

# The ICC or the ACC

## Defining the Future of the Immunities of African State Officials\*

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### Abstract

*The International Criminal Court (ICC), whose treaty came into force about 18 years ago, was highly celebrated at the time of its creation in 1998 by many African states, led by the African Union (AU), even though it does not recognize the immunities of state officials before its jurisdiction. Conversely, the African Criminal Court (ACC), which was established in 2014 through a Protocol by the AU, recognizes the personal immunities of serving African state officials before its jurisdiction. Accordingly, this article argues that both Article 46A bis of the Malabo Protocol and Article 27 of the Rome Statute are neither inconsistent nor violative of the customary international law rules on the immunities of state officials. It further suggests that the immunity provision in Article 46A bis may be an affront to justice to the people of Africa as long as the state officials are in office despite its seeming consistency with customary international law rule. Finally, in exploring the future of the immunities of African state officials, the article will examine the possibility of blending the jurisdictions of both the ICC and the ACC through the complementarity principle since both courts are aimed at ending impunity for international crimes.*

**Keywords:** ICC, ACC, immunities of African state officials, customary international law rules on immunities, Article 46A bis of the 2014 Malabo Protocol.

### 1 Introduction

The Rome Statute creating the ICC was finally given birth to on 17 July 1998 after many decades of conception.<sup>1</sup> The Court was created through a treaty signed

\* I am sincerely indebted to Prof. Charles Chernor Jalloh for his comments and support on the initial draft of this article. I am also grateful to the anonymous external reviewers whose comments shaped the structure of this article.

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1 See C.C. Achaleke Taku, 'International Politics and Policy Considerations for Inappropriate Targeting of Africa by the ICC OTP', in R.H. Steinberg (Ed.), *Contemporary Issues Facing the International Criminal Court*, Leiden, Brill Nijhoff, 2016, p. 342, noting that the ICC was conceived at the World Peace Conference in 1898.

by 120 states after the adoption and ratification of the Rome Statute,<sup>2</sup> and on 1 July 2002 the Court came into force.<sup>3</sup> Accordingly, the ICC is the first ever permanent international criminal court created by treaty.<sup>4</sup> Currently, 123 countries are state parties to the Rome Statute; 33 are from Africa,<sup>5</sup> 19 from Asia-Pacific states, 18 from Eastern Europe, 28 from Latin American and the Caribbean states and 25 are from Western European and other states.<sup>6</sup> By virtue of Article 5 of the Rome Statute, the ICC has the jurisdiction to entertain the following crimes: the crime of genocide; crimes against humanity; war crimes and the crime of aggression.<sup>7</sup> Moreover, the Rome Statute is divided into four main organs as follows: The Presidency, the Judiciary, the Office of the Prosecutor (OTP) and the Registry. As an international court created by treaty, only the state officials of state parties to the Rome Statute are primarily responsible to its jurisdiction. However, the state officials of non-state parties to the Rome Statute may also accept the Court's jurisdiction by willingly endorsing the jurisdiction of the Court even if they have not ratified the treaty.<sup>8</sup> Early on, after the ICC treaty came into force, African state officials argued that they had become its primary targets.<sup>9</sup> The inappropriate targeting of African state officials by the ICC, especially two sitting heads of states,<sup>10</sup>

- 2 Rome Statute of the International Criminal Court circulated as document A/CONF.183/9 of 17 July 1998 and came into force on 1 July 2002 (Rome Statute), available at: <https://www.icc-int/resource-library> (last accessed 14 April 2020).
- 3 *Ibid.* See also Art. 126 of the Rome Statute requiring 60 ratifications by signed state parties for the Court to come into force.
- 4 See A. Jones, 'Judicial Cross-Referencing and the Identity of the International Criminal Law', *North Carolina Journal of International Law*, Vol. 43, No. 1, 2018, p. 73.
- 5 See *African States Parties to the Rome Statute*, available at: [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states/Pages/african%20states.aspx) (last accessed 2 May 2020).
- 6 See 'The States Parties to the Rome Statute', available at: [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last accessed 11 April 2020).
- 7 See generally Art. 5 of the Rome Statute.
- 8 See, for example, Cote d'Ivoire's acceptance of the jurisdiction initially in April 2003 and became a state party on 15 February 2013, *Situation in Cote d'Ivoire*, available at: [www.icc-cpi.int/cdi](http://www.icc-cpi.int/cdi) (last accessed 5 April 2020).
- 9 M.M. deGuzman, 'Is the ICC Targeting Inappropriately? A Moral, Legal and Sociological Assessment', in R.H. Steinberg (Ed.), *Contemporary Issues Facing the International Criminal Court*, Leiden, Brill Nijhoff, 2016, p. 333, noting that the ICC's focus on Africa is neither legally nor morally inappropriate but threatens to undermine the perceptions of the Court's fairness. For analysis of the ICC Africa relationship, see C. Jalloh, 'Regionalizing International Criminal Law?', *International Criminal Law Review*, Vol. 9, No. 3, 2009, pp. 445-499; D. Akande, M. du Plessis & C. Jalloh, 'An African Expert Study on the AU Concerns about Article 16 of the Rome Statute', ISS Paper, 26 October 2010; and C. Jalloh & I. Bantekas (Eds.), *The International Criminal Court and Africa*, Oxford University Press, 2017. See also K. Clarke, *Affective Justice: The International Criminal Court and the Pan Africanist Pushback*, Durham, NC, Duke University Press, 2019, E. Ankuamah (Ed.), *The International Criminal Court and Africa: One Decade On*, Cambridge, Cambridge University Press, 2016 and K. Clarke, A. Knottnerus & E. de Volder (Eds.), *Africa and the ICC: Perceptions of Justice*, Cambridge, Cambridge University Press, 2016 and G. Werle, L. Fernandez & M. Vorbaum (Eds.), *Africa and the International Criminal Court*, Berlin, Springer, 2014.
- 10 See S.T. Tilden, 'Africa's Conflict with the International Criminal Court: The African Court of Justice and Human and People's Rights' as an Alternative to ICC', *Tulane Journal of International and Comparative Law*, Vol. 27, No. 1, 2018, pp. 205-208.

