unlawful by emphasising that:

rules governing the jurisdiction of National Courts must be carefully distinguished from those governing jurisdictional immunities, as jurisdiction does not imply absence of immunity, it States that although all States have universal jurisdiction over international crimes that should not in any way affect immunity under customary International law.» The court held that personal immunity remains opposable before the Courts of foreign States, even in cases involving the crimes over which universal jurisdiction applies.¹⁷⁸

Another case is about Hissène Habré, where Belgium sought his extradition from Senegal where he was arrested and being trialed in Belgium.¹⁷⁹ However, the Belgium request for extradition did not meet a positive response from Senegalese Court, as the court has refused to grant Belgium's request for extradition. Instead, after referring the matter to the African Union, it has been decided that the matter fell within its jurisdiction and eventually mandated Senegal to prosecute Hissène Habré.¹⁸⁰

¹⁷⁶ KPTJ, *supra* note 21.

¹⁷⁷ Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), Judgment, I.C.J. Reports, 2002, p. 3, 166, available at <http://www.icj-cij.org/docket/files/121/8126.pdf>

¹⁷⁸ Arrest Warrant, *supra* note, 177.

¹⁷⁹ Jurist legal news and research, 29 september 2005, Belgium Issues international arrest warrant for former Chad Leader, available at <http://jurist.law.pitt.edu/paperchase/2005/09/belgium-issues-international-arrest.php> (last visited March 10, 2011)

¹⁸⁰ The Executive Council, thirteenth ordinary Session, 24-28 June 2008, Report of the Commission on the Use of the principle of universal jurisdiction by Some non-African States as recommended by the conference of ministers of justice/attorney general, available at http://www.unhcrilo.org/Regional_Partners/Docs/ExeCoun_2008b.pdf.

The African leaders considered the arrest warrant as the misuse of universal jurisdiction and uses against Africans only, as there were other cases untried without any legal reason, like a case of Palestinian refugees and survivors from several crimes, submitted to Belgium seeking to have Prime Minister Ariel Sharon tried for his alleged involvement in the massacre of Palestinians in Sabra and Shatila refugee camps in 1982 while the camps were under Israeli control.¹⁸¹ Another case, regarding various Iraqi victims seeking the former U.S. Presidents, George H. W. Bush, William J. Clinton, George W. Bush and his senior officials, and President Barak H. Obama, along with four U.K. Prime Ministers to be tried for various crimes they are supposed to initiate like crimes against humanity and genocide committed during the bombing of Baghdad in 1991 and 2003.¹⁸² But Belgium did not decide over the cases and created an unprecedented judicial confusion which materially impacted on the international community.

These four cases illustrate how proceedings about universal jurisdiction are more complexes and more difficult because as one can see they are often left to the discretion of political channel rather than judicial one.

Accordingly, during this sub section, we will attempt to analyze the legality of Protocol to ACJHR, to see in particular if it is in conformity with the VCLT, ICC and UN Charter.

II.2.2 Legality of Malabo protocol vis – a-vis other treaties

Like other treaties, the Malabo protocol took its origin from a decision of African leaders representing their respective countries. Consequently, the initiators of Malabo protocol have competence to negotiate and do whatever necessary in line with the creation of international criminal law section in Africa.

¹⁸¹ Wolfgang Kaleck, *from Pinochet to Rumsfeld: universal jurisdiction in Europe 1998-2008*, 30 MICH. J. INT' L L., 927, 933 (2009)

¹⁸² See Global Research, Brussels Tribunal, Law Suit Against 4 US Presidents and 4 UK Prime Ministers for War Crimes, Crimes Against Humanity, & Genocide in Iraq, Statement on Closure of Legal Case for Iraq in Spain, February 10, 2010, available at <http://www.globalresearch.ca/index.php?context=va&aid=17535>

II.2.2.1 Legality of Malabo protocol vis- à -vis the Rome Statute

Many scholars and commentators of ICLS have the view that there is no basis in the Rome statute that impend regional judicial entities to prosecute international crimes. By result, if a regional court like the ACJHR with its international criminal law section tries suspect of committing international crimes, one should not claim that it has no jurisdiction over those international crimes, and that not complies with the ICC Statute.¹⁸³ Furthermore, Ademola Abass is of the view that there is no legal basis that should impede the African States to create a court which reflect their own context.¹⁸⁴ He sustain his argument by showing that a court created by multilateral treaty should not seek an approval of another similar treaty to justify its own existence, as neither under international law nor national law based on treaty or general principles, there is no provision that forbids a State to ratify a treaty to the exclusion of all other treaties, even those adopted lastly governing the same subject as the preexisting one.¹⁸⁵ He is of the view that in specific case, the members of African Union non State party to the Rome Statute cannot seek the legality under the Statute that does not bind them.¹⁸⁶ Indeed, it is mistake to seek legality of Protocol on the Amendment to the Protocol on the ACJHR since there is no specific provision of the Rome Statute that prohibits its States parties from adhering to other treaties, even those likely of establishing courts of a same nature as the ICC.¹⁸⁷ Ahead of international community, particularly with regard to the law of treaty, the Rome Statute has not supremacy to other treaties and cannot restrain the power of its States parties to deploy their consent to ratify other treaties.¹⁸⁸

Ademola Abass gives an example of other pre-existing courts, and argues that before the creation of the ICC, there were other international criminal tribunals like the ICTY for former Yugoslavia and ICTR both tribunals prosecuted the same crimes that the ICC now does without any legal complication.¹⁸⁹ He observes that during their respective works, the creation of those two tribunals have not extinguished the right of the international criminal court to prosecute the same

¹⁸³ Chacha Bhoke Murungu *supra* note 96.

¹⁸⁴ Ademola Abass, *Historical and Political Background to the Malabo Protocol*, 2017, p.21.

¹⁸⁵ Ademola Abass *supra* note 184.

¹⁸⁶ *Ibid.*

¹⁸⁷ Ademola Abass *supra* note 184.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

crimes under their jurisdiction.¹⁹⁰ He maintains that since two tribunals exercised their activities parallel to those of ICC, the latter should have not any barrier to prosecute the same crime provided in Malabo protocol.¹⁹¹

He supports his argument by invoking Vienna convention on the law of treaties,¹⁹² that forbids only treaties that may breach a peremptory norm of international law, already assumed under another treaty, since there are no peremptory norms in the Rome Statute that forbid the establishment of international Court. Then, the creation of an African court to prosecute such crimes should be seen as positive value rather to be in conflict with Rome Statute.¹⁹³

II.2.2.2 Legality of Malabo Protocol vis -à- vis the Vienna convention on the law on treaties

The Vienna convention on law of treaties indicates that any kind of interpretation must comply with the principle of good faith and effectiveness, as it States that: « A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose... »¹⁹⁴

In order to maintain coherence and legal validity in the system, it is necessary to respect a set of principles and rules of general international law, in particular the provision of the Vienna convention of the law of treaties (VCLT).¹⁹⁵

The principle of good faith on treaty interpretation is provided in part of art. 31 of Vienna Convention and States as follow: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose There shall be taken into account, together with the context :(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;(b) any subsequent practice in the application of the treaty which

¹⁹⁰ *Ibid.*

¹⁹¹ *Ibid.*

¹⁹² Article 53 of the Vienna Convention on the Law of Treaties

¹⁹³ Ademola Abass, *supra* note 184.

¹⁹⁴ Article 31-33 of Vienna convention on the Laws of Treaties Concluded at Vienna on 23 May 1969.

¹⁹⁵ Articles 31–33 of Vienna convention on the Laws of Treaties Concluded at Vienna on 23 May 1969.

establishes the agreement of the parties regarding its interpretation. . . . A special meaning shall be given to a term if it is established that the parties so intended".¹⁹⁶

The said convention provide also that: *Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:(a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.*¹⁹⁷

The law of treaty recognizes the principle of effectiveness and good faith of the treaty as useful even when a treaty is open to two interpretations,¹⁹⁸ and that at any case one of them should deprive another to produce its effect, the good faith and object and purpose of the treaty require that the effective interpretation should be applied,¹⁹⁹ in order to allow each of them to work in safe way.

By recalling article 53 of the Vienna Convention on the law of treaties, a treaty is void only if at the time of its conclusion, it conflicts with a peremptory norm of general international law.

The opponent to the African criminal law section as they consider the Malabo Protocol like a political tool to compete with the ICC, and be used as a strategic mechanism to shield senior officials from prosecution of international crimes,²⁰⁰ they cannot prove with a legal support that the creation of international Criminal law section conflict with Rome statute.²⁰¹

In fact, when the States parties to a particular treaty decides to conclude another treaty which establishes obligations similar to those of the previous treaty, the only legal requirement they must satisfy is to avoid that the new treaty conflict with obligations assumed under the previous treaty.²⁰² Thus there is no legal reason to believe that the establishment of international criminal

¹⁹⁶ *Ibid.*

¹⁹⁷ Articles 31–33 of Vienna convention on the Laws of Treaties Concluded at Vienna on 23 May 1969.

¹⁹⁸ Ompha Malima, *protocol: the legal muscle to tackle crimes of dignity in Africa*, at <https://www.africamattersinitiative.com/single-post/2018/02/11/The-Malabo-Protocol-the-legal-muscle-to-tackle-crimes-of-dignity-in-Africa>, accessed on 29th September 2018

¹⁹⁹ Ompha Malima, *supra* note 275.

²⁰⁰ Ademola Abass, *supra* note 184.

²⁰¹ *Ibid.*

²⁰² *Ibid*

law section provide in Malabo protocol is not in conformity with both the Rome statute establishing the ICC and the Vienna Convention on the Law of Treaties.

