Prospects of the Coordinate Jurisdiction of the International Criminal Court (ICC) and the African Court of Justice and Human Rights (ACJHR)

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Abstract

The intended coordinate jurisdiction with the International Criminal Court (ICC) and African Court of Justice and Human Rights (ACJHR) adopted by the Malabo Protocol 2014, and which called on all African Union (A.U) State parties to sign and ratify same, inarguably, raised questions concerning its prospects and challenges to the development of international criminal justice system. This study, therefore, argues that this development may undermine the universality of the Protocol of the International Criminal Court (ICC) and encumbered extradition processes in Africa if the coordinate jurisdiction to entertain cases relating to the contravention of the provisions of the international humanitarian laws, especially those that are related to violations of peoples' rights which is a commonplace in the continent of Africa is sustained. It also argues that if properly managed it may also enhance the implementation of international extradition processes in Africa. To achieve its specific objectives, this study adopted historical research design relying mainly on secondary source of data. The study suggests among others that both courts should harmonise the jurisdictional mandates granted them by the protocols that established them and collaborate in cases involving individuals and regime leaders and officials in order to continue to indict and prosecute those who have contravened the provisions of international humanitarian laws, particularly in Africa that has recorded more grievous human rights violations during civil unrests, conflicts and civil wars.

Keywords: *ICC, ACJHR, Malabo Protocol, African Union, International Extradition Laws.*

I. Introduction

The allegation against the International Criminal Court (ICC) of practicing selective prosecution against African leaders is not true because a number of the States parties of the African Union (A.U) played significant role in the formation of the ICC in 2002. Although, the euphoria of what the ICC have achieved since its establishment was challenged by the adoption of the Malabo Protocol which granted the African Court of Justice and Human Rights (ACJHR) equal jurisdiction to entertain cases related to violations of the provisions of both municipal and

international human rights laws in Africa. Aside this development, Africa seems to entertain more cases of contravention of the provisions of existing municipal, regional, sub-regional and international human rights provisions such as the African Charter on Human and Peoples' Rights which came into force on 21st October, 1986, Universal Declaration on Human Rights established in 1948, etc (see African Commission on Human and Peoples' Rights ACHPR, 2020: Universal Declaration on Human Rights, UDHR, 1948). The idea of creating a system of international court was born after the end of the Cold War. While the negotiation of establishing the ICC was underway, the world witnessed the commission of atrocities against humanity in the territories of some countries in the international system including the defunct State of the Yugoslavia, and in Rwanda in Africa. In response to these challenges, the United Nations Security Council (UNSC) created ad hoc tribunals for each of these situations (International Criminal Court, ICC, 2020).

In June 2008, the Assembly of the A.U adopted the Protocol on which the Statute of the African Court of Justice and Human Rights (ACHPR) was merged with the African Court of Justice (ACJ) and which gave birth to the ACJHR as the main judicial body of the A.U (Max, 2012). The adoption of the Malabo Protocol held in Equatorial Guinea [hereafter: the Malabo Protocol, 2014], apparently, is a step in the right direction exemplified in the principles underlying its adoption which are: respect for human rights and sanctity of life, condemnation, rejection and fighting of impunity, strengthening of A.U's commitment to promote sustained peace, security and stability; and prevention of massive violations of human rights. The Protocol specifically modified and expanded the mandates of the already existing African Court of Justice and Human Rights (ACJHR) to include offences such as crimes against humanity, war crimes, crime of aggression, unconstitutional change of government, genocide, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, trafficking in hazardous wastes and illicit exploitation of natural resources (Malabo Protocol on ACJHR, 2014; Amnesty International, 2016).

By this provision, the ACJHR is expected to operate in the same manner like the ICC; unfortunately, its jurisdiction is limited to the geographical scope of Africa. The protocol which established it has also not been fully ratified by all A.U States parties. As Clarke, Jalloh and Nmehoelle (2019) put it, "the adoption of the Malabo Protocol was sequel to the clamour for extension of the mandates of the already existing regional court that began long before what most advocates of the African Court of Justice and the Malabo Protocol see as the outcome of the indictment of President Omar Al-Bashir of Sudan". Furthermore, Clarke et al. (2019) argued that "between 2009 and 2014 the draft protocol of the African Union (A.U) was subject to series of politically motivated calls to advance the expansion of the criminal jurisdiction of the proposed merged court as a sort of African alternative to the ICC". The dictatorial civilian and military regimes in some parts of Africa such as the cases involving Hissene Habre of Chad Republic, the Dergue of Mengistus Haile Mariam in Ethiopia, Jean Bedel Bokassa of Central Africa Republic (CAR), Idi Ami Dada of Uganda, and General Sani Abacha of Nigeria were ranked among the most brutal regimes that violated human rights in Africa, and a number of which were never indicted and prosecuted, because of the paralysis of the UNSC by the Cold War realpolitik (Clarke et al., 2019).