Aghem Hanson Ekori

President Al Bashir of Sudan and President Uhuru Kenyatta of Kenya, pushed for the creation of the ACC by the AU after more than a decade of conception.<sup>11</sup> Moreover, the ACC is a product of the African Court of Justice and Human and Peoples' Rights (ACJHPR) created on 27 June 2014 at Malabo, Equatorial Guinea.<sup>12</sup> The ACJHPR is a blend of the African Court on Human and Peoples Rights and the Court of Justice of the African Union amended by the AU.<sup>13</sup> The main purpose of the protocol was to create and institute a criminal chamber to the ACJHPR, called the ACC.<sup>14</sup> The treaty establishing the court has not yet come into force, and currently there are 15 states that have signed the 2014 Malabo Protocol,<sup>15</sup> with no single ratification.

By virtue of Article 11 of the 2014 Malabo Protocol, the ACC shall enter into force 30 days after its ratification by 15 AU states member.<sup>16</sup> Under Article 2 of the 2014 Malabo Protocol, the ACJHPR shall consist of the presidency, the OTP, the registry and the defence office.<sup>17</sup> Additionally, by virtue of Article 28A of the 2014 Malabo Protocol, the jurisdiction of the ACC shall comprise the following crimes:<sup>18</sup> 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 waste, illicit exploitation of natural resources, and the crime of aggression.<sup>19</sup> The structure of ACJHPR consists of the following sections:<sup>20</sup> a general affairs section, a human and peoples' rights section and an international criminal law

- 11 See A.K. Onoma, 'An Epochal Bifurcation: The International Criminal Court, the African Court and the Struggle against Gross Human Rights Abuses', *African Journal of International Criminal Justice (AJICJ)*, Vol. 29, 2016, pp. 31-32.
- 12 See *Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights of the African Union*, available at: <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (the 2014 Malabo Protocol) (last accessed 30 April 2020).
- 13 See Onoma, 2016, p. 32; Tilden, 2018, pp. 202-203.
- 14 M. Abaya, 'No Place for Immunity: Argument against the African Criminal Court's Article 46A Bis', *Temple International & Comparative Law Journal*, Vol. 30, No. 2, 2016, pp. 189-190. See also Z.B. Abebe, 'The African Court with a Criminal Jurisdiction and the ICC: A Case for Overlapping Jurisdiction', *African Journal of International and Comparative Law*, Vol. 25, 2017, pp. 418-420.
- 15 As of 30 April 2020 only 15 states have signed the 2014 Malabo Protocol, and no single state has ratified the Protocol available on *Protocol on Amendments to the Protocol on the Statute of African Court of Justice and Human Rights*, available at: <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (last accessed 16 April 2020); while 32 states have signed and only seven have ratified the 2008 Protocol, creating the African Court of Justice and Human Rights. These are: Benin, Burkina Faso, Congo, Libya, Mali, Liberia and Gambia, as seen in *Status List*, available at: <https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights> (last accessed 15 April 2020).
- 16 See Art. 11 of the 2014 Malabo Protocol.
- 17 See Art. 2 of the 2014 Malabo Protocol.
- 18 Abebe, 2017, p. 418.
- 19 See C.C. Jalloh, 'The Crimes', in C.C. Jalloh, K.M. Clarke & V.O. Nmehielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, Cambridge, Cambridge University Press, 2019, pp. 225-256.
- 20 Abebe, 2017, p. 419.

section.<sup>21</sup> The international criminal law section created the ACC, which consists of three chambers: a pre-trial chamber, a trial chamber and an appellate chamber.<sup>22</sup>

The structure and composition of the ACC is very similar to that of the ICC. However, while the ICC does not recognize any form of immunities before its jurisdiction, the ACC – whose instrument was initially consistent with the Rome Statute on this point – later actually recognized the immunities of serving state officials before its jurisdiction.<sup>23</sup> Part II of this article will examine the immunities of African state officials before the jurisdictions of the ICC and the ACC. Part III will examine whether the immunities provision of Article 46A *bis* of the 2014 Malabo Protocol is consistent with immunities under customary international law. Part IV will explore the future of the immunities of African state officials. Part V will conclude with some recommendations.

## 2 The Immunities of African State Officials before the Jurisdictions of ICC and the ACC

This section will analyse the immunities of state officials before the jurisdiction of the ICC, on the one hand, and the immunities of African state officials before the jurisdiction of the ACC, on the other hand. I then discuss whether the immunity of African state officials before the jurisdiction of the ACC is inconsistent with the immunity provision under Article 27 of the Rome Statute.

### 2.1 Immunities of African State Officials before the Jurisdiction of the ICC

As indicated in Paragraphs 4 and 5 of the Preamble of the Rome Statute, namely that the most serious crimes affecting the international community should not go unpunished,<sup>24</sup> and also to end impunity for the perpetrators of international crimes, as well as contribute to the prevention of such crimes,<sup>25</sup> the ICC, on the basis of these views, does not recognize any form of immunities enjoyed by state officials before its jurisdiction.<sup>26</sup> Consequently, Article 27 of the Rome Statute waives the immunities of state officials before its jurisdiction as follows:

- 1 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.

21 See Art. 6 of the 2014 Malabo Protocol.

22 See Art. 6(2) of the 2014 Malabo Protocol.

23 See generally Art. 27 of the Rome Statute and Art. 46A *bis* of the 2014 Malabo Protocol, respectively, dealing with immunities.

24 See generally para. 4 of the Preamble of the Rome Statute.

25 See also Para. 5 of the Preamble of the Rome Statute.

26 See G.N. Barrie, 'Al Bashir and the Tale of Two Cities: The Law of Rome and the Law of Pretoria', *Journal of South African Law*, No. 1, 2017, pp. 150-152.