II.2.2.3 Legality of the Malabo protocol vis –à-vis the UN Charter

Obviously there is no provision under the UN Charter that explicitly either allow or prohibits intergovernmental organisations like the AU to establish criminal courts to try international crimes, but the examination of article 52 of the Charter with more attention may answer the question whether the proposed criminal section within ACJHR is in conformity with the Charter or not. The article 52(1) of the UN Charter reads as follows: *«Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the UN. »*

Considering the said article 52(1) of UN Charter, the AU may consider itself as a regional organization, as it has been endorsed by itself.²⁰³ Thus, as the AU plays a role in the maintenance of peace and security in Africa as it described in its constitutive Act. The AU can be considered as a regional organisation under Article 52(1) of the UN Charter.²⁰⁴ In light of maintaining security and peace in the world, under chapter seven, the UNSC can pass a resolution when it considers a situation as a threat to international peace and security, hence, the proposed international criminal law section of the ACJHR is in line with purpose of the UN Charter, since it has jurisdiction to prosecute international crimes like genocide, war crimes and crimes against humanity considered by UNSC as a threat of peace and security in the world.

II 2.2.4 Advantages of international criminal section of the ACJHR

The establishment of proposed ICSL should not be seen in sense of enabling only the African States officials to escape from prosecution from ICC, but would be seen as better than other criminal jurisdictions, especially that of ICC when it comes to prosecute suspects from the

²⁰³ Protocol relating to the establishment of the Peace and Security Council of the African Union adopted 09 July 2002, last signature March 07.2017, date of entry into force 26 December 2003 art 17 (2).

²⁰⁴ Constitutive Act Art 3(f) and (e);

Africa continent.²⁰⁵ While there are similar or even worse situations in other continents than what happened in Africa and when the ICC obviously focusing on situations and conflicts in Africa only this behavior is considered as selective justice.²⁰⁶ Consequently, for African the proposed ICSL will mainly solve the problems that the ICC has faced in its eight years of operation, as there are several international crimes at the African continent which necessitate the intervention of a criminal tribunal to try and sentenced the offenders.²⁰⁷

The access to justice is another advantage that can bring the ICLS as it would be easily accessible for victims and all persons involving in perpetration of international crimes.²⁰⁸ Along with that, the proposed international criminal law section also will enhance the effectiveness because when it comes to accessing the crime scene, acquiring firsthand information and interviewing witnesses,²⁰⁹ that is very useful with regard to the protection of the specific evidences that might be destroyed if processes took longer, without ignoring that it will probably set an important deterrent for future perpetrators of such crimes around.²¹⁰ Finally, one cannot ignore to describe other advantages that will bring the ICLS like the defense and victim's office, the additional crimes to be prosecuted like corporate liabilities now considered as crime.²¹¹

II 2.2.5 The challenges of the international criminal section of ACJHR

Many challenges are point out in relation to the criminal law section of ACJHR. To be operational, the ICLS of ACJHR needs more cooperation and sustainable means, but the lack of political will from African States to make it operational,²¹² financial constraint of the AU to sustain the expensive costs of international criminal proceedings, the issue of immunity, the narrow number of the judges to ensure speedy judicial process,²¹³ may hinder the ICLS to achieve its objectives. But a big challenge that is to be analyzed in this section is about the jurisdictional

²⁰⁵ Charle Sello Mabunda, *the Pros and Cons of the criminal jurisdiction of the proposed African court of justice and human rights*, Africa institute of south Africa briefing No 98 November, 2013,P.2

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.*

²⁰⁸ Titulaer, *a the power of empathy in conflict resolution*. peace and conflict monitor, 24 June 2012. Available at: <http://www.monitor.upeace.org/innerpg.cfm?id=714> Accessed 14th December 2018.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ KPTJ, *supra* note 21.

²¹² See and read concerns raised by the Peace and Security Council of the AU in its Communiqué of the 175th meeting, 5 March 2009, *supra* note 54, §§ 1-2; Decision Assembly/AU/Dec.221 (XII), *supra* note 55, § 2.

²¹³ KPTJ, *supra* note 21.

conflict between the ACHJR and the ICC especially with regards to African States party to both the Rome Statute and Malabo protocol, when it comes to prosecute African Senior officials.

II.2.2.6 Jurisdiction and repression regime of the ICLS

The international crimes namely genocide, war crimes and crimes against humanity will be under jurisdiction of ICLS of ACJHR.²¹⁴ In addition, the ICLS of ACJHR will have power to try transnational crimes that include terrorism, piracy, and trafficking in persons and drugs. The matters related to the accountability of governments, multi-national corporations over the exploitation of natural resources, money laundering and corruption, unlawful changes of government as well as the crime of aggression will be also fall under jurisdiction of the new criminal section of ACJHR.²¹⁵ The specificity in terms of jurisdiction is that the listed crimes that are subject to prosecution are not exhaustive, since through consensus the Assembly of the African Union may extend jurisdiction of the Court by incorporating additional crimes.²¹⁶

Furthermore, except the sentences, the court will have the jurisdiction to order the surrender of any property , proceeds or any asset acquired unlawfully or by criminal conduct, ordering to return to their rightful owner or to an appropriate member State,²¹⁷ without prejudice to the compensation and reparations to victims.²¹⁸

The Court has also the jurisdiction *ratione temporis* as it will have jurisdiction only with respect to the crimes committed after the entry into force of protocol of ACJHR,²¹⁹ meaning that if State becomes a party to the protocol after its entry into force the court may exercise its jurisdiction only with respect to crimes committed after its adhesion.²²⁰

²¹⁴ Article 43 A of Malabo protocol

²¹⁵ Article 28A of Malabo protocol (1)

²¹⁶ Article 28A of Malabo protocol (2).

²¹⁷ Article 43 A of Malabo protocol

²¹⁸ Article 45 of Malabo protocol

²¹⁹ Article 46 E of Malabo protocol

²²⁰ *ibid*

II.3 The immunities before the international criminal court (ICC) and ICLS of ACJHR

The Rome Statute as well as the amendment of ACJHR provides within their provisions the concept of immunities.²²¹ But those provisions are without criticisms from different sides, since their establishment had potential purpose to eradicate impunity.

II.3.1 The immunities before the international criminal court (ICC)

The Rome statute intentionally considered two immunities structure for State officials before the ICC. First, for officials from States that are party to the Rome statute treaty²²², and another one for officials from States that are not party to the Rome statute.²²³

II.3.1.2 The immunities for officials from State parties to the Rome statute

The article 27 of the Rome statute, will serve us, as we are attempting to analyse the immunities of officials of States party to the Rome statute. Indeed, the article 27 of the Rome statute supports the existing of customary international law norm that forbid senior State officials to stand behind personal immunities in order to escape prosecution for international crimes they committed or supposed to commit before international criminal tribunals.²²⁴

In general, neither functional nor personal immunity operates with respect to any proceeding connected to the ICC. The article 27(2) of the Rome statute of the International Criminal Court is more clear about that issue, as it states that: « *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.* » Actually by ratifying the Rome statute, there is presumption that the States waives rights to its officials who may have such immunities and express an explicit denial about immunities either within international or national law.²²⁵

²²¹ Arts 27,98 of Rome Statute and 46A bis of Malabo protocol

²²² Art.27 of Rome statute

²²³ Art.98 of Rome statute

²²⁴ Sukhija, comment on the arrest question, human rights and international criminal law ICC forum, available on internet at: <http://iccforum.com/forum/permalink/93/4084>. Visited on 25th May, 2018.

²²⁵ See Akande and Sangeeta shah, *supra* note 56.

In addition, the article 27 (1) not allows State to escape criminal responsibility for crime under the statute to obtain reduction of punishment, as it States that: *This Statute shall apply equally 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*, the second paragraph of article 27 as it has been said above, could not be a way of officials of a State member to Rome statute to invoke immunity, by preventing the court from exercising its jurisdiction over the officials suspected of committing international crimes or to be a room of shielding them.²²⁶

The case of Kenyatta indicates explicitly that by ratifying the Rome statute Kenya has directly accepted that article 27 (2) obliges the State party to the Rome statute to wave immunity granted to any officials and acquiesced that head of State must be subject of prosecution before the ICC.²²⁷ This case has affirmed the denial of immunity to the Head of State suspected of committing international crimes before international courts.

While the issue to prosecute State party to the Rome Statute are explicitly found in article 27, the position is less certain and ambiguous for non-State party nationals to the Rome Statute who are suspects of committing international crimes. This issue will be discussed in the sub-section bellow.

II.3.1.3 The immunities for officials from non-State parties to the Rome statute

The principle of *pacta sunt severanda* provided in the Vienna Convention on the law of treaties is mere protection of third party officials suspect of committing international crimes, not to be prosecuted by the ICC, as treaty does not create either obligations or rights for a third State without its voluntary consent.²²⁸ But, there are other many ways that an official of no State party to Rome statute may be suit before the ICC.

²²⁶ Rita Mutyaba, *an analysis of the cooperation regime of the international criminal court and its effectiveness in the court's objective in securing suspects in its ongoing investigations and prosecutions* (2012) 12 ICLR 937.

²²⁷ Situation in the Republic of Kenya. authorization of 31 March 2010. ICC -01/09.P.83

²²⁸ Vienna convention on the law of treaties, art 34 adopted on 3 May 1969 at Geneva.

II.3.2 The waiver of immunities for officials from no State party to the Rome statute

The article 12 of the Rome Statute indicates the first way to prosecute an official from non-State party to the Rome, where the court has jurisdiction over such nationals when they have committed relevant crimes on the territory of States parties.²²⁹ Another way to prosecute a suspect from non- State party to the Rome Statute comes when one or more of such crimes appears to have been committed, is referred to the Prosecutor by a State party,²³⁰ or when the security council refers to the ICC a case acting under Chapter VII of the UN Charter, a situation in which it appears that international crimes have been committed by non-State party nationals.,²³¹ where the prosecutor may initiate a case *proprio motu* as per article 13(c) if the pre-trial chamber believes there is a reasonable ground to proceed investigation as it is provided by article 15.