Perhaps, the horrific genocide in Rwanda was as a result of the absence of near unanimous support for the ICC in Africa, and the near absence of a permanent institution to combat, as well as prosecute some of these leaders and powerful individuals who have committed or suspected to have committed mass atrocities against humanity in the continent. As such the International Criminal Tribunal for Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone were created and used to discharge international criminal justice of this nature following the realisation of the need to ameliorate these forms of atrocities in Africa and beyond (Westen, 2018). Crimes such as murder, attempted murder, conspiracy to murder, manslaughter, rape, sexual slavery and sexual violence, the use of infant soldiers for internal war, genocide, amongst others committed by some of these regime leaders and individuals in Africa, such as Hissene Habre of Chad Republic, Omar Hassan Ahmad al-Bashir of Sudan, Charles Taylor of Liberia, and despotic others that were initially treated with kid-gloves and never indicted nor tried for violations of peoples' rights were later questioned, and indictments and requests for extradition for trial were made by these International Criminal Tribunals (ICTs) and the ICC established by the Statute of Rome on 17 July 1998 but came into force on July 1, 2002 (Ezeibe, 2011).

In truism, in some quarters the ICC and its prosecutors were applauded while the others accused the Court and its prosecutors for targeting only African leaders. The Malabo Protocol exemplified this allegation against the operators of the ICC because of its adoption to exercise concurrent or equal jurisdiction with the ICC. In some quarters, it was said to derailing the ICC's interest in Africa which has witnessed more cases of violations of the provisions of international human rights laws. This development has resulted to allegations and counter allegations from the operators of both Courts. While the ICC was accused of being bias against African leaders by the A.U leaders, the latter was accused of protecting African leaders who have contravened the sections of the international human rights laws. On 27 June 2014, the General Assembly of the Head of State and Government of the A.U adopted the Protocol which amended the Protocol of the Statute of the ACJHR and what is today known as the Malabo Protocol. Although, years after its adoption the Protocol failed to secure the required support it needed to enter into full force (Jalloh, Clarke & Nmehille, 219).

Although, the Malabo Protocol is intended to establish the first-ever African Court with expanded jurisdiction on all forms of human rights violations committed by regime leaders, some powerful individuals and security personnel in the continent. It was also intended to complementing national and regional bodies and institutions in the fight against serious crimes and massive violations of peoples' rights and dignities as human beings in Africa but up to date the Court has not satisfactorily achieved its objectives of prosecuting offenders in Africa. As Jalloh et al. (2019) rightly stated, the Court seems to retain the mandate granted it by the Malabo Protocol but it seems there is no guarantee that the Protocol will achieve its aims at the long runs because human rights violations and offences against the provisions of the international human rights laws are in the increase, especially those involving officials of national government and security agencies of governments in Africa. This development has presented difficulty in comprehension to most of the political analysts, jurists and scholars who have studied this development in Africa.

A lot of questions have been asked but what wasn't sufficiently exhausted is the prospect of this polygamous relationship now before the Courts (i.e., the ICC and ACJHR). If the intended concurrent jurisdiction granted the ACJHR by the Malabo Protocol is sustained will the ACJHR be bold enough to indict and prosecute regime leaders and officials and powerful individuals who have contravened the provisions of human rights laws in Africa in the same manner the ICC has successfully done? Will the Court be sufficiently funded since A.U which is the mother of the Court is primarily funded by external donors? These are pertinent questions that informed the reason for this study.

1. Nature of the Problem

The ICC which was and still at the centre of international criminal justice for the victims of egregious violations of their rights and dignities as human beings before the adoption of Malabo Protocol in 2014 of the A.U held in Equatorial Guinea is inarguably confronted with certain challenges with the emerging concurrent jurisdiction granted the ACJHR by the Malabo Protocol. Although, the Protocol has officially granted ACJHR coordinate jurisdiction with the ICC but it has not been completely ratified by all the A.U member nations. This development has challenged the ICC mandates and operations of the ICC in Africa. Martini (2021) opined that the adoption of the Protocol has attracted several questions that are directed to whether it will obstruct ICC mandate to indict and prosecute individuals or group of individuals who have violated the provisions of international human rights laws, as well as domestic human rights laws during conflict and wars. Issues emanating from this development contributed to the seemingly lack of cooperation, and otherwise negatively influenced the behaviour of some powerful individuals and leaders in the states of Africa. It could therefore be argued that the adoption of the Malabo Protocol does not only challenge the ICC mandate to indict and issue warrant of arrest, but to prosecute those who have committed offences, particularly in Africa.