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

Article 27 of the Rome Statute waives both the functional immunity and personal immunity of all state officials before the jurisdiction of the ICC.<sup>27</sup> Accordingly, given the fact that ICC was created by contracting state parties through a treaty, the functional immunity or immunity *ratione materiae* as well as the personal immunity or immunity *ratione personae* of state officials whose states are parties to the Rome Statute have been waived.<sup>28</sup> Consequently, while Article 27(1) of the ICC reinforces criminal responsibility and waives functional immunity of all state officials whose states are parties to the ICC, Article 27(2) also waives personal immunity and all remaining protections, including procedural rules and hurdles attached to the official capacity in respect of crimes before the ICC.<sup>29</sup> Therefore, immunities as a bar to the exercise of jurisdiction are completely eliminated by the treaty creating the Court in accordance with Article 27 of the Rome Statute. This waiver applies to both high-ranking and subordinate state officials before the jurisdiction of the ICC.<sup>30</sup>

In other words, while Article 27(1) of the Rome Statute eliminates the official capacity of the state officials as a substantive defence to criminal responsibility before the jurisdiction of the ICC, Article 27(2) of the Rome Statute also eliminates all the immunities, including personal and functional immunities belonging to the state officials, whether high ranking or subordinate, as a defence in the exercise of its jurisdiction.<sup>31</sup> As of date, the state officials of all the 33 African state parties to the Rome Statute could be held responsible before the ICC if accused of any of the crimes under its jurisdiction.<sup>32</sup>

Finally, with regard to cooperation and arrest of African state officials under the jurisdiction of the ICC, as one of the reasons for the AU opposition of the ICC besides alleged double standards and targeting only African state officials with

27 See M. Ramsden & I. Yeung, 'Head of State Immunity and the Rome Statute: A Critique of the PTC's Malawi and DRC Decision', *International Criminal Law Review*, Vol. 16, 2016, pp. 707-708.

28 See S.E. Lee, 'Head of State Immunity: The Ongoing Debate and Implications for the Future Development in International Criminal Law', *Australian International Law Journal*, Vol. 24, 2018, p. 133.

29 See P. Webb, 'Human Rights and the Immunities of State Officials', in E. De Wet & J. Vidmar (Eds.), *Hierarchy in International Law: The Place of Human Rights*, Oxford, Oxford Press University, 2012, p. 8, holding that while Art. 27(2) of the ICC is the first express denial of immunity in a constitutive instrument of an international court, Art. 98 of the ICC also upholds immunity in certain situations, as indicated earlier.

30 See D. Akande, 'International Law Immunities and International Criminal Court', *American Journal of International Law*, Vol. 98, 2004, p. 420, noting that state parties to the Rome Statute are compelled to arrest and surrender their own officials to the jurisdiction of the ICC.

31 See J.A. Uriarte, 'Al Bashir: Exception to Immunity of Sudanese Head of State and Cooperation with the International Criminal Court', *Revista Española de Derecho Internacional*, Vol. 68, 2016, p. 46.

32 *African states*, available at: [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/african%20states.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/african%20states.aspx) (last accessed 15 April 2020).

immunities,<sup>33</sup> it is imperative to indicate that all the immunities of African state officials whose states are parties to the Rome Statute are waived at the vertical level in their relationship with the Court,<sup>34</sup> and, according to the ICC, also at the horizontal level in their relationship with other state parties in respect of crimes within the jurisdiction of the Court.<sup>35</sup> Consequently, the state officials of any state party to the Rome Statute could be arrested and surrender to the ICC by another state party without consent should there be any requests by the Court to investigate and prosecute crimes within its jurisdiction.<sup>36</sup> However, the immunities of African state officials whose states are not parties to the Rome statute are not applicable as they have not ratified the Rome Statute.<sup>37</sup>

## 2.2 Immunities of African State Officials before the Jurisdiction of the ACC

The 2014 Malabo Protocol of the ACJHPR creating the ACC introduced an amendment to the prior draft treaty to now recognize, at the request of Kenya, the inclusion of immunities of all senior sitting or incumbent African state officials before its jurisdiction. Accordingly, departing from parity with Article 27 of the Rome Statute, Article 46A *bis* of the 2014 Malabo Protocol reads as follows:

No charges shall be commenced or continued before the Court [ACC] against any serving AU 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.<sup>38</sup>

Consequently, no prosecution can be commenced before the ACC's jurisdiction against any AU serving head of state, head of government or senior state officials based on their functions during their term of office as they are protected by personal immunity recognized under customary international law.<sup>39</sup> As indicated in the first two lines of the paragraph, the personal immunities of all AU incumbent states officials apply as a defence before the ACC's jurisdiction, while the last lines appear to be applicable to functional immunity.<sup>40</sup> Since there is no clear specifica-

33 See K.M Clarke, 'Why Africa', in R.H. Steinberg (Ed.), *Contemporary Issues Facing the International Criminal Court*, Leiden, Brill Nijhoff, 2016, pp. 326-332.

34 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09-302-06-07-2017(2017), at 77.

35 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09-302-06-07-2017(2017), at 79; D. Akande, 'The Immunity of Heads of States of Nonparties in the Early Years of the ICC', *AJIL Unbound*, Vol. 112, 2018, pp. 172-176.

36 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09-302-06-07-2017(2017), at 80.

37 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OAA 06-05-2019 (2019), at 132.

38 Art. 46A *bis* of the 2014 Malabo Protocol.

39 Abebe, 2017, p. 425.

40 See S. Zappala, 'Do Heads of State in Office Enjoy Immunity from Jurisdiction for International Crimes? The Ghaddafi Case Before the French Cour de Cassation', *European Journal of International Law*, Vol. 12, No. 3, 2001, p. 595, noting that under customary international law state officials do no benefit from functional immunity for international crimes.