Indeed, the States that is not party to the Rome Statute they have, as a matter of treaty law, maintains immunities enjoyed by their officials. For a third State to hand that individual over to the ICC, the Court would first of all have to acquire from a non-State party the waiver of its official's immunity.²³² This argument is more comprehensive since Vienna convention on the laws of treaties prohibits a State to oppose a treaty to another States which are not party to that treaty.²³³

II.3.2.1 The waver of immunities vis-à-vis to the other international obligations

In customary international law, as it has said before, heads of State enjoy immunity *ratione personae*, that is to say that heads of State while they are in office cannot be prosecuted or arrested abroad for crimes they have allegedly committed, whether these crimes were committed before or during their taking office.²³⁴ But this position is more complex and reversed before the

²²⁹ Art. 12 (a) of Rome statute

²³⁰ Art.13 (a) of Rome statute

²³¹ Art. 13 (b) of Rome statute

²³² Du Plessis, *the international criminal court that Africa wants* p. 78. at: <http://www.operationspaix.net/DATA/DOCUMENT/4627~v~The International Criminal Court that Africa wants.pdf>. Accessed on 29, may,2018.

²³³ See 34 of Vienna convention on the Laws of Treaties Concluded at Vienna on 23 May 1969, (*pacta tertiis nec nocent nec prosunt.*)

²³⁴ Sarah Nouwen and Mogogo Albanese , *arresting Bashir: how the ICC has violated its own Statute*, March 10, 2009 at: <http://africanarguments.org/2009/03/10/arresting-bashir-how-the-icc-has-violated-its-own-statute/>, visited on June 9th, 2018.

ICC, and more debatable by many scholars when it arrives to States to comply with other international obligations as it is mentioned in article 98 (1) of statute, as it States that:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

To avoid a clash of obligations, during the drafting of Rome Statute, States were well aware of this rule and inserted article 98(1). Indeed, the article prevents the court from putting States in difficult position, as the States may have other obligations under international law by which they remain bound. In order to avoid putting a State in a position where it would both have to arrest and surrender pursuant to an ICC arrest warrant on one hand, and the requirements of article 89 of other obligations under international law on the other side, Sates recognizes other possible obligation of State party to the Rome statute and place article 98(1).²³⁵

Under article 98(1) the court can only requires a State to act in violation of its obligations under international laws on immunity if the Court obtains an immunity waiver from the third State in question , the second paragraph States:

that the court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under customary international law with respect to the State or diplomatic immunity of a person or property of third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.²³⁶

In effect, article 98(1) protects officials of non- States party but not those of States parties, as for them, the immunity was removed under article 27, consequently they cannot claim their officials

²³⁵ Article 98(1) of Rome Statute (“The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity”).

²³⁶ *Rome Statute*, art 98(1).

immunity by invoking article 98 (1).²³⁷ In such situation, the Court must ask the home State of the wanted person, the (sending State), for a waiver of immunity before it can proceed with a request to the State for assistance or surrender. But it may happen that, the sending State doesn't want its citizens or its senior State officials being on trial at the ICC for any crimes, in this case it repudiates implicitly the request. Even if the court will continue to have jurisdiction, it will not compel the sending State to extradite, unless the SC intervenes.²³⁸

Akande opines that the court may ask for cooperation for the arrest and surrender of serving State officials who do not possess immunity *ratione personae*, and former officials alleged to have committed offences of universal jurisdiction.²³⁹ But it is disallowed to the Court to demand assistance to arrest and surrender of senior State officials of non- States party entitled to immunity *ratione personae*.²⁴⁰

For others, the functional immunity whilst it may be available as a defence to prosecution for local or domestic crimes or civil liability, would not be a defence to some international crimes,²⁴¹ despite the suggestion of international law in its current development which consider the functional immunity as a privilege given to the people to perform certain functions of a State.²⁴²

This position above was embodied in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) particularly in the *Karadzic*,²⁴³ *Milosevic* and *Miroslav Tadić* cases.²⁴⁴ The reason behind for the rejection of immunities as a defence of the offenders is that international crimes are not an exclusive acts of State,²⁴⁵ which State official can raise as defence,

²³⁷ Dapo Akande,, international law immunities and the international criminal court (2004) 98 (3) AJIL 407.

²³⁸ A. Cassese, P. Gaeta, and J. Jones, *the Rome Statute of the international criminal court – A Commentary*, Oxford University Press, 2002, p. 1889

²³⁹ D.Akande,, *the jurisdiction of the international criminal court over nationals of non-parties: legal basis and limits* (n 202).

²⁴⁰. Akande, *supra* note 208.

²⁴¹ Jürgen Bröhmer, *diplomatic immunity, head of State immunity, State immunity: misconceptions of a Notorious human rights violator*, 1999, LILJ.

²⁴² *Ibid.*

²⁴³ [Karadžić Radovan, case number \(IT-95-5/18\)](http://www.icty.org/cases/party/703/4) sentenced to 40 years' imprisonment on 24 March 2016, at: <http://www.icty.org/cases/party/703/4>, accessed on 29th September 2018.

²⁴⁴ [Simić et al. \(IT-95-9\) "Bosanski Šamac"](http://www.icty.org/cases/party/818/4), Blagoje Simić sentenced to 15 years' imprisonment on 28 November 2006. Miroslav Tadić sentenced to 8 years' imprisonment, Simo Zarić sentenced to 6 years' imprisonment on 17 October 2003. Proceedings against Slobodan Miljković terminated. Accused died before transfer to the Tribunal, at <http://www.icty.org/cases/party/818/4> accessed on 29th September 2018.

²⁴⁵ Alexander Orakhelashvili, *immunities of State officials, international crimes, and foreign domestic courts: a reply to Dapo Akande and Sangeeta Shah*, in the European journal of international law Vol. 22 no. 3, pp 850-855, 2011.

to add that immunity should not prevail to the existence of *jus cogens* nature of international crimes.²⁴⁶ Thus, in the case everyone is granted of broader immunity because the acts are imputable to States, the restrictive immunity doctrine will collapse, because anything that is imputable to States involving even non-sovereign acts, would be immunized.²⁴⁷

Some scholars observed that “*the idea that individuals who commit international crimes are internationally accountable has now become an accepted part of international law*».”²⁴⁸ Then indisputably, a head of State will personally be liable to be accountable under general customary international law if there is sufficient evidence that he authorized or perpetrated himself such serious international crimes.²⁴⁹

The ILC set out its understanding by saying that “*the absence of any procedural immunity with respect to prosecution or punishment in appropriate judicial proceedings is an essential corollary of the absence of any substantive immunity of defence.*”²⁵⁰ It would be exceptional to prevent an individual from invoking his official position for committing a crime, and allow him to invoke the same argument to escape the effects of his responsibility.²⁵¹

This position is not endorsed by Sarah Nouwen and Mogogo Albanese as they consider that even UN Security Council may refer case to ICC, the person with *immunity personae* should not be subject to any act of the arrest. For them, the Court (ICC) should not believe for example the removal of immunity to Al Bashir simply because the UN Security Council referred the situation in Darfur to the ICC acting under Chapter VII of the UN Charter.²⁵²

They indicate further that when the entire Statute applicable, the referral in contrary allows immunity when reconciling article 27 and article 98 in legal contexts. They explain moreover that in the context of article 98(1), for example in the case of Al Bashir, Sudan is still a “*third*

²⁴⁶ Alexander Orakhelashvili, *supra* note 245.

²⁴⁷ Alexander Orakhelashvili, *supra* note 245.

²⁴⁸ Arthur Watts, *the legal position in international law of Heads of States, Heads of government and foreign ministers* at Page. 82.

²⁴⁹ Arthur Wattss *supra* note 116. See also Regina v Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On appeal from the Divisional court of the Queen’s Bench Divison). Also found at <http://www.parliament.thestationeryoffice.co.uk/pa//id199899jd990324/pino2.htm> (last visited on 22 March 2015)

²⁵⁰ Draft code of crimes against peace and security and immunity in Cassese P. Gaeta and J.Jones. *The Rome Statute of International Criminal Court – A commentary*, Oxford University press, 2002. P. 989

²⁵¹ *ibid.*

²⁵² Sarah Nouwen and Mogogo Albanese, *supra* note 234.

State"; the referral itself has not given Sudan a status of coming a State party to the Rome Statute.²⁵³ They added that Sudan's obligation to cooperate with the court, for instance, originate not from the statute itself but not from the Security Council resolution, by adding that article 98(1) related to immunity still be applicable as there is no provision in the Security Council's resolution that excludes the applicability of this article.²⁵⁴ They argue to conclude that the judges of ICC only reasoning simply about the circulation of the arrest warrant among States other than Sudan, but that they cannot justify inapplicability of article 98 related to the waiver of the immunity obtaining through the cooperation of third State.²⁵⁵

Concisely, cooperation with respect to waiver of immunity and consent to surrender provided by article 98 contemplates a hypothetical situation in which the ICC seeks cooperation from a State Party (here considered as requested State) in the form of the surrender of the person or property of third State when such action on the part of the requested State will conflict with its obligation under international law.²⁵⁶ It also contemplates the situation in which the ICC seeks surrender or assistance that "*would require State party to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State.*"²⁵⁷ In case the receiving State comply with demand of ICC, it will undermine on another side its obligation toward the third State, and if it remains with the first position to maintain immunity for its citizens, then, the individual wanted should escapes liability, which obviously conflict with intentions and content of article 27(2).²⁵⁸ From those controversies set out above, the members of the Rome Statute are required to review the statute to reconcile article 27 and article 98(1) in order to enable ICC to work fairly and avoid ambiguous interpretation on the side of State who have not ratified the Rome statute.

²⁵³ *Ibid.*

²⁵⁴ Sarah Nouwen and Mogogo Albanese, *supra* note 234.

²⁵⁵ *Ibid.*

²⁵⁶ Chimene Keitner, *crafting the international criminal court trials and tribulations in Articles 98(2)*, University of California, Hastings College of the Law, 2001, p.233.