While African countries initially decided to join the Rome Statute and considered the ICC as the solution to injustices in the continent, the acceptance of the jurisdiction of the ICC thereafter became controversial with the adoption of the Malabo Protocol in 2014. The Belgian proceedings against Hissene Hibre and the prosecution of African leaders by several European countries in the early 2000s prompted the need for the establishment of African alternative criminal court to the ICC. Extradition cases involving African leaders, important personalities and government officials, perhaps, is bedevilled by this development as it was evident in the indictment cases involving former President Omar Hassan Ahmed al-Bashir of Sudan, among others. In the face of this development, issues concerning the pursuit of human rights in Africa and re-emphasized in the Charter of the Africa Union (A.U) on Human Rights has encumbered extradition process in the continent (Martini, 2021).

Most disturbing is the occasional involvement of state-actors in disregard and abuse of bilateral and multilateral treaty arrangements, especially those relating to extradition. Following the mandate to amend the Protocol of the Statute of ACJHR by the States parties of the A.U in Equatorial Guinea, and subsequently, the call on all A.U States parties to sign and ratify same, the universality of the ICC is challenged (Malabo Protocol on ACJHR, 2014). In spite of this development, many African citizens and Civil Society Organisations (CSO) dot not support their national governments in what they regarded as a pursuit of their selfish interest which

represented the ICC in bag light before Africans and the rest of the world. The refusal of some States in Africa to cooperate with the ICC, and the subsequent directive by the A.U General Assembly on member states to withdrawal from the Rome Statute, no doubt, poses serious challenge to the jurisdiction of the ICC to indict, demand for extradition and try individuals who have or alleged to have contravened the provisions of the international human rights laws (Blaw, 2020). This development challenged the prospects of the concurrent jurisdiction intended to exist side by side between the ICC and ACJHRC. Again, the yet to be fully ratified Malabo Protocol by some states in Africa is also a challenge to the prospect of the ACJHR. It also challenged the diplomatic relation between the Western States, the ICC and A.U which is accused of sabotaging the efforts of the West and the ICC in ameliorating all forms of impunity and aggressive behaviours in Africa.

As Westen (2018) puts it, "with the adoption of the Malabo Protocol, there is a diplomatic impasse between the ICC and the A.U regarding accountability for, and jurisdiction to entertain the atrocities committed in Africa. While the A.U accuses the ICC of bias against African leaders, the ICC accuses A.U of shading their kinds in Africa who have committed war crimes, crimes against humanity and genocide while their victims deserve justice which the ACJHR cannot provide. Extradition cases involving regime leaders and officials and certain powerful individual in Africa, perhaps, is bedevilled by this development. It is on this basis that this study examined the prospects and challenges of the proposed coordinate jurisdiction granted the ACJHR under the Malabo Protocol to entertain certain cases concerning human rights violations and the ICC established under the Statute of Rome in 2002.

2. Objectives of the Study

The general objective of this study is to examine the nature of the mandates of the International Criminal Court (ICC) and the Malabo Protocol of 2014 of the African Union (A.U). While the specific objectives are to examine:

i. The reasons for the adoption of the Malabo Protocol of 2014 by the African Union,
ii. The prospect of the ICC and ACJHR coordinate jurisdiction,
iii. The challenges of the ICC and ACJHR coordinate jurisdiction, and
iv. To suggest solutions to the challenges may arise from the coordinate jurisdiction granted the ACJHR over the ICC.

3. Research Questions

The research questions below are provided to direct this study:

i. What are the reasons for the adoption of the Malabo Protocol in 2014 by the African Union?
ii. What are the prospects of the ICC and ACJHR coordinate or concurrent jurisdiction?
iii. What are the challenges that may arise from the coordinate jurisdiction between the ICC and ACJHR?
iv. What are the possible solutions to the challenges may arise from concurrent jurisdiction between the ICC and ACJHR?

4. Method of the Study

This study adopted historical research design. This design is explorative and qualitative in nature. The data used in this study were collected from secondary sources. Secondary source of data collection refers to materials that are not originally from the researcher but from extant literatures such as textbooks, dailies, periodicals, journal, and internet sources, among others.