Aghem Hanson Ekori

tion as to whether Article 46A *bis* of the 2014 Malabo Protocol is applicable to either immunity *ratione personae* or immunity *ratione materiae*,<sup>41</sup> it is imperative to differentiate the two kinds of immunities and the categories of state officials who benefit from the various immunities.<sup>42</sup> However, in the opinion of the author of this article, Article 46A *bis* is applicable only to the personal immunities of AU serving state officials. Immunities *ratione materiae*, on the one hand, are immunities that usually protect state officials from all official acts performed on the behalf of the state.<sup>43</sup> These functional immunities attach to all official acts executed by officials representing the state.<sup>44</sup> Most state officials, including the head of state, are accorded functional immunity since the duties that they performed are sovereign acts or *acta jure imperii* in their official capacity.<sup>45</sup> In other words, this immunity exclusively covers the acts executed in an official capacity on behalf of the state and not the person.<sup>46</sup> This is why acts performed in this capacity escape foreign scrutiny because they are sovereign acts.<sup>47</sup> Finally, immunities *ratione materiae* continue to protect these official acts even when the state officials are no longer in office.<sup>48</sup>

On the other hand, immunities *ratione personae* are immunities from the jurisdiction of other states conferred on state officials because of the position he or she holds in the state.<sup>49</sup> This immunity is also known as status immunity, personal immunity or, generally, as immunity attaching to an office or status.<sup>50</sup> Additionally, this immunity *ratione personae* is absolute while the state official is in office and ends when the person is no longer in office or has abdicated his or her office.<sup>51</sup> State officials entitled to this immunity are completely immune from the jurisdiction of other states in both civil and criminal jurisdictions<sup>52</sup> for acts that they performed in an official capacity and, equally, those carried out in their

41 E.O. Asaala, 'Rule of Law of Realpolitik: The Role of the United Nations Security Council in the International Criminal Court Processes in Africa', *African Human Rights Law Journal*, Vol. 17, 2017, p. 266.

42 See A. Cassese, 'When Senior Officials May Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case', *European Journal International Law*, Vol. 13, No. 4, 2002, pp. 862-864, for the distinction between personal and functional immunities.

43 See J. Dugard, 'Immunity, Human Rights and International Law Crimes', *Journal of South African Law*, Vol. 482, 2005, p. 484.

44 D. Akande & S. Shah, 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts', *European Journal of International Law (EJIL)*, Vol. 21, No. 4, 2011, pp. 825-827.

45 *Ibid.*, p. 825; Zappala, 2001, p. 598.

46 See E. Bates, 'State Immunity for Torture', *Human Right Law Review (HRLR)*, Vol. 7, 2007, p. 672.

47 V. Koivu, 'Head of State Immunity v. Individual Criminal Responsibility under International Law', *Finch Year Book of International Law*, Vol. 12, 2001, p. 312.

48 See Cassese, 2002, p. 862.

49 See Akande & Shah, 2011, pp. 818-819.

50 *Ibid.*, p. 818.

51 See S.D. Murphy, 'Immunity Ratione Personae of Foreign Government Officials and Other Topics: The Sixty-Fifth Session of the International Law Commission', *American Journal of International Law*, Vol. 108, 2014, p. 46.

52 See Zappala, 2001, pp. 599-600.

private capacities.<sup>53</sup> Immunities *ratione personae* also shield state officials for actions amounting to international crimes irrespective of whether the actions concerned were executed before the person assumed office or when in office.<sup>54</sup>

Furthermore, immunity *ratione personae* is granted only to high-ranking state officials in office,<sup>55</sup> and protects the holder against any act of the authority of another state that hinders the high-ranking officials from performing his or her duties.<sup>56</sup> The holders and beneficiaries of this immunity usually represent the state for purposes of adopting or authenticating texts of treaty.<sup>57</sup>

Even though Article 46A *bis* of the 2014 Malabo Protocol appears to cover both functional and personal immunity of sitting African states officials, a convincing interpretation would mean that it is applicable only to the personal immunities of heads of state, heads of government and foreign ministers and their deputies based on their status, office and functions, and this is consistent with the International Court of Justice (ICJ) judgment in the *Arrest Warrant* case.<sup>58</sup> Another justification that Article 46A *bis* of the 2014 Malabo Protocol is applicable to personal immunity of serving African state officials is that it was only when the ICC indicted two sitting African state officials, namely<sup>59</sup> President Al Bashir, of Sudan, and President Uhuru Kenyatta, of Kenya, that the AU strongly opposed and accused the ICC of targeting African state officials.<sup>60</sup>

Moreover, although there had been a waiver of immunity by the state concerned, the prosecution of former Chadian President Habre Hissene by the AU indicates that the immunity *ratione materiae* of former African state officials is recognized only for official acts. In other words, Article 46A *bis* of the 2014 Malabo Protocol does not recognize the functional immunities of former African state officials that are inconsistent with international crimes before its jurisdiction. Finally, the immunity granted to African state officials under Article 46A

53 See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)* [1999] UKHL 17, [2000] 1 A.C.147, at 201-202, *per* Lord Browne-Wilkinson, indicating that this immunity enjoyed by a head of state in office is absolute immunity attaching to the person of the head of state and rendered him immune from all actions or prosecutions, whether or not they relate to matters done for the benefit of the state.

54 See *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, I.C.J., Judgment, 14 February (2002), No. 121, at 55.

55 See *Khurts Bat v. The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin); [2011] All ER (D) 293 (July); ILR 147 (2012), 633 at 55-62, as *per* Lord Justice Moses holding that there is no dispute in customary international law that certain holders of high office are entitled to immunity *ratione personae* while in office, but Bat is a mid-ranking official and therefore not entitled to immunity *ratione personae*.

56 *Democratic Republic of Congo v. Belgium*, I.C.J., Judgment, 14 February (2002) No. 121, at 54.

57 See Cassese, 2002, pp. 863-864; Zappala, 2001, p. 600.

58 *Ibid.*

59 See D. Tladi, 'The Immunity Provision in the AU Amendment Protocol', *Journal of International Criminal Justice*, Vol. 13, 2015, p. 6.