²⁵⁷ *Ibid.*

²⁵⁸ Meghan Jakbson, *immunity versus impunity? reconciling articles 27(2) and 98(1) of the Rome statute*, p.13

II.4 The immunities provided to the protocol on the African court of justice and human rights (ACJHR)

The adoption of Malabo protocol is considered as a legal step to address and criminalize the crimes that are closed to the continent. However, the immunity clause provided in Malabo protocol for Sates senior official is the most critical and seen by some as way to shield State officials from prosecution.²⁵⁹ Thus, in this section it is necessary to analyze the provisions provided by Malabo protocol related to immunity so that to see if it complies with the objectives and mandate of the protocol on African Court of justice and human rights that create the international criminal law section.

II.4.1 The article 46 A bis of Malabo Protocol

The article 46 A bis of 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.*

The immunity gives to Heads of State and other public official's from investigation and prosecution provides by article 46A of the Malabo protocol instituting the international criminal law section, has been strongly criticized by international community as it intends to shield them from prosecution.²⁶⁰ Contrary to the Rome Statute, the said that article broadly and blindly grants immunity to sitting heads of States and State officials.²⁶¹ The immunity in question creates a serious misunderstanding between the prospective operations of the African Court and the current operations of the ICC with the indictment and prosecution of sitting heads of States. In this continuing conflict, the issue of cooperation will become more complicated as it is currently observed, as result, the sitting heads of States suspecting of committing international crimes will still unpunished for their cruel acts.²⁶²

²⁵⁹ Amnesty international, *supra* note 17.

²⁶⁰ Article 46A bis of protocol on amendments to the protocol on the statute of the African court of justice and human rights, adopted at Malabo, Equitorial Guinea, 27 June 2014.

²⁶¹ *ibid.*

²⁶² Parusha Naidoo and Tim Murithi, , the African court of justice and human rights and the international criminal court: Unpacking the political dimensions of concurrent jurisdiction, IJR, P. 5, 2016.

II.4.1.1 The article 46A bis and objectives of the ACJHR

The preamble on amendment of ACJHR is very explicit about the objective of international criminal section as it reiterates that:

It is crucial to respect for the sanctity of human life condemnation and rejection of impunity and political assassination, acts of terrorism and subversive, unconstitutional changes of governments and acts of aggression, and had commitment for fighting impunity in conformity with constitutive act of the African Union.²⁶³

The constitutive act of the African Union also on another side indicates a strong will to fight against impunity in Africa soil.²⁶⁴ But by allowing immunity to the sitting and other officials is regarded as largely contradictory and has been heavy criticized.²⁶⁵ The international human rights organizations have condemned widely the immunity provision as it creates an irrefutable issue both to the protection of human rights in Africa and in current international justice system.²⁶⁶

The immunity granting to the Head of States and other State officials is considered as a license given to the African officials to reinforce their position, as they should enjoy immunity regardless of crimes they perpetrated, which position that has created for a long time a conflicts between AU and the ICC.²⁶⁷ It is seen also as inconsistency that leaders support the addition of the article simply out of self-interest and a desire to avoid being held accountable for their actions, in such case they create the court as a substitution, rather than a complement of the ICC.²⁶⁸ Thus, by grating immunities to the State officials, the amendments to the protocol on the statute of the ACJHR that institutes the ICLS, contrast in itself and with the constitutive act of African Union and inconsistent with the objectives of the two institutions. From that, the expectation of African people to see all criminals being prosecuted will fall down.

²⁶³ Preamble on amendments to the protocol on the statute of the African Court of justice and human rights adopted at Malabo, Equitorial Guinea, 27 June 2014.

²⁶⁴ Preamble of constitutive Act of African Union, and article 4(0).

²⁶⁵ Mireille Affa'a-Mindzie, leaders agree on immunity for themselves during expansion of African court,2014.

²⁶⁶ *Ibid*

²⁶⁷ KPTJ, *supra* note 21.

²⁶⁸ *Ibid*.

II.4.1.2 Consequences of granting immunity under the Malabo Protocol

The beneficiaries of immunity may have the ability to use their power to act illegally and commit international crimes knowing that there will likely be no serious consequences, at the expense of victims who continue to suffer from waiting justice.²⁶⁹ Indeed, the AU Constitutive Act recognizes no tolerance against impunity under Article 4(o), which specifically declines and calls for the rejection of impunity. It is paradoxically, that the one instrument sends a conflicting message as court is set up to address impunity and holds individuals to account, yet provides in the same instrument immunity for individuals holding actually the position that would allow them to commit organized crimes and wicked atrocities.²⁷⁰ Thus, once immunity is granted, will undoubtedly stimulating those accused of the international crimes to hold on their positions of power to avoid facing prosecution. For this preoccupation, the immunity should not be seen in a narrow sense and vested broadly to Africa State officials.

If we consider that the ICLS satisfies the key criteria of an international tribunal, the absence of granting immunity envisaged in international customary law remains in effect and applicable before the ICLS. In line with that consideration, it is clear that the articles 46B and 46Abis of Malabo protocol constitute grave inconsistency from current international law.²⁷¹ Thus, if the immunity clause will still be maintained by protocol to ACJHR will generate serious risks to its integrity, legitimacy and credibility.²⁷² The court will lack of capacity to address the affliction of war crimes, crimes against humanity and genocide that have afflicted the continent for decades and court will struggle to enjoy or exploit the confidence and support of the African population especially from the victims of gross atrocities.²⁷³

²⁶⁹Human Rights Watch, African States: Reject Immunity for Leaders, at <https://www.hrw.org/news/2014/08/24/african-states-reject-immunity-leaders>, accessed on 29th September

²⁷⁰Human Rights Watch, *supra* note 238.

²⁷¹ International Amnesty, *supra* note 17.

²⁷²*Ibid.*

²⁷³ *Ibid.*

II.4.1.3 The senior State officials vested with immunity under Malabo protocol

The immunity granted to senior State officials by Malabo Protocol, implies some categories of persons, but the categories of those officials are not clearly detailed, hence several criticisms will probably occur about the beneficiaries of the immunity, when the ICLS will be operational.

The 23rd ordinary AU Session unexpectedly, confirmed in its recent decisions the approval of immunity for sitting Head of State or government official will prevail over any charge before any international criminal court or tribunal, including the ICC and the ICLS of ACJHR.²⁷⁴ During the session, the assembly declared that: To safeguard the constitutional order, stability and integrity of Member States, no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.

Despite the fact that during discussions delegations of specialized technical committee on justice and legal affairs raised concerns regarding the conformity of Malabo protocol with the international law, domestic laws of member States and jurisprudence, the provision about immunity of senior State officials was approved.²⁷⁵ Other issues have been raised by the STCJLA by underlining the challenges inherent to widening immunities, the lack of a precise definition of senior State official who should be included in the category of senior State officials beneficiaries of immunity have been subjects to extensive debate but in vain.²⁷⁶

The ambiguous group of State officials and lack of precision of the senior State officials to be prosecuted, as it has been said before, will undermine the very primary objective of the Malabo Protocol that is the prosecution of any suspect responsible for committing heinous crimes. Thus, the problem of providing an exhaustive list of persons will only be a way to spread impunity.²⁷⁷

²⁷⁴ AU Extraordinary session of the assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia Ext/Assembly/AU/Dec 1(Oct 2013). Associated Press African leaders vote to give themselves immunity from war crimes 2014 <http://america.aljazeera.com/articles/2014/7/1/africa-summit-immunity0.html#> accessed 10th December 2018.

²⁷⁵ The Report, the draft legal instruments and recommendations of the specialized technical committee on justice and legal affairs, Malabo, Equatorial Guinea, 20-24 June 2014, EX.CL/846 (XXV), para 25.

²⁷⁶ The Report, the draft legal instruments and recommendations of the specialized technical committee on justice and legal affairs, *supra* note, 244.

²⁷⁷ Communiqué of foundation of human rights, amnesty international and others, understanding the Malabo protocol: the potential, the pitfalls and way forward for international justice in Africa conference, southern sun

Then the amendment of the Africa court of justice and human rights creating the international criminal law section ICLS should provide in a more express way that immunity must not be a defense or a mitigating circumstances in the prosecution and punishment of individuals responsible of perpetrating international crimes in Africa continent as it is clearly expressed in Rome statute.²⁷⁸

II.4.1.4 The ground of no consideration of immunity in the Malabo protocol

The rejection of immunity of prosecution State official in Africa who is suspect of having perpetrated international crime, corroborate with the essence of the genocide convention,²⁷⁹ article 4(m) and (o) of the Constitutive Act of the AU,²⁸⁰ article 27 of the Rome Statute as well as article 12 of the protocol for the prevention and the punishment of the crime of genocide,²⁸¹ the war crimes, crimes against humanity and all forms of discrimination committed in great lakes region.²⁸²

During the session on human rights on Great lakes region, the participants were invited to reflect on the issues regarding the most severe violations of human rights, namely the international crimes and all forms of discrimination and to generate better strategies and put in place adequate mechanisms to help decision-makers at all levels to react effectively and efficiently to prevent and respond to any risk of serious atrocities in the region.²⁸³ To the same extent, all individuals

hotel Pretoria, South Africa ,7-8 November 2016, at <http://www.hrforumzim.org/wp-content/uploads/2016/11/Malabo-Protocol-Communique.pdf>, accessed on 30th September 2018.

²⁷⁸ Article 27 of Rome Statute.

²⁷⁹ United Nation, Articles IV-VII of Convention on the prevention and punishment of the crime of genocide. adopted by the general assembly of the m united nations on 9 December 1948. At <https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf>, accessed on 28th September 2018. (among other provision art4 States that Persons committing genocide or any of the other acts shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals)

²⁸⁰ Art 4 (m) invoke a respect for democratic principles, human rights, the rule of law and good governance and (o) indicates that in respecting for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities, must be punished.