II. Review of Related Literature

The International Criminal Court (ICC)

The ICC which was established under the Rome Statute negotiated on 17 July 1998 in a conference of 160 countries came into force in 2002. States parties to the treaty which established the Court include most of the A.U member countries. For the first time in the history of mankind, the first permanent international criminal court with the mandate to prosecute the most serious crimes committed by the nationals of any of the States parties, and in territories of the State parties was established under the Rome Statute. The Court after its establishment on 1 July 2002 is not a substitute for any national court but an international court which should exercise jurisdiction over individuals who have committed crimes against humanity (International Criminal Court, ICC, 2020). As at 2016, over 124 States have ratified the Rome Statute, including Pakistan. Of all the 124 countries, 34 are from Africa, 19 from Asia-Pacific, 18 from Eastern Europe, 28 from Latin America and the Caribbean States, and 25 from Western Europe and others (Teles, 2017).

Part 1 of the Rome Statute of International Criminal Court (ICC) adopted on 17 July 1998 established the Court. Article 2 defines the relationship between the court (ICC) and the United Nations (UN). It states categorically that the Court shall be brought into relationship with the UN through an agreement to be approved by the Assembly of States parties to the Rome Statute. Article 3 defines the Seat of the Court which is at The Hague, Netherlands. Article 4 defines the legal status and powers of the Court. Part 2, Article 5 defines the jurisdiction, admissibility and applicable law of the Court. Article 5 specifically defines crimes within the jurisdiction of the Court including: the crime of genocide; crimes against humanity; war crimes; and the crimes of aggression. Article 7 defines crime against humanity under the jurisdiction of the Court to include: murder; extermination; enslavement; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation; and any other form of sexual violence of comparable gravity, Other crimes against humanity under the jurisdiction of the ICC include: persecution against any group- racial, national, ethnic, cultural, religious, and gender; enforced disappearance of persons; the crime of apartheid; and other inhumane acts of similar character (UN Office of the High Commissioner,1998).

Part 5, 6 and 7 deal with investigation and prosecution, trial, and penalties respectively. Part 10, Article 103 defines the role of States parties in enforcement of sentences and imprisonment. Part 12 deals with financing of the Court, while Article 113 of Part 12 defines financial regulations which shall be governed by the Statute financial regulation and rules adopted by the Assembly of States parties (UN Office of the High Commissioner,1998). Without doubt, the ICC was created to ameliorate all forms of impunity and aggression from some powerful individuals, and regime

leaders and officials in the States parties of the Rome Statute. The Court was not created with a specific event or continent in mind. Its jurisdiction covers all forms of crimes against humanity in any of the States parties of the Rome Statute that established it.

The Malabo Protocol 2014 and the African Court

In June 2014, African leaders under the African Union (A.U) agreed to establish an African International Criminal Court to exercise equal jurisdiction with the ICC established under the Rome Statute negotiated on 17 July 1998. The Protocol adopted in Malabo is an amendment to an earlier protocol that seek to merge two courts: the African Court of Justice and Human Rights which did not survive beyond the period it was created by the A.U Art, and second was the vibrant and functioning African Court on Human and Peoples' Rights. The merger Protocol requires ratification which up to date has not been fully ratified by all the member countries of the A.U but fifteen countries only did. This makes the merger Protocol an ambitious project which its realisation is in doubt (Maram, 2019). According to Amnesty International (2017) the original plan for the ACJHR was to have two sections; first was to have the general affairs section; and second, a human rights which was later expanded to have a third section by the Malabo Protocol which is the international criminal law section. The Malabo Protocol provided the ACJHR the jurisdiction to entertain the following 14 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 hazardous wastes, illicit exploitation of natural resources, and the crime of aggression (Amnesty International, 2016).

The build-up to what is today known as Malabo Protocol started long before it was adopted in 2014 by the Assembly of the Head of State and Government of the A.U States held in Equatorial Guinea. In the early 1980s, a proposal to establish a court in Africa to try various crimes under international law was suggested. During the period of the drafting of the African Charter on Human and Peoples' Rights [hereafter the African Charter] this was also suggested. In July 2004, discussion around the possibility of creating an African Criminal Court resurfaced when the issue of electing judges of the African Court on Human and Peoples' Rights (ACHPR) [hereafter the African Human Rights Court] came before the Assembly of the Head of State and Government of the A.U states. Within the period, the chairperson of the Assembly of the A.U, President Olusegun Obasanjo of Nigeria, suggested to the Assembly of the A.U to merge the African Court of Justice (ACJ) and the African Human Rights Court (AHRC) with the jurisdiction to entertain cases involving international crimes (Amnesty International, 2016).