60 See 'Decision on Africa's Relationship with the International Criminal Court (ICC)', *African Journal of International Criminal Justice (AJICJ)*, 2015, p. 91 (para. 10(ii) of that Decision states 'that the trials of President Uhuru Kenyatta and Deputy President William Samoei Ruto, who are current serving leaders of the Republic of Kenya, should be suspended until they complete their terms of office').



Aghem Hanson Ekori

*bis* of the 2014 Malabo Protocol, creating the ACC, is applicable only when the officials are in office, and this is also consistent with the customary rules governing personal immunity in foreign criminal jurisdictions, which ceases when the official is no longer in office.<sup>61</sup> The functional immunity of African state officials before the jurisdiction of the ACC is applicable only to official acts performed by former and subordinate state officials, and this immunity has continued even when these officials are no longer in office.<sup>62</sup> Accordingly, former African state officials may be held criminally responsible for acts carried out while in office that are inconsistent with international criminal laws.

### 2.3 *The Immunity of African State Officials under the Jurisdiction of the ACC Is Inconsistent with Article 27 of the ICC*

It has been established that Article 27 of the Rome Statute does not recognize any form of immunities enjoyed by African state officials before its jurisdiction. Accordingly, African state officials accused of any of the crimes under Article 5 of the Rome Statute are criminally responsible before the jurisdiction of the ICC. On the contrary, Article 46A *bis* of the 2014 Malabo Protocol recognizes the personal immunity of the AU serving heads of state, heads of government and ministers of foreign affairs under the jurisdiction of the ACC.<sup>63</sup> In other words, all the AU serving heads of state, heads of government and foreign ministers are immune before the jurisdiction of the ACC while in office, and this provision is inconsistent with Article 27 of the Rome Statute. Consequently, while all the senior serving African state officials are immune before the jurisdiction of the ACC and therefore criminally irresponsible while in office, the ICC does not recognize the immunity of serving African state officials before its jurisdiction as all their immunities are waived, and, hence, they are criminally responsible before the ICC. However, both the ICC and the ACC jurisdictions are consistent when it comes to immunity *ratione materiae* since the ACC recognizes only the personal immunity of serving senior African state officials.<sup>64</sup>

Moreover, another consistency between the ICC and the ACC is seen in the methods that both courts exercise jurisdiction. On the one hand, ACC may exercise its jurisdiction with respect to the 14 crimes referred to in Article 28A of the 2014 Malabo Protocol in the following three ways: (i) a situation where one or more crimes appear to have been committed is referred to the prosecutor by a state party; (ii) a situation where the assembly of head of state and government makes referral to the prosecutor if one or more of the crimes appear to have been committed; (iii) the prosecutor may initiate an investigation with respect to any crime in accordance with Article 46G of the 2014 Malabo Protocol,<sup>65</sup> using his or her *proprio motu* powers.<sup>66</sup> On the other hand, crimes within the jurisdiction of the ICC could also be initiated in three ways: (i) through a state party to the Rome

61 Zappala, 2001, pp. 611-612.

62 *Ibid.*

63 Tladi, 2015, pp. 7-8, *supra* note 59.

64 See Art. 46B of the 2014 Malabo Protocol.

65 See generally Art. 46F of the 2014 Malabo Protocol.

66 See also Art. 46G(1) of the 2014 Malabo Protocol.

Statute; (ii) through United Nations Security Council (UNSC) referral; (iii) through the Prosecutor of the ICC using his or her own initiative (*proprio motu*) powers.<sup>67</sup> Finally, the recognition of the immunities of senior serving African state officials before the jurisdiction of the ACC has been challenged by some scholars and commentators.<sup>68</sup> The immunity provision of the ACC has also been criticized as being inconsistent with the fight against impunity in the African continent, in particular, and international criminal law, in general. The next section of this article examines whether this immunity provision is consistent with customary international rules on immunities.

### 3 Whether the Immunities Provision in Article 46A *bis* of the Malabo Protocol Is Consistent with Customary International Law Rule on Immunities

In order to determine whether the immunities of African state officials under the ACC are consistent with the customary international law rules on immunities, the *Arrest Warrant* judgment, customary international law rules governing the immunities of state officials in foreign criminal jurisdiction, the application of customary rules comprising state practice and *opinio juris* and the application of customary international rules of immunities by the ICC in the *Jordan* Decision will be examined.

#### 3.1 *The Arrest Warrant Judgment and the Immunities of State Officials*

Even though the *Arrest Warrant* case was mostly concerned with the immunities of incumbent ministers of foreign affairs under the foreign criminal jurisdiction,<sup>69</sup> the ICJ did make some comments regarding the immunities of state officials before international criminal courts. Paragraph 61 of the judgment provides as follows:

Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs [state official] do not represent a bar to criminal prosecution in certain circumstances. ... Fourthly, an incumbent or former state official may be subject to criminal proceeding before certain international criminal courts, where they have jurisdiction.<sup>70</sup>

On the basis of the judgment of the ICJ,<sup>71</sup> serving African state officials 'may be', not shall be, subject to the criminal proceedings of certain international courts.

67 See generally Arts. 13 and 15 of the Rome Statute.

68 See Abaya, 2016, p. 190.

69 *Democratic Republic of Congo v. Belgium, I.C.J., Judgment*, 14 February 2002, No. 121, at 13.

70 See *Democratic Republic of Congo v. Belgium, I.C.J., Judgment*, 14 February 2002, No. 121, at 61.

71 See D. Tladi, 'Immunity in the Era of Criminalisation: The African Union, the ICC and International Law', *Japanese Yearbook International Law*, Vol. 58, 2015, p. 43, noting that the ICJ was not laying down a rule of customary international law concerning immunities but potential avenues of prosecuting officials with immunities in certain circumstance under international criminal courts.