²⁸¹ Art. 12 States that the provisions of this chapter shall apply equally to all persons suspected of committing the offences to which this Protocol applies, irrespective of the official status of such person. In particular, the official status of a Head of State or Government, or an official member of a Government or Parliament, or an elected representative or agent of a State shall in no way shield or bar their criminal liability

²⁸² MONUSCO, UN Organization Stabilization Mission in the Democratic Republic of the Congo, Ending mass crimes, a major challenge for the ICGLR and the United Nations, held on 13 April 2015, at <http://reliefweb.int/report/democratic-republic-congo/ending-mass-crimes-major-challenge-icglr-and-united-nations>, accessed on 30th September 2018

²⁸³ *Ibid.*

including State officials whatever there are grounds to link them with the commission of international crimes should be summoned by the court as it was stipulated in founding instrument.²⁸⁴ For this purpose, the absence of provision that expressly abolish immunity attaching to African State officials, no another way that impunity would be plainly addressed, even when the establishment of the international criminal law section begins to operate.²⁸⁵ Stay within that situation of granting immunity in wider way, the international criminal law section that is intended to be established would be problematic than a solution aimed to eradicate impunity.

To conclude this chapter about immunities before ACJHR and ICC it is clear that the two types of immunities help us to understand how both the immunities work. Indeed personal immunity is a procedural defense, as it gives the State official immune from a foreign State's jurisdiction,²⁸⁶ whereas functional immunity, in contrary is considered as a substantive defense since State is only responsible of the violation of law whilst the individual liability comes only in rare cases, like when he violates laws and regulations out of his genuine missions.²⁸⁷

²⁸⁴ Chacha Bhoke Murungu, *supra* note 96 p19.

²⁸⁵ *ibid*

²⁸⁶ Antonio Cassese, *when may senior State officials be tried for international crimes?* Some comments on the Congo v Belgium Case" (2002) 13 Eur J Int'l L 853, 863–864

²⁸⁷ *Ibid.*

CHAPTER III CONCURRENT JURISDICTION OF ICC AND ACJHR OVER AFRICAN OFFICIALS: LEGAL CHALLENGES AND PERSPECTIVES

The increasing of the number of international and regional tribunals in recent years, create enlarge possibility of thinking that those tribunals will have competing or concurrent jurisdiction over the same disputes.²⁸⁸ In effect, concurrent jurisdiction can produce certain positive effects, including the expansion of international norms and upgrade access to justice.²⁸⁹ However, it may also create potential conflicts between those courts which seem to have the same jurisdiction, that can lead to impunity.²⁹⁰ Thus, it is imperative to overcome possible conflicts that the concurrent jurisdiction of ICC and ACJHR may generate in order to avoid impunity of the suspect and to provide potential justice to victims.

Accordingly, during this chapter we will attempt to analyze the possible competing between the ICC and of ACJHR as well as their challenges and perspectives.

III.5 The concurrent jurisdiction of ICC and ACJHR

As it has been said before while there is increasing of number of international and regional tribunals in recent years, the possibility for these courts to have conflicting, competing, or concurrent jurisdiction over the same crimes and some suspects has also easily increased.²⁹¹

In effect, concurrent or competing jurisdiction is an authority that has been conferred on two or more courts to hear and decide similar cases.²⁹² When two or more courts hold jurisdiction over the same case due to the crimes being investigated falling within the mandate of both courts, it is considered as concurrent jurisdiction.²⁹³ The issue of primacy appears in relationship between the different courts in this context and it translates into an equating of competencies.

²⁸⁸ Brandeis Institute for International Judges (BIJ) Issues of Concurrent Jurisdiction, p.1 found at https://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/Con_Juris_2012.pdf, accessed on 18th December 2018.

²⁸⁹ Brandeis Institute for International Judges, *supra* note 154.

²⁹⁰ *Ibid.*

²⁹¹ International center ethics, justice and public life, issues of concurrent jurisdiction, Brandeis University, 2012, p.1

²⁹² The law dictionary, what is concurrent jurisdiction? <https://thelawdictionary.org/concurrent-jurisdiction/> accessed on 10th December 2018.

²⁹³ Madeline H. Morris, *the trails of concurrent jurisdiction: The case of Rwanda. Duke Journal of Comparative and International Law*, 1997, Vol 48: 349 – 374.

As one can see, there is no legal obligation that exists in the Malabo Protocol that obliges the ACJHR to refer a case to ICC, although thirty-three African States are already member States to the Rome Statute.²⁹⁴ Despite that autonomy, having international criminal law section by ACJHR is without challenges.

III.5.1 Concurrent jurisdiction of ICC and AJCHR over international crimes committed by the African officials.

The International crimes that will be under jurisdiction of ICLS of ACJHR are also the subject matter of the ICC. Thus one sees the similarity as both will have the power to try those international crimes like genocide, war crimes, crimes against humanity and crime of aggression²⁹⁵. Consequently, the proposal of AU to create a criminal court section within ACJHR is considered as duplication of jurisdiction with that of the ICC.²⁹⁶

III.5.1.1 Concurrent Jurisdiction of ICC and AJCHR over African officials

States parties from African States to the Rome Statute that are also States parties to the Malabo protocol of ACJHR instituting the ICLS, are likely to face several challenges. In fact, the Rome Statute has been ratified by 33 AU member States. Actually those States will have the hybrid obligations towards both to the ICC and the ACJHR,²⁹⁷ but the Malabo Protocol does not clarify how these competing obligations will be addressed.²⁹⁸ Indeed, when happening a case where the ACJHR and the ICC indict the same person and order his or her to surrender, a State party to both the Rome Statute and the Malabo protocol may have probably to choose which obligation to fulfill and which one to infringe.²⁹⁹ This may result in conflicting and concurrent obligations placed on such member States in instances where both courts have competence to decide over the same case.³⁰⁰ While parallel in their missions, without a clear complementarity, the two courts will essentially operate in competition, by result, States will be required to select which

²⁹⁴ ICC, States parties to the Rome statute, (African States) found at https://asp.icc-cpi.int/en_menus/asp/States%20parties/african%20States/Pages/african%20States.aspx, accessed on 10th December 2018.

²⁹⁵ See article 28A of Malabo protocol and article 5 of the Rome Statute

²⁹⁶ See articles above.

²⁹⁷ Amnesty international, *supra* note 17, P.10.

²⁹⁸ *Ibid.*

²⁹⁹ Amnesty international, *supra* note 17, P.10.

³⁰⁰ Parusha Naidoo and Tim Murithi, *supra* note, 262.

obligations to obey or to abide by and which to infringe, when cooperation fails to operate, thereby exacerbating possible climate of selective and politicized justice.³⁰¹

It is not apparent and clear within the Malabo Protocol how priority will be given to the different instruments when both hold jurisdiction over a particular case, and placing State parties in legal conflict. While practically and logically in this approach, the nuances of how to operationalize this duplication in mandates are less coherent and simple.³⁰²

Since some African States have accepted to the ICC to have jurisdiction to prosecute individuals suspected of committing international atrocities, one may argue that the provision of ACJHR to grant immunity to sitting heads of State and senior government officials will still inoperative vis-à-vis to ICC's ability to prosecute.³⁰³ In the case it occurs that State's court party to the Rome Statute, has failed to prosecute an individual who is alleged to have committed international crime because of the immunity provided by Malabo Protocol, this position could comply only with international customary law with regard to State's court, but being in contradiction directly with the Rome statute in its article 27, which expressly deny to seniors State officials from prosecution.³⁰⁴

Furthermore, current relationship between African States and the ICC as well as their background and history could be used as a comprehensive starting point to determine which court African State parties to both ACJHR and Rome statute are likely to choose, since it was demonstrated that the creation of the ICLS is motivated by the ICC anti-sentiments.³⁰⁵ Firstly, with the anti ICC sentiment, the African States will probably give favor to the new African criminal court over the ICC, as they may argue that judges of the ICLS are well placed to address African problems than any others showing that Africa problem might go with African solutions.³⁰⁶ Secondly with legal motivation, State may take reference to the Rome Statute in its

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ Du Plessis 2012 ISS 10; Abass 2013 NILJ 46-49; Du Plessis 2012 <http://www.ejiltalk.org/a-case-of-negative-regional-complementarity-giving-the-african-court-of-justice-and-human-rights-jurisdiction-over-international-crimes/>

³⁰⁴ Art. 27 of Rome Statute.

³⁰⁵ Du Plessis, *supra* note 303.

³⁰⁶ Terry M. May, *African solutions for African problems: the changing face of African-mandated peace operations*, the journal of Africa study, Vol. XXIII, No. 1 Spring 2000 at <https://journals.lib.unb.ca/index.php/jcs/article/view/353/552> accessed on 18th december 2018.

article 27 and preamble along with article 1, to surrender and arrest individual suspected of having committed international crimes to ICC.³⁰⁷

At the time the proposal to extend the jurisdiction of the ACJHR to try international crimes is implemented, as 33 African States are also State party to the Rome Statute. It will possibly affect the obligations of those African States satisfy their obligation under the Rome statute, and will create a delicate legal position to them to comply with two institutions at the same time. In the presence of a such situation, the African States will be in the position of having to choose whether to refer cases to the ACJHR or conform to their obligations under the Rome statute.³⁰⁸ The refusal to refer a case to the ICC or to comply with their obligations found in Rome Statute by the African States, would be only supported by the immunity that State officials enjoy before the ACJHR.³⁰⁹

All in all, the last option of fulfilling their obligations under the two tests will always belong to the requested State to choice between the two courts when it comes to deal with investigations of African Senior State official suspect of having committed international crimes. But this shall be possible if the State parties both to the Rome statute and to the protocol, obtained firstly the amendment of one treaties (Rome Statute and Malabo Protocol) in order to avoid conflict that may occur when requested to surrender or arrest State officials suspect of committing international crimes titled with immunity provided by international customary law.³¹⁰

III.5.2 The legal perspective of the concurrent jurisdiction of the ICC and ACJHR

In the preceding part, points at the many limitations, and has shown that there are tasks and many challenges that the two Courts have to manage in the future. A self-assessment based on realistic idea of the conditions in which the two Court will operate, will enable them to work together now and in the future without conflicts.