The development in Chad Republic and the consideration by the Assembly of the A.U to bring the former Chadian President Hissene Habre to justice made the Assembly to reconsider the pertinence of establishing a court that will have the mandate to entertain cases involving the contravention of the provisions of international human rights laws. As a result a committee of jurists was established to advice the A.U Assembly on the modalities of bringing President Habre to justice. The committee of the jurists thereafter suggested that merger court should be empowered to try crimes under international law. In July 2008, the Assembly of the A.U adopted the Protocol on the Statute of the African Court of Justice and Human Rights. Article 25(5) of the Charter specifically, provides that perpetrators of unconstitutional change of government may

also be tried before the competent court of the Union. In February 2009, and in the face of the indictment and arrest warrants issued by certain European States and the ICC against senior African States officials and leaders, such as that against former President Ahmad Al-Bashir of Sudan, and President Uhuru Kenyatha of Kenya and his deputy, William Ruto under charges of crimes against humanity, the A.U Assembly requested its Commission in consultation with the African Commission and the ACHPR to examine the implications of empowering the Court to try international crimes such as genocide, crime against humanity and war crimes (Amnesty International, 2017).

In 2010, the Committee report was forwarded to the Assembly of the A.U for adoption. Pursuant to the decision of the Assembly, the Commission contacted the Secretariat of the Pan African Lawyers Union (PALU) to study the situation, and recommend the appropriate legal instrument that could amend the Protocol of the ACJHR. In June and August 2010, PALU submitted its reports to the A.U Commission. In November 2011 the Draft Protocol was considered by government experts in a meeting held in Addis Ababa, Ethiopia. Between 7th and 11th May 2012, a meeting of government legal experts was held to review the 2011 draft. In the 19th ordinary session of the A.U held in July 2012, the Assembly presented the Draft Protocol for adoption, although, the Assembly did not adopt the Draft but requested the African Human Rights Court (AHRD) to consider the prospect of extending the jurisdiction of the ACJHR to cover international crimes (Amnesty International, 2016). Up to date, the Protocol to amend the Protocol of the Rome Statute in order to provide the ACJHR equal jurisdiction with the ICC has not receives the expected signatory or ratification from member States of the A.U which makes it an ambitious project that its prospect is still a mirage. Yet, it threatens the effort of the ICC in Africa to ameliorate all forms of impunity leading to violations of human rights in Africa.

III. Presentation and Analysis of Data

Reasons for the Adoption of the Malabo Protocol

Several reasons abound for the adoption of the Malabo Protocol in 2014 which granted the ACJHR equal jurisdiction with the ICC. Social and international political analysts, jurists and scholars have juxtaposed the reasons as well as consequence of this development. This section therefore is focus only on identifying the reasons behind the adoption of the Protocol to amend the Protocol of the ACJHR by the A.U States parties in 4014 [hereafter the Malabo Protocol 2014]. On a general perspective, the reasons for the adoption of the Malabo Protocol as stated under the preamble of the Protocol on Amendments of the Protocol on the Statute of the ACJHR include: settlement of disputes through peaceful means; commitment to promote peace, security and stability of the continent; protect human and people's rights in accordance with the African Charter on Human and People's Rights (ACHPR) and other relevant instruments. There are also commitments to the right of the Union to intervene in a member state pursuant to the decision of the General Assembly in regards to atrocious circumstances, such as war crimes, genocide and crimes against humanity, and serious threat to legitimate order to restore peace and stability to all member states of the Union upon recommendation of the Peace and Security Council. There are also the need to restore respect for the sanctity of human life, condemnation and rejection of all forms of impunity and political assassination, acts of terrorism, rebellious or dissident activities,

unconstitutional change of government, and acts of aggression (see Protocol on Amendments to the Protocol on the Statute of the ACJHR).

As Olugbuo (2014) as cited in Blaw (2020) noted, the ICC has in recent times experiencing increased resistance from African States who criticise the Court for focusing only on their nationals for indictment and trial. It was argued that politics is the main reason for investigating and prosecuting certain powerful individuals in Africa. Because the ICC is the only universal and permanent judicial body with the jurisdiction to entertain cases involving violation of international humanitarian laws, it prosecutors main targets are African leaders. The Court was also criticise for having post-colonial structure, first, by practicing selective prosecution, second, by allowing itself to be used as hegemonic tool of the West which focuses mainly on the relationship between the ICC and UNSC. Responding to these criticisms, the ICC and the Western States re-emphasized the fact that the ICC is a Court for justice (Olugbuo, 2014).