Aghem Hanson Ekori

Accordingly, it would appear that there is no binding customary international law rule that either removes or recognizes the immunities enjoyed by serving senior state officials on the basis of their function.<sup>72</sup> Moreover, the statement that “where they may have jurisdiction” also implies that an international criminal court could be created with the jurisdiction that either waives or recognizes the immunities of serving or former African state officials.<sup>73</sup> Consequently, whether or not an international criminal court recognizes or waives the immunities of both serving and former state officials depends on the instrument creating the court, and its jurisdiction in relationship to the various state parties, either to be bound by its provision to accept the immunities of state officials before its jurisdiction, as in the case with the ACC,<sup>74</sup> or prohibit the immunities of state officials before its jurisdiction,<sup>75</sup> as in the case with the ICC.<sup>76</sup> Therefore, on the basis of the foregoing assertion by the ICJ, while Article 46A *bis* of the 2014 Malabo Protocol is not inconsistent with the customary international law rules that govern the immunities of state officials, Article 27 of the Rome Statute is also consistent with the customary international law rules on the immunities of state officials since the authority to either include or exclude immunities provisions depends on the statute creating the said court.<sup>77</sup> Moreover, international law encourages the creation of regional courts such as the ACC, and the ICC’s existence does not hinder the operation of the ACC.<sup>78</sup>

### 3.2 Customary International Law Recognizes the Immunities of State Officials before Foreign Criminal Jurisdiction

While there is no definite customary international law rule that recognizes or rejects the immunities of state officials under international criminal courts, as indicated earlier,<sup>79</sup> there is a customary international law rule that recognizes the immunities of state officials before foreign criminal jurisdictions.<sup>80</sup> Again, in the *Arrest Warrant* case, the ICJ endorsed this view, and it reads as follows:

72 See *Democratic Republic of Congo v. Belgium, I.C.J., Judgment*, 14 February 2002, No. 121, at 58.

73 For example, the ICC waives all the immunities of state officials in its Art. 27(2) of the Rome Statute. See also *Democratic Republic of Congo v. Belgium, I.C.J., Judgment*, 14 February 2002, No. 121, at 61.

74 See Art. 46A *bis* of the 2014 Malabo Protocol.

75 See Tladi, 2015, p. 41, *supra* note 71; Tladi, 2015, p. 14, *supra* note 59, holding that the argument that customary international law refuses immunity before international court is unconvincing.

76 See Art. 27 of the Rome Statute.

77 *Ibid.*, pp. 42-43.

78 See C. Eboe-Osuji, ‘Administering International Criminal Justice through the African Court’, in C.C. Jalloh, K.M. Clarke & V.O. Nmeielle (Eds.), *The African Court of Justice and Human and Peoples’ Rights in Context: Development and Challenges*, Cambridge, Cambridge University Press, 2019, pp. 838-839.

79 See Tladi, 2015, p. 13, *supra* note 59.

80 See P. Gaeta, ‘Does President Al Bashir Enjoy Immunity from Arrest?’, *Journal of International Criminal Justice*, Vol. 7, 2009, p. 320, noting that the rules apply at the interstate level to ensure the proper and smooth execution of sovereign functions abroad and to avoid state interference in the exercise of the official functions by foreign state representatives.

The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French court of cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.<sup>81</sup>

Even though the ACC is a regional court of the AU, the immunity provision in Article 46A *bis* of the 2014 Malabo Protocol is also consistent with customary international law rule governing the immunity of serving state officials before foreign criminal jurisdiction.<sup>82</sup> Additionally, the International Law Commission's (ILC) report on the immunity of state officials before foreign criminal jurisdiction also recognizes the personal immunity of senior state officials before foreign criminal jurisdictions.<sup>83</sup> Similarly, Professor Paola Gaeta, an international criminal law professor, also asserts that the rules of customary international law on personal immunities are aimed at preventing states from meddling with the activities of foreign states in their territory.<sup>84</sup> Conversely, the rationale for granting personal immunity to serving African state officials is based on their functions as representatives of the state as well as their office.<sup>85</sup> Finally, the removal of the immunity of state officials under international criminal courts by customary international law requires both state practice and *opinio juris*.<sup>86</sup>

### 3.3 Customary International Law Requires State Practice and *Opinio Juris* to Waive Immunities before International Criminal Courts

Customary international law consists of rules that originate from a “general practice accepted as law”.<sup>87</sup> Article 38 of the Statute of the ICJ also recognizes the two elements of general practice and accepted as law as evidence of applications by

81 *Democratic Republic of Congo v. Belgium, I.C.J., Judgment*, 14 February 2002, No. 121, at 58.

82 *See Cassese*, 2002, p. 854.

83 *See Draft Art. 4(1) on the immunity of state officials from foreign criminal jurisdiction, Seventh Report of the Special Rapporteur, Concepcion Escobar Hernandez on the Immunity of State Officials from Foreign Criminal Jurisdiction* (2019), (A/CN.4/727).

84 *See Gaeta*, 2009, p. 320.

85 The immunity provision in Art. 46A *bis* of the 2014 Malabo Protocol is equally consistent with the decision of the ICJ in *Democratic Republic of Congo v. Belgium, I.C.J., Judgment*, 14 February 2002, No. 121, at 53.

86 *But see The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 O/A2 06-05-2019 (2019), at 1, where the Appeals Chamber of the ICC held that there is neither state practice nor *opinio juris* that would support the existence of the immunity of senior state officials under customary international law before an international court and that such immunity has never been recognized in international law as a bar to the jurisdiction of an international court.