Whereas it is known that incorporation of the Rome Statute into domestic law is a key aspect of complementarity, but it is still uncertain about the implications of concurrent obligations of

³⁰⁷ Terry M. May, *supra* note 306.

³⁰⁸ Charle Sello Mabunda, *supra* note 205.

³⁰⁹ Art. 46 A of Malabo protocol

³¹⁰ KPTJ, *supra* note,21

States parties to both the Rome Statute and the ACJHR, with regard to how double signatories might implement their obligations particularly on the issue related to the head of State bearing immunity when suspected of having committed international crimes.³¹¹

The failure to refer to ICC is explicitly captured within the Malabo protocol,³¹² which does not mention anyway the ICC but solely refers regional and national courts.³¹³ The article 46H of the Malabo protocol highlighted silence on that matter as it states: « The jurisdiction of the court shall be complementary to that of the national courts, and to the courts of the Regional Economic Communities where specifically provided for by the communities. » From that matter, complementarity principle may be seen as a remedy for a long time to handle the issue of concurrent jurisdiction that may occurs between ICC and ICJHR.

III.5.2.1 The principle of complementarity both the ICC and ACJHR

The principle of complementarity can be defined as a *functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction*.³¹⁴ Among several bodies this can be seen as a principle of priority able to exercise the same jurisdiction.³¹⁵

III.5.2.1.1 The principle of complementarity within the Rome statute

The preamble of the Rome statute emphasizes that the national criminal jurisdictions is complemented by the International Criminal Court. The jurisdiction of the ICC is complementary to the jurisdiction of States as it only exercises its jurisdiction in the case State fails to properly investigate and prosecute a situation in which international crimes have been perpetrated.³¹⁶

³¹¹ Amnesty international, *supra* note 17.

³¹² Parusha Naidoo and Tim Murithi, *supra* note 262.

³¹³ *Ibid.*

³¹⁴ Xavier Philippe, *the principles of universal jurisdiction and complementarity: how do the two principles intermesh?* International Review of Red Cross, Volume 88 Number 862 June, p.380 2006.

³¹⁵ Bartram S. Brown, primacy or complementarity: Reconciling the jurisdiction of national courts and international criminal tribunals, in Yale Journal of International Law, Vol. 23, p. 386. 1998.

³¹⁶ Article 17 of Rome statute of the International Criminal Court.

Indeed, it is not an elementary statement when it comes to the principle of complementarity in the ICC Statute. It implies a precise legal regime calling for the issue of jurisdiction to be analyzed by applying substance and admissibility conditions. As it is clear in Rome statute, the jurisdiction of national courts by priority will be taken into account at the first time and secondly to the ICC, only at the moment the national courts are unable or unwilling to prosecute properly.³¹⁷ By adopting that principle, States wanted to show their concern for respect for the principle of sovereignty and keeping control over the situation and act as primary players, not simply as spectators.³¹⁸

The complementarity principle explicitly leaves member States free to initiate proceedings, and the ICC to decide whether the process has been satisfactory or not, meaning that the last word is given to the ICC when States fail to fulfill their respective obligations in good faith.³¹⁹

In term of cooperation the Rome statute has taken into account the importance of States to initiate proceedings through the principle of complementarity, whereas Malabo Protocol did not make any reference to ICC, but solely addresses regional and national courts.

III.5.2.1.2 The complementarity within ACJHR

The principle of complementarity found in Rome statute, is seen as model for the Malabo Protocol as it has appropriated that principle, but curiously it does not indicate and being silent on the ICLS relationship with the ICC.³²⁰

National Courts and to the Courts of the Regional Economic, have been privileged by article 46 of the Malabo Protocol (Annex) in term of complementarity principle. Nevertheless, this provision is contrary to the Rome statute provisions which prioritize the Nation Courts as it makes case admissible before ICC, once a national court has manifestly demonstrated its unwillingness and inability to prosecute,³²¹ showing of course that the African court of justice

³¹⁷ Article 17(1(a) of the Statute

³¹⁸ Xavier Philippe, *supra* note 314.

³¹⁹ *Ibid.*

³²⁰ H. G. Van der Wilt Complementary Jurisdiction (Article 46H) ,(PDF). Available from: https://www.researchgate.net/publication/311255712_Complementary_Jurisdiction_Article_46H [accessed Dec 17 2018].

³²¹ Art. 17 of Rome Statute.

and human rights requires the “double failure” of national courts and Regional Economic community’s court.³²²

When reading carefully the article 46 of the Malabo Protocol with regard to the notion of complementarity, it reveals serious ambiguity relating to the requirement of “*inability to prosecute*.”³²³ Rome Statute has adopted the formula that there must be genuine inability to prosecute by the States party in order to intervene. However, the draft of protocol omitted or waived the formula “genuineness” adopted by Rome statute.³²⁴

The principle of complementarity was not endorsed by many African leaders as they saw in it as a way that may be triggered and risk of being a discriminatory principle.³²⁵ According to AU, by applying the principle of complementarity by ICC, this would favor developed States, that possess more resources to keep a well functioned and effective judicial system, while developing States with developing judicial systems, and that the African States would not get the opportunity to exercise its jurisdiction over cases in the same way.³²⁶ However, it should be held in mind that the existence of the principle of complementarity is there to ensure that serious international crimes are prosecuted and encourages States also to make sure that serious crimes against international community are investigated and prosecuted.³²⁷ Thus, States deserve to put more effort in funds judicial system by making sure that they have a strong and fair judicial system to avoid possible discriminatory principle.³²⁸ As it is known, the ICC will engage investigate on and prosecution and then replace States to that specific case when only States fail to comply with the ICC provision to prosecute suspects of having committing international crimes.³²⁹

Under the article 46H of Malabo protocol as it has been said above, the Malabo Protocol includes a provision detailing the ACJHR’s relationship with both national courts and RECs onlr.³³⁰ But an explosive omission in the Protocol is that the principle of complementarity with ICC is

³²² Ademola Abass, *supra* note 184.

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ Schabas. W, *an Introduction to the International Criminal Court*, Cambridge university press, p. 86-87

³²⁶ Schabas. W, *supra* note 216.

³²⁷ Informal expert Paper, the principle of complementarity in practice, p.3, 2003.

³²⁸ *Ibid.*

³²⁹ Lee, Roy S., the Rome conference and its contributions to international law, Ed. Lee, p. 6,

³³⁰ KPTJ, *supra* note 21.

revealed nowhere.³³¹ This omission is seen as it will complicate the relationship that will exist for States parties to the Rome Statute and considered as irresponsible treaty making, forcing signatories to become party to an instrument that willfully or negligently ignores the relation that should enable two bodies to fulfil their mission.³³²

III.5.3 Possible alternatives to overcome divergence between ACJHR and ICC

Obviously, the proposed international criminal law section will compete in term of jurisdiction over person vested with immunity suspected of committing international crimes that ICC has jurisdiction too. As it has been seen, the relation between ICC and ICJHR seems to be complicated and consequently hard for these two organs to end up with impunity. Thus, to put end to the cycle conflict of that kind, as well as avoiding impunity over State official suspected of having committed the international crimes, the positive complementarity should be applied by both institutions particularly before starting of ICLS.³³³

As it has been proposed by Kenya, the Rome Statute would be revised by highlighting in term of complementarity, that the ICC shall be complementary to national and regional criminal jurisdictions, instead of be complementary to national criminal jurisdictions only.³³⁴ Kenya indicated in its suggestion, that the ICC should be remained a court of last resort by allowing judicial proceedings of local courts to take place near to the allocation where crimes took place.³³⁵

Other alternatives may consist of the ICC and ACJHR to cooperate as equals partners as they have the same core objective of ending impunity, possibly being governed by a treaty giving one or another primary jurisdiction, in order to avoid conflict.³³⁶ The ACJHR should in seeking the prosecution of high officials, to leave from the jurisdiction over the crimes within jurisdiction of

³³¹ *Ibid.*

³³² Du Plessis, M. *implications of the AU decision to give the African Court jurisdiction over international crimes* page 10. < <https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf>>

³³³ Atuza David Tuhoye, Felix Opilli, Noella Mutta, Weldon Ng'eno, *positive complementarity in Africa, a dream or reality? an analytical Study of the Consequences of the ICC Process in Kenya*, international journal of social science and humanities research, vol.5, issue2,pp: (112-116) june 2017

³³⁴ William A. Schabas, *the international criminal court: a commentary on the Rome statute*, Oxford, 2ed. 2016,p.56

³³⁵ *Ibid.*

³³⁶ John M. Raymond, *the exercise of concurrent International Jurisdiction: "move with circumspection appropriate"*, Boston College Law Review, V, VIII, 1967, P. 675.

the ICC and decline immunity provided for senior State officials.³³⁷ These alternatives shall facilitate and simplify prosecution of State officials that are suspected of having committed international crimes on one hand , and shall give undoubtedly satisfaction to the victims of gross violations of human rights.

³³⁷ John M. Raymond, *supra* note 327.

GENERAL CONCLUSION

This thesis focused on types of immunities accepted at international level granted to the senior officials of States in general. But the question for this research was how those immunities may work between States and before international criminal tribunal, when a senior State officials are suspected of committing international crimes. To answer to that question, the decision of ICJ, related to arrest warrant was clear and indicated that senior officials who are titled with immunity are protected during the exercise of their international functions in case they are arrested or detained while in a foreign State even if they are suspected of committing international crimes.³³⁸ This view was shared and endorsed by the house of Lord in the case of Former Chilean President³³⁹ and the Cassation Court of French on the case of Gadhafi.³⁴⁰ But the positions above, are different from the decision taken by international criminal tribunal like SCSL,³⁴¹ and ICTR.³⁴² This divergence shows that there is no a common understanding about the use of immunities when it comes to decide over senior States officials suspecting of committing international crimes.