Blaw (2020) argued that the criticism against the ICC by African leaders is understandable because the African critiques cannot be separated from their self-interests as it is the only reason for the propaganda raised against the ICC and its prosecutors and which informs the reason for the adoption of the Malabo Protocol of the A.U in 2014. Barigayonmwe and Prevost (2022:67) argued "that the reason for A.U's move to establish its criminal division under the ACJHR was because of the perception of the global criminal procedures of the ICC as one-sided and to sabotage harmony and compromise endeavours inside the African landmass". By 2009, the relationship between A.U and ICC had changed to worse because of A.U's despondency with what it regarded as an enemy of African inclination at the ICC. To this end, there was the need for it to address violations of human rights and all forms of atrocities and transnational crimes such as defilement and psychological warfare in Africa (Odero, 2011; Schwerdtfeger, 2011). The reasons stated above, prompted the move by the Assembly of the A.U under the Malabo Protocol to granted the merger African Court equal jurisdiction with the ICC to investigate, indict, issue warrant of arrest, and demand for extradition, and try individuals who have or alleged to have violated international human rights provisions in Africa. This brings the prospect of this new development under critical inquiries by international political analysts, jurists and scholars in recent times.

Prospects of the Coordinate Jurisdiction between the ICC and ACJHR

The prospects of the coordinate jurisdiction between the ICC and ACJHR if the Malabo Protocol is eventually fully signed and ratified by the A.U States parties depends on the corporation between the operators of both international courts. As Eden (2018) puts it, establishing the African Court does not mean that the jurisdiction of the ICC should be undermined but to provide African solutions to African problems. In essence, the prospect of establishing the ACJHR lies in its effort to fill the vacuum that was created by not having recourse to the regional legal mechanism before resorting to an international one. African Court is not only a Court that could possibly replace the ICC but rather a court of next resort if the national courts in Africa fail for one reason or another to prosecute powerful individuals and regime leaders and officials responsible for violations of international human rights laws. For this reason, the ICC may retain its jurisdiction to try cases if victims of human rights violations in Africa have cause to believe

that the ACJHR could not provide them justice they needed or expected, or rather prosecute cases involving them appropriately, and to their satisfaction as the law demands (Eden, 2018).

At the entry into force of the Malabo Protocol, conflict of jurisdiction may arise when both courts have jurisdiction to entertain same matter in accordance with Article 12 of the Rome Statute and Article 46 of the ACJHR Statute. Also at the entry of the Malabo Protocol, both Courts may exercise jurisdiction over same territory, or on matters concerning alleged offenders within the jurisdiction of both courts. Unlike the ICC, the ACJHR may exercise jurisdiction when a national of a state party is a victim of crime (the passive personality principle) or when a state party's interests have been threatened (the protective principle) irrespective of the place of crime or nationality or the perpetrators (Oellers-Frahm, 20001; Martini, 2021). The prospect of the equal jurisdiction between the ICC and ACJHR, however, depends mainly on the cooperation between the operators of both courts, as well as the definition of crimes and jurisdiction of crimes to be committed and the place of the commission of such crimes. In other words, conceding jurisdiction to try cases involving violation of human rights in African territories depends on A.U cooperation with the prosecutors of the ICC which means that African States parties to both the Rome Statute which established the ICC and the Malabo Protocol which added international criminal jurisdiction to the ACJHR should as a matter of fact provide undiluted support to both the ICC and the African Court.

Challenges of the ICC and ACJHR Coordinate Jurisdiction

One of the obvious challenges that may confront the ACJHR that was granted equal jurisdiction by the Malabo Protocol of 2014 with the ICC to indict and try individuals and regime leaders and officials who have committed egregious crimes such as war crimes, crimes against humanity and genocide depends on the inability of the Assembly of the A.U to have it mandate fully ratified by all fifty-five (55) member countries of the A.U out of which only Fifteen (15) have been able to ratify it. The need to ratify the Protocol gives the ACJHR jurisdiction over international crimes, although, such jurisdiction will go a long way to give the Court the mandate to entertain cases involving international and transnational organised crimes but this may bedevilled by the failure of the Protocol to have the required signatories from the A.U. member countries. This development may limit the progress of the development of the African Court as one of its kind in the world (Maram, 2019). The jurisdiction if fully ratified will no doubt go a long way to address extreme impunity resulting to serious crimes in Africa. Unfortunately, this ambition is far from becoming a reality. Most challenging is the immunity clause in the Malabo Protocol provided in favour of sitting African regime leaders and senior officials. If this is sustained, it may paralyse the ACJHR's ability to deliver justice and accountability. It was however thought by many that with this provision, the A.U could possibly silence the ICC's mandate to indict, issue warrant of arrest, demand for extradition and prosecute regime leaders and officials who have violated the provisions of international human rights laws during civil unrests, protests and civil war (Maram, 2019).