87 *See 'Sources of International Law'*, available at: [www.diakonia.se/en/IHL/The-Law/International-Law1/Sources-of-IL/](http://www.diakonia.se/en/IHL/The-Law/International-Law1/Sources-of-IL/) (last accessed 20 April 2020).

states.<sup>88</sup> Accordingly, the application of any rule under customary international law must be complemented by state practice and *opinio juris*.<sup>89</sup> These two elements are necessary for the formation and continued validity of customary norm.<sup>90</sup> While it has been established by state practice and *opinio juris* that the immunity of senior state officials is applicable before foreign criminal jurisdiction, it has not been established under international criminal courts as the application so far is based on the statute creating the court.<sup>91</sup> The element of state practice may have been satisfied under the various tribunals created by the UNSC;<sup>92</sup> however, the other element of *opinio juris* is still to be fulfilled.<sup>93</sup> Accordingly, while the international criminal courts like the ICC and ACC are created by treaties binding on state parties and their statutes may either waive or recognize the immunities of states officials before their respective jurisdiction,<sup>94</sup> customary international law is created by general practice of state accepted as law and is binding on all states.<sup>95</sup> In other words, both the fact that the ICC removes the immunities of state officials before its jurisdiction and the fact that the ACC rec-

88 See Art. 38(1)(b) of the Statute of ICJ, available at: [https://legal.un.org/avl/pdf/ha/sicj/icj\\_staute\\_e.pdf](https://legal.un.org/avl/pdf/ha/sicj/icj_staute_e.pdf) (last accessed 20 April 2020); J.J. Paust, 'Customary International Law: Its Nature, Sources and the Status as Law of the United States', *Michigan Journal of International Law*, Vol. 12, 1990, pp. 61-62.

89 *Ibid.*, Paust, state practice, also known as *usus*, is an objective criterion where customary law is confirmed through the behaviour of states and manifested through official statements and actions; legal nature of practice, also known as *opinio juris*, is a subjective criteria and is the expressed opinion of states, individually or collectively with actions that have a legal basis. See also 'Opinio Juris Sive Necessitatis' which means "an opinion of law or necessity", available at: [www.spacelegalissues.com/opinio-juris-sive-necessitatis/](http://www.spacelegalissues.com/opinio-juris-sive-necessitatis/) (last accessed 20 April 2020); Tladi, 2015, pp. 13-14, *supra* note 59.

90 Paust, 1990, p. 61.

91 See, for example, Art. 27 of the Rome Statute, which waives all the immunities state officials enjoy before the jurisdiction of the ICC.

92 Some examples and provisions of these tribunal include the following: Art. 7 of the IMT, on 8 August 1945, states that the official position of the defendant, be it head of state or responsible official in the government office, is immaterial with regard to criminal responsibility; Art. 6 of the IMTFE, on 19 January 1946, also states that neither the official position of the accused nor his high government office will free him of his criminal responsibility before the tribunal; Art. 7 of ICTY, on 25 May 1993, provides that a person who has instigated or committed a crime will be criminally responsible and that the official position, whether head of state or responsible government official, will not relieve him of his criminal responsibility; likewise, Art. 6 of the ICTR 1994 affirmed that the individuals are criminally responsible and that the fact that the culprit is head of state or occupies top government office will not exonerate him from his responsibility; Art. 6 of the SCSL on 14 August 2000, holding an individual criminally responsible with no mitigation of punishment, irrespective of his personality, whether head of state or senior government official. Finally, Art. 3 of the STL, on 10 June 2007, maintaining that a person is criminally responsible when he acts as an accomplice or directs others to commit a crime. See also Tladi, 2015, p. 13, *supra* note 59.

93 See Tladi, 2015, p. 13, *supra* note 59.

94 For example, Art. 27 of the Rome Statute was created by treaty by consented state parties its jurisdiction waives all form of immunities granted to state officials, and Art. 46A *bis* of the 2014 Malabo Protocol recognizes the personal immunities of senior serving African state officials before its jurisdiction.

95 'Sources of International Law', available at: [www.diakonia.se/en/IHL/The-Law/International-Law1/Sources-of-IL/](http://www.diakonia.se/en/IHL/The-Law/International-Law1/Sources-of-IL/) (last accessed 20 April 2020).

ognizes the immunities of serving African state officials are consistent with customary international law. This is equally so because the authority to either reject or accept the immunities of state officials before their respective jurisdictions is determined by the statute creating the court, which must then have in turn been accepted by the States concerned.<sup>96</sup> Finally, while the customary rules on immunities are granted to state officials at the horizontal level before foreign criminal jurisdictions to enable them to perform and fulfil their respective sovereign activities, there is no such rationale for granting of immunities to state officials before the jurisdiction of international criminal courts. Accordingly, international criminal courts are not organs of a particular state, and they act in the interests of the international community as a whole to suppress serious international crimes.<sup>97</sup> Hence, the immunities provision before international criminal courts is determined by the statute creating the court and not customary international law, as indicated by the *Jordan* Decision in the next subsection.<sup>98</sup> However, according to Professor Dire Tladi, customary international law has no provision for the immunity of state officials before international courts; the immunity provision in Article 46A *bis* of the 2014 Malabo Protocol is inconsistent with international law, or, better still, goes against the trend of practice but reflects customary international law.<sup>99</sup>

### 3.4 *The Application of Customary International Law Rule on the Immunities of State Officials in the Jordan Decision and the International Criminal Court*

The dominant issue before the ICC's Appeals Chamber in the *Jordan* judgment was whether President Al Bashir, as head of state of Sudan, enjoys immunity before the ICC, which Jordan was obligated to respect without the waiver from Sudan. This was equally so bearing in mind that while Sudan is not a state party to the Rome Statute and Al Bashir was the sitting president at that time, Jordan is a state party and was obligated to cooperate with the Court.<sup>100</sup> Again, the Court noted that the immunity of state officials is recognized under customary international law and that, as such, this immunity is applicable only in the relations between states. The rationale for granting such immunities is to prevent one state from exercising its criminal jurisdiction over officials of another state.<sup>101</sup> Additionally, the Court also noted that Article 27(2) of the Rome Statute is a reflection of both conventional law and the status of customary international law.<sup>102</sup> This was established taking into consideration Article 7 of the Nuremberg

96 See D. Tladi, 'Article 46A Bis : Beyond the Rhetoric', in C.C. Jalloh, K.M. Clarke & V.O. Nmehielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, Cambridge, Cambridge University Press, 2019, pp. 862-863.

97 See Gaeta, 2009, pp. 320-321.

98 See *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019).

99 Tladi, 2019, pp. 857-859.

100 See Art. 86 of the Rome Statute obligating all state parties to cooperate during investigation and prosecution of crimes within its jurisdiction.