The second chapter showed the immunities provided both within the Rome Statute and to the protocol on the African court of justice and human rights (ACJHR). Whereas it is obvious that the ICC exclude any kind of immunity to the extent of the senior State officials suspected of committing international crimes, the ACJHR in contrary provides immunity that impends its objectives and the objectives of African Constitutive Act. And there was suggestion that the provision of immunity planed within the ACJHR should be revised in order to comply with the principle of eradicating impunity through the African continent as it is provided by Africa constitutive Act, considered as an expression of African people. Maintaining the immunity would decrease the trust to wards ACJHR, as it is incredible and unfathomable that an individual

³³⁸ ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002, p. 3.

³³⁹ R v Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet ugarte (N° 3) [1999] 2

³⁴⁰ Cour de Cassation of France , Gaddaf Case, Cass, Mar, 12, 2001 N° 1414, 125 IIR

³⁴¹ SCSL, *Prosecutor V. Charles Ghankay Taylor*, Case No SCSL-03-1-T, 26 April 2012.

³⁴² ICTR , *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).

who commits one crime may face life imprisonment, while another who murders or help to murder thousands and thousands of innocent people enjoying impunity through immunity.³⁴³

It has also been exhibited several reasons and the concerns for the establishment of the proposal of the extended jurisdiction of the ACJHR. It recalls that the indictment of the sitting President and the justice used selectively by the ICC were among the reason of establishment of the new International Criminal Law Section by the African Leaders. During this work. The chapter tried to prove that the international conventions like the UN Charter, the Vienna convention on the law on treaties and the Rome statute have not in their provisions, the articles that forbid the creation of criminal court. Thus the proposed criminal jurisdiction is considered as legal vis-à-vis those conventions and being considered to be more legitimate, effective and accessible to try international crimes in Africa than ICC.

The last chapter has attempted to answer the main question related to States party both Rome statute and Malabo protocol when it happens to prosecute senior State officials suspected of committing international crimes, where it was observed that it is delicious for a State to satisfy and to serve the two Courts, the suggestion was that when the proposed jurisdiction of the ACJHR yet to be operational, before starting its works, it would be crucial to introduce the amendment of protocol with regard to immunities, in order to harmonize the jurisdiction of the two Courts (ACJHR and ICC) over the senior States officials suspecting of committing international crimes. Another alternative in line of the amendment, is to complete the provision related to principle of complementarity, where jurisdiction of the proposed criminal section of the ACJHR would be revised in its article 46, by expressing its cooperation with ICC or leave from the jurisdiction over the crimes under jurisdiction of the ICC or to decline immunity provided to senior State officials.

It has also suggested on another side, the Rome Statute should be revised by stressing that the complementarity principle should not be only limited to the National courts, but also to the regional criminal jurisdictions. This will actually answer the concern of concurrent jurisdiction which also should be in future the main challenge of the two courts.

³⁴³Chimene Keitner, *supra* note 256, p.233.

Finally, since the ICC and International criminal law section of ACJHR will share common goals and objectives, they will strongly need to strengthen their cooperation to apprehend and prosecute perpetrators by providing justice and assistance particularly to African victims of mass atrocities,³⁴⁴ as the international crimes must be punished regardless of nationality and the rank of perpetrators, by avoiding that the immunity appears as a bar for prosecution in the case an official from any State is suspected of having committed international crimes.

³⁴⁴ Mélanie Roudreux, *the international criminal court and Africa: transcending cleavages to achieve common goals*, South Africa, institute of international affairs (SAIIA), Occasion Paper 274, 2017.

BIBLIOGRAPHY

I. INTERNATIONAL INSTRUMENTS

1. United Nation, Convention on the prevention and punishment of the crime of genocide. 9 December 1948
2. United Nations, Vienna Convention on diplomatic relations adopted in 1961
3. Vienna convention on the Laws of Treaties Concluded at Vienna on 23 May 1969.
4. International convention on the suppression and punishment of the crime of apartheid, 30 November 1973
5. The Statute of the International Criminal Tribunal for the former Yugoslavia on 25 May 1993
6. The Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955(1994).
7. The Statute of the Special Court of Serra Leone resolution 1315 (2000) of 14 August 2000.
8. The Rome Statute of the International Criminal Court 1998
9. Constitutive Act of the African Union adopted in Lomé, Togo on 11 July 2000
10. Protocol relating to the establishment of the peace and Security Council of the African Union on 09 July 2002
11. Protocol to the African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights (1998/2004)
12. Protocol to the African Court of Justice and Human Rights adopted on 1st July 2008

II. INTERNATIONAL CASE LAWS

1. *Arrest Warrant of 11 April 2000 Democratic Republic of the Congo v. Belgium*, Judgment, ICJ Reports 2002.
2. *R v Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet ugarte* (N° 3) [1999] 2
3. *Cour de Cassation of France, Gadhafi Case*, Cass, Mar, 12, 2001 N° 1414, 125 IIR
4. *Prosecutor V. Charles Ghankay Taylor*, Case No SCSL-03-1-T, 26 April 2012.
5. *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence (Sept. 4, 1998).
6. *The United States of America, the French Republic, et al, vs Robert Ley et al.* International Military Tribunal (Nuremberg), Judgment of 1 October 1946.

7. *Prosecutor v. Blaškić* (Objection to the Issue of Subpoena duces Tecum) IT-95-14-AR108 (1997), 110 ILR (1997) .
8. *Zoernsch v. Waldock* [1964] 1 WLR 675, at 692 (England: CA, per Diplock L J).
9. *Procureur General vs Hissein Habré*, Chambre Africaine extraordinaire d'Assise d'Appel,, on 27th april 2017.
10. Simić et al. (IT-95-9) "Bosanski Šamac", Blagoje Simić , Miroslav Tadić, Simo Zarić Proceedings against Slobodan Miljković terminated.

III. BOOKS AND CHAPTERS IN BOOKS

1. Ademola. A., *Historical and Political Background to the Malabo Protocol*, 2017.
2. Cassese. A, *International Criminal Justice*, the Oxford Companion to International Criminal Justice (Oxford University Press, 2009.
3. Anna Rosén and Veronica Jorméus Gruner, *article 98 agreements: legal or not?* University of Örebro 2007
4. Dapo. A., *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. Int'l Crim. Just. 2009.
5. Hugh.K.,*Immunities and bilateral immunity agreements: issues arising from articles 27 and 98 of the Rome statute*, 2006.
6. Robert Uerpman-Witzack, *Prosecuting international crimes*, Bartłomiej Krzaz, Leiden / Boston, 2016.
7. Schabas.W., *An introduction to the international criminal court*: Cambridge university press, 2004
8. Schabas, W., *The international criminal court: a commentary on the Rome statute*, Oxford, 2ed. 2016.

IV. JOURNAL ARTICLES AND PAPERS

1. Alexander Orakhelashvili, «Immunities of State officials, international crimes, and foreign domestic courts: a reply to Dapo Akande and Sangeeta Shah»,in *the European journal of international law* Vol. 22 no. 3
2. Antonio Cassese, «When may senior State officials be tried for international crimes? Some comments on the Congo v Belgium Case » (2002) 13 *EJIL* 853.
3. Ademola Abass, *Historical and Political Background to the Malabo Protocol*, 2017.
4. Abraham. G., «Africa's evolving continental court structures: At the crossroads? » *South African Institute of International Affairs, Occasional Paper* 209 (2015) 14
5. Arthur Watts, «The legal position in international law of Heads of States, Heads of government and foreign ministers» P.82.
6. Atuza David T., Felix O., «Positive complementarity in Africa, a dream or reality? an analytical Study of the Consequences of the ICC Process in Kenya», *International Journal of Social Science and Humanities Research*, vol.5,2017.

7. Bartram S. Brown, primacy or complementarity: Reconciling the jurisdiction of national courts and international criminal tribunals, in *Yale Journal of International Law*, Vol. 23, p. 386. 1998
8. Benedict Abrahamson Chigara & Chidebe Matthew Nwankwo, member States parties' participation as high contracting States parties to the Rome Statute of the international criminal court (1998) *Nordic Journal of Human Rights*. 2015.
9. Badar Mohamed Elewa, islamic law(Shari'a) and the jurisdiction of the international criminal Court, 24 *LJIL*.
10. Cassese A., P. Gaeta, and J. Jones, «The Rome Statute of the international criminal court – A Commentary, 1889
11. Chacha Bhoke Murungu, «Towards a criminal chamber in the African Court of Justice and Human Rights, » 2011.
12. Chimene. K., Crafting «The International Criminal Court trials and Tribulations in articles 98(2), *University of California, Hastings College of the Law*, » 2001, P.233.
13. Charle Sello Mabunda, «The Pros and Cons of the Criminal Jurisdiction of the Proposed African Court of Justice and Human Rights, » *Africa institute of south Africa briefing No 98*, 2013.
14. Dapo. A., «International law immunities and the international criminal court » (2004) 98 (3) *African Journal of International Law (AJIL)* 407.
15. Dapo. A., «The jurisdiction of the international criminal court over nationals of non-parties: legal basis and limits» (n 202).
16. Dapo A., « International law immunities and the international criminal court » (2004) 98 (3) *AJIL* 407.
17. Dapo A., Sangeeta. S., «Immunities of State officials, international crimes and foreign domestic courts, » *European Journal of International Law*, Volume 21, November 2010.
18. Evelyne Owiye Asaala, «Rule of law or realpolitik? The role of the United Nations Security Council in the International Criminal Court processes in Africa, » *Africa human rights Law Journal*, Volume 17No 1, 2017.
19. Henry T. King Jr., et.al, «Origins of the Genocide Convention, » *Western reserve journal of international law*, vo. 40, 2007.
20. Harmen Van Der Wilt, «Unconstitutional change of government: A new crime within the jurisdiction of the African criminal court, » *Leiden Journal of International Law*, Volume 30.
21. Jürgen Bröhmer, « Diplomatic immunity, head of State immunity, State immunity: misconceptions of a Notorious human rights violator 1999, *IJL*.
22. Jalloh, K. Clarke, V. Nmehielle, « Article 46C: corporate Criminal Liability at the African Criminal Court, African court of justice and human and people's rights in context. » 2017.
23. John M. Raymond, «The exercise of concurrent International Jurisdiction: "move with circumspection appropriate», *Boston College Law Review*, V, VIII, 1967.