Martini (2021) argued "that the Malabo Protocol which provided the African Court overlaps with the jurisdiction of the ICC if entered into force will exercise concurrent jurisdiction over same cases which will results to conflicts of jurisdiction should both Courts decide to exercise jurisdiction over the same case". Aside this challenge, the A.U and its Criminal Court (ACJHR)

is also accused by the ICC and the Western Countries for sabotaging the effort of the international community through the UNSC and ICC to ameliorate all forms of impunity resulting to egregious crimes in Africa. As Westen (2018) noted, "the Malabo Protocol is a deliberate attempt by the A.U leaders to protect their kinds in Africa who have committed war crimes, crimes against humanity and genocide from prosecution by the ICC". This is what some critiques of the Protocol called the unchallenged posture of African leaders against all forms of impunity exhibited by their kinds in Africa. Like the ACJHR, the ICC mandate granted it by the Rome Statute to entertain cases involving individuals, and regime leaders and official who have or alleged to have violated international humanitarian law provisions has been limited, especially in Africa since the adoption of the Malabo Protocol in 2014. Although, not yet fully implemented, but in several ways, it has limited the ICC interest in Africa. The seemingly increasing criticism of the Court by African leaders is a challenge to the prosecutors of the Court and victims of these crimes.

As Klip (2012) as cited in Barigayonwe and Prevost (2022:26) puts it, "with the foundation of the African crook court, the A.U took the issue of upholding worldwide criminal regulation at the local above and beyond than European Union (EU) has done". While the European idea criminal regulation develops progressively and meaningfully, the development of the African lawbreaker court has a fairly unique beginning. Blaw (2020) stated the criticism directed against the ICC and its prosecutors for focusing only on nationals of the States of African, particularly, regime leaders and officials, has limited the interest of the Court in Africa. Most, disturbing was the refusal by some national governments in Africa to surrender regime officials who have violated international human rights provisions in their domain and beyond despite having about 34 A.U members States that ratified the Rome Statute which is the treaty that established the ICC. This is evidenced in the case involving Omar Hassan Ahmad Al-Bashir of Sudan who was indicted by the ICC in 2009 for crimes against humanity in the territory of Sudan (Ezeibe, 2011; Patryk, 2019; Amnesty International, 2016; Oluka, Ativie & Okuguni, 2019).

Criticising the ICC for having a post-colonial structure, first by practicing selective prosecution, secondly, allowing itself to be used as hegemonic tool of the West which focuses mainly on the relationship between the ICC and UNSC is also a challenge to the ICC in exercising its mandates in Africa. The question as to which of these Courts (ICC and ACJHR) should exercise jurisdiction over cases of violation of international human rights laws in Africa and committed by African nationals may arise if the mandate of the Malabo Protocol is fully ratified and the ACJHR assumes total jurisdiction of the proscribed crimes in its Protocol. As Teles (2017) stated, the Rome Statute is also confronted with certain problems; including a lack of universality as well as deadlock in the UNSC; a situation where serious crimes are committed and the perpetrators are not brought before the ICC and ad hoc tribunals continues to be established in spite of the existence of a permanent criminal court, such as the cases involving the republic of South Sudan and Syria respectively. There is also the Malabo Protocol of the A.U which if concluded will not only exercise coordinate jurisdiction with the ICC but complement regional and national jurisdictions in its mandate.

Kevin (2022) argued that A.U's defence of personal immunity in its 2013 ICC decision wasn't a surprise after all since the Malabo Protocol was adopted to extend jurisdiction of its proposed African Court to entertain a variety of international crimes, including crimes of aggression.

Kobina (2022) argued that the provision of immunity clause for Head of State and Government in Africa in the Malabo Protocol of 2014 spawned the widespread and trenchant criticism from the advocates of the ICC who alleged that the A.U seeks only to create a culture of impunity and perpetuate same. The A.U on the other hand argued that its standing up for itself is not only against the neo-colonialist imperialist forces that have perverted the ICC and seek subjugation of African States, but also championed the soul of customary international law on immunities (Kobina, 2022). As Nimigan (2021) rightly stated, the problems of the ICC since its establishment under the Statute of Rome are numerous. She argued that of all the problems of the Court, those emanating from African countries have been the most obvious, ranging from allegation of bias, and criticism and displeasure that African leaders are the major targets of the Court since its establishment in 2002.

Teles (2017) argued that the 2017 contentious issue of activation of the crime of aggression under the Rome Statute and against the Permanent Members of the UNSC is another obvious problem that has affects the credibility and legitimacy of the ICC aside the negative perception of the court by the African leaders. The fact remains that out of the five (5) Permanent Members of UNSC, only two (2), France and United Kingdom, are parties to the Statute of Rome. Russia, China and the United States are not parties and this development affects the operation of the Court. Another challenge confronting the ICC is the issue of complementarity enshrined in Article 17 of the Statute of Rome which authorise the ICC to only act as a last resort. It means that the ICC can only intervene in cases involving violations of international human rights provisions if the national government of the state in which the offence is committed is unable or unwilling to try the individual or group of individuals who have violated the provisions of international human rights laws under its jurisdiction (Teles, 2017).

The continued universality issue against the Statute of Rome means that ad hoc tribunals as it was done in past in Yugoslavia, Rwanda, Sierra Leone, Cambodia and Lebanon will continue to be created and sustained. States parties of the A.U that are also states parties to the Rome Statute may face certain challenges. For example, the Statute of Rome which established the ICC has been ratified by over 34 A.U member states, and for this reason, these states have obligations to the ICC as well as the ACJHR. In the event that both Courts indict the same person for same offence against the provision of the international humanitarian laws, and order his/her surrender, the problem of whether to choose the Court to which the demand will be oblige by a state party to both the Rome Statute and the Malabo Protocol may arise. This dilemma may increase the tension between the A.U and the ICC (Amnesty International, 2017). All of these developments highlighted above become the real challenges confronting the ICC in recent times. Indictments of regime officials in Africa as in the case involving Al-Bashir of Sudan, among others are pertinent examples of the challenges now confronting the ICC and its prosecutors since the adoption of the Malabo protocol by the A.U States parties who also double as parties to the Statute of Rome which established the ICC in 2002.

IV. Conclusion

The adoption of the Malabo Protocol will not only challenge the universality of the ICC but delays and sabotage the effort of the international court to indict and request for extradition of ignorable powerful individuals in Africa who have, or alleged to have violated both municipal

and international human rights laws. By implication, the equal jurisdiction granted the ACJHR with the ICC, and if fully ratified by members of the A.U aside the 15 member states that have already ratified the Protocol, means that the ICC will be subjected to a second class court in Africa. Indicting and requesting for the trial of individuals, especially regime officials in Africa who have or alleged to have contravened the provisions of international human rights laws will be resisted by the A.U since the ACJHR now has the jurisdiction to investigate and try nationals from any of the State parties of the A.U. This will inarguably encourage, first, impunity in Africa if not properly managed. Second, if properly managed, both Courts will serve as panacea for prevention of crimes against humanity in Africa. Both Courts will also help to ameliorate all manners of impunities resulting in violations of human rights in Africa. Again, since both Courts condemn conducts that infringes on peoples' rights, corporation between the Courts in cases involving African leaders and powerful individuals who have violated human rights will discourage these forms of impunities and aggressions in the territories of the States of Africa and beyond, if properly coordinated.

V. Recommendations

The following recommendations/suggestions are provided to ensure that the coordinate jurisdiction granted the ACJHR with the ICC does not affect the operations of both Courts in Africa:

1. Both courts should ammonise the jurisdictional mandates granted them by the protocols that established them and collaborate in cases involving individuals and regime leaders and officials in order to continue to indict and prosecute those who have contravened the provisions of international humanitarian laws, particularly in Africa that has recorded more grievous human rights violations during civil unrests, conflicts and civil wars. This will no doubt discouraged all forms of impunity and aggression in the territories of the States of Africa and beyond.
2. Governments of the States of Africa should be responsive to the fact that most of the regime leaders and officials are guilty of the offences or crimes of aggression and impunity leading to violations of the provisions of international humanitarian laws. In other words, they should avoid abuses of their offices as Head of Sates and Government, and most importantly, change their perception against the ICC as having a post-colonial structure, practicing selective prosecution, and allowing itself to be used as imperial tool of the West which focuses mainly on the relationship between the ICC and UNSC.

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