24. Madeline H. Morris, «The trails of concurrent jurisdiction: The case of Rwanda». *Duke Journal of Comparative and International Law*, 1997, Vol 48.
25. Manisuli Ssenyonjo and Saidat Nakitto, «The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials? » *International criminal law review*, 2016.
26. Matiangai Sirleaf, «The African justice cascade and the Malabo protocol, » *International Journal transitional justice* 2017, peer-review.
27. Mélanie Rondreux, «The international criminal court and Africa: transcending cleavages to achieve common goals, *South Africa, institute of international affairs (SAIIA), Occasion Paper 274, 2017.*
28. Parusha Naidoo and Tim Murithi., «The African court of justice and human rights and the international criminal court: Unpacking the political dimensions of concurrent jurisdiction», *Institute of justice and reconciliation (IJR)*, 2006.
29. Rita Mutyaba, «An analysis of the cooperation regime of the International criminal court and its effectiveness in the court's objective in securing suspects in its ongoing investigations and prosecutions, » (2012) 12 *ICLR* 937.
30. Wolfgang Kaleck, « From Pinochet to Rumsfeld: universal jurisdiction in Europe» *Journal of International Law*.
31. Xavier. P., «The principles of universal jurisdiction and complementarity: how do the two principles intermesh? » *International Review of Red Cross*, Volume 88 Number 862 June, P.380 2006.
32. Zachary Douglas, «State immunity for the acts of State officials», *British Yearbook of International Law*, Volume 82, Issue 1, 1 January 2012, Pages 281.

V. INTERNET SOURCES

1. Amnesty international, « Legal and institutional implications of the merged and expanded African court,» available at <https://www.amnesty.org/download/Documents/AFR0130632016ENGLISH.PDF>,
2. Amnesty International, Malabo Protocol , «Legal and institutional implications of the merged and expanded African court, » P.27, 2016, available at <https://www.amnesty.org/download/Documents/AFR0130632016ENGLISH.PDF>
3. Amnesty international, «Legal and institutional implications of the merged and expanded African court», available at www.amesty.org.

4. Alexandra Zavis and Robyn Dixon, Los Angeles times, « Only Africans have been tried at the court for the worst crimes on earth», 2016. Available at <http://www.latimes.com/world/africa/la-fg-icc-africa-snap-story.html>
5. Brandeis Institute for International Judges (BIIJ) «Issues of Concurrent Jurisdiction», available at https://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/Con_Juris_2012.pdf
6. Chimène Keitner, «Functional immunity of State officials before the international law commission: The ‘who’ and the ‘what’», available, at <http://www.qil-qdi.org/forthcoming/>.
7. Désiré Assogbavi, «The ICC or the AU: who can ensure justice for African victims? » available at <http://www.coalitionfortheicc.org/news/20170216/icc-or-au-who-can-ensure-justice-african-victims>.
8. Du Plessis, «The international criminal court that Africa wants» available at: http://www.operationspaix.net/DATA/DOCUMENT/4627~v~The_International_Criminal_Court_that_Africa_wants.pdf
9. Du Plessis, M. « Implications of the AU decision to give the African Court jurisdiction over international crimes» page 10. Available at <https://issafrica.s3.amazonaws.com/site/uploads/Paper235-AfricaCourt.pdf>,
10. Eden Matiyas, «What prospects for an African Court under the Malabo Protocol? » available at <https://www.justiceinfo.net/en/other/37633-what-prospects-for-an-african-court-under-the-malabo-protocol.html>
11. H. G. Van der Wilt «Complementary Jurisdiction» (Article 46H), (PDF). Available at https://www.researchgate.net/publication/311255712_Complementary_Jurisdiction_Article_46_H.
12. Human Rights Watch, «Universal jurisdiction in Europe», the State of the art volume 18, No. 5(D) June 2006, available at <https://www.hrw.org/sites/default/files/reports/ij0606web.pdf>
13. Human Rights Watch, African States: Reject Immunity for Leaders», available at <https://www.hrw.org/news/2014/08/24/african-states-reject-immunity-leaders>.
14. J. Shola Omotola, «Unconstitutional changes of government in Africa, what Implications for Democratic Consolidation,» <http://www.diva-portal.org/smash/get/diva2:478511/FULLTEXT01.pdf>
15. KPTJ «Africa and international criminal Court, Seeking Justice or Shielding Suspects? An analysis of the Malabo Protocol on the African Court» available on http://www.iccnw.org/documents/Africa_and_the_ICC.pdf.,
16. Mary Robinson, «The Princeton principles on universal jurisdiction», available at https://lapa.princeton.edu/hosteddocs/unive_jur.pdf.,

17. Moritz Vormbaum, «The search for alternatives: The African criminal court», available at <https://www.ispionline.it/it/publicazione/search-alternatives-african-criminal-court-16451>,
18. Ricarda Rösch, «Thinking globally, acting regionally» available at <https://voelkerrechtsblog.org/thinking-globally-acting-regionally/>.
19. Ompha Malima, «Protocol: the legal muscle to tackle crimes of dignity in Africa», available at <https://www.africamattersinitiative.com/single-post/2018/02/11/The-Malabo-Protocol-the-legal-muscle-to-tackle-crimes-of-dignity-in-Africa>.
20. Phil Williams, «Transnational criminal organizations and international security», pp.315-316 chapter 14, available at https://www.rand.org/content/dam/rand/pubs/monograph_reports/MR880/MR880.ch14.pdf
21. Philippe Kirsch, «The international criminal court: Current issues and perspectives, » available at: <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1199&context=lc>.
22. Roger O' Keefe, «Immunity *ratione materiae* from foreign criminal jurisdiction and the concept of “acts performed in an official capacity», available at: <https://rm.coe.int/1680097836.pdf>.
23. Sarah Nouwen and Mogogo Albanese , «Arresting Bashir: how the ICC has violated its own Statute, » available at: <http://africanarguments.org/2009/03/10/arresting-bashir-how-the-icc-has-violated-its-own-statute/>.
24. Sukhija, «Comment on the Arrest Question, human rights and international criminal law ICC forum, » available at: <http://iccforum.com/forum/permalink/93/4084>,
25. Titular, «The power of empathy in conflict resolution. peace and conflict monitor», 24 June 2012. available at: <http://www.monitor.upeace.org/innerpg.cfm?>
26. Terry M. May, «African solutions for African problems: the changing face of African-mandated peace operations, the journal of Africa study, Vol. XXIII, No. 1 Spring 2000 available at <https://journals.lib.unb.ca/index.php/jcs/article/view/353/552>.
27. The law dictionary, « What is concurrent jurisdiction? » <https://thelawdictionary.org/concurrent-jurisdiction/pdf>.

VI. AFRICAN UNION RESOLUTIONS AND SESSIONS

1. Twenty –third ordinary session of the assembly, held in Malabo, Equatorial Guinea on 27th June 2014, «Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights», at <https://au.int/sites/default/files/treaties/7804-treaty-0045>

[protocol on amendments to the protocol on the statute of the african court of justice and human rights e-compressed.pdf](#).

2. Twenty –third ordinary session of the assembly, held in Malabo, Equatorial Guinea on 27th June 2014
3. The Executive Council, thirteenth ordinary Session, 24-28 June 2008, «Report of the Commission on the Use of the principle of universal jurisdiction by Some non-African States as recommended by the conference of ministers of justice/attorney general», available at http://www.unhcr.org/Regional_Partners/Docs/ExeCoun_2008b.pdf.
4. AU Extraordinary session of the assembly of the African Union 12 October 2013 Addis Ababa, Ethiopia Ext/Assembly/AU/Dec 1(Oct 2013)

VII. REPORTS AND OTHER DOCUMENTS

1. Expert Workshop, Cooperation and the international criminal court», Nottingham, 2014.
2. Global financial integrity, «Illicit financial flows from Africa: hidden resource for development» available, at https://www.gfintegrity.org/storage/gfip/documents/reports/gfi_africareport_web.pdf
3. Global Research, Brussels Tribunal, Law Suit Against 4 US Presidents and 4 UK Prime Ministers for War Crimes, Crimes Against Humanity, & Genocide in Iraq, Statement on Closure of Legal Case for Iraq in Spain, February 10, 2010, at <http://www.globalresearch.ca/index.php?context=va&aid=17535>
4. Situation in the Republic of Kenya. authorization of 31 March 2010. ICC -01/09.
5. UN mapping report, Democratic Republic of the Congo 1993-2003, at https://www.ohchr.org/Documents/Countries/CD/FS-5_Natural_Resources_FINAL.pdf
6. The Report, the draft legal instruments and recommendations of the specialized technical committee on justice and legal affairs, Malabo, Equatorial Guinea, 20-24 June 2014, EX.CL/846 (XXV), para 25.
7. Communiqué of foundation of human rights, amnesty international and others, understanding the Malabo protocol: the potential, the pitfalls and way forward for international justice in Africa conference, southern sun hotel Pretoria, South Africa, at <http://www.hrforumzim.org/wp-content/uploads/2016/11/Malabo-Protocol-Communique.pdf>.
8. MONUSCO, UN Organization Stabilization Mission in the Democratic Republic of the Congo, Ending mass crimes, a major challenge for the ICGLR and the United Nations, held on 13 April 2015, at <https://reliefweb.int/report/democratic-republic-congo/ending-mass-crimes-major-challenge-icglr-and-united-nations>.