101 *The Prosecutor v. Omar Hassan Ahmad Al Bashir* No. ICC-02/05-01/09 OA2 06-05-2019 (2019), at 101.

102 *Ibid.*, at 103.

Aghem Hanson Ekori

Charter of the IMT and the Nuremberg Principles, Article 3 of the of the ILC's draft Code of Offences against Peace and Security of Mankind, and the Convention against Genocide.<sup>103</sup> All these principles, according to the Court, now seem to establish that the sovereign equality of all states does not prevent a state official from being prosecuted before an international criminal court.<sup>104</sup> Finally, the Appeals Chamber in the *Jordan* decision, after much consideration, held that there is neither state practice nor *opinio juris* that would support or that has recognized the existence of the immunities of senior state officials under customary international law before an international criminal court if they are accused of international crimes before its jurisdiction.<sup>105</sup> Consequently, related to this decision is the fact that immunity before international courts depends on the statute creating the court, which most often is by a treaty.

In sum, the immunity provision in Article 46A *bis* of the Malabo Protocol can be said to be justifiable for the following reasons: (i) it is consistent with customary international law rules on immunities of state officials before foreign criminal jurisdiction, and customary international law does not provide for the immunities of state officials before an international court; (ii) the immunity provision of the ACC was created by a treaty through the Malabo Protocol, and the state parties to the treaty creating the court may either agree to recognize or reject immunities before the jurisdiction of the court; (iii) finally, the immunity provision in the ACC is consistent with immunities *ratione personae*, which are procedural in nature. Procedural immunity does not mean criminal irresponsibility as the serving AU state officials will be criminally liable when they are no longer in office.

Despite the legality of both Article 27 of the Rome Statute and Article 46A *bis* of the 2014 Malabo Protocol, the immunities provision in Article 46A *bis* of the Malabo Protocol is inappropriate and an affront to justice to the people of Africa for the following reasons: (i) it defers the investigations and prosecutions of the suspected AU serving state officials while in office and, equally, allows the officials to retain power, thereby escaping criminal proceedings; (ii) it might hinder the potential value of the ACC in preventing crimes and fighting against impunity in the continent; (iii) some victims of the offences masterminded by the AU serving state officials might never see justice because of the deferred investigation and prosecution of the officials caused by longer serving terms, and, furthermore, delayed prosecution enables the officials to eradicate potential evidence and witnesses that could possibly incriminate them when they leave office.<sup>106</sup> In other words, the immunity provision in Article 46A *bis* might be an affront to justice to the people of Africa. For one thing, it suggests senior state officials can stay in office for decades with impunity despite evidence of international crimes committed by them.<sup>107</sup> Additionally, the constitutions of some of the African states are constantly being modified by these senior serving African state officials under

103 *Ibid.*, at 105.

104 *Ibid.*, at 107.

105 *Ibid.*, at 113. See also paras. 114-119 of the same judgment.

106 See 10 of *Africa's longest serving presidents*, available at: <https://thisisafrica.me/politics-and-society/10-africas-longest-serving-leaders/> (last accessed 6 May 2020).

107 *Ibid.*

their influence to keep them from being prosecuted by the domestic court after serving for decades in office.<sup>108</sup> In all, it would appear that Article 46A *bis* of the 2014 Malabo Protocol is also consistent with the Jordan judgment since immunity in this regard depends on the statute of the court and not customary international law rule. Be that as it may, what is the future of the immunities of African state officials?

#### 4 The Future of the Immunities of African State Officials

The future of the immunities of African state officials will be determined by three scenarios in accordance with the existing international criminal courts as follows: (i) the ICC, (ii) the ACC and (iii) a blend of the ICC and the ACC through some compromises from both criminal courts and *détente*.

##### 4.1 *The Future of the Immunity of African State Officials as Determined by the ICC*

To begin with the ICC, 33 African states, out of the 55 AU member states, are currently state parties to the Rome Statute. These 33 African state parties to the Rome Statute have agreed to waive the immunities of their respective state officials before the jurisdiction of the ICC,<sup>109</sup> since the ICC was created by a treaty.<sup>110</sup> Unfortunately for the African continent and the AU, the ICC came into force when some of the worst crimes were committed in Africa.<sup>111</sup> Moreover, currently, there are 13 situations under investigation, 10 of which are from Africa,<sup>112</sup> and of these 10, five were referred by their respective governments,<sup>113</sup> one accepted the jurisdiction of the ICC,<sup>114</sup> two were referred by the UNSC to the Prosecutor of the ICC,<sup>115</sup> and the remaining two were initiated by the Prosecutor using the *proprio motu* power.<sup>116</sup> All these are indications that some AU states member are cooper-

108 For example, the Constitution of the Republic of Cameroon.

109 Art. 27 of the Rome Statute.

110 See 'The International Criminal Court on Trial: A Conversation with Fatou Bensouda', *Foreign Affairs*, 2017, pp. 48-53.

111 See B.J. Cannon, D.R. Pkalya & B. Maragia, 'The International Criminal Court and Africa', *African Journal of International Criminal Justice*, Vol. 6, 2016, p. 20.

112 See *Situations under Investigation*, available at: [www.icc-cpi.int/pages/situation.aspx](http://www.icc-cpi.int/pages/situation.aspx) (last accessed 23 April 2020).

113 *Ibid.*, for example Democratic Republic of Congo (DRC), Uganda, Central Africa Republic (CAR), Mali and Central Africa Republic II were all referred to the jurisdiction of the ICC by their governments.

114 Cote d'Ivoire accepted the jurisdiction of the ICC in April 2003 and became a state party to the Rome Statute on 15 February 2013, as seen in *Situation in the Republic of Cote d'Ivoire*, available at: [www.icc-cpi.int/cdi](http://www.icc-cpi.int/cdi) (last accessed 23 April 2020).

115 The situation in Darfur, Sudan, was referred to the ICC's Prosecutor by UNSC in 2005 through Resolution 1593 of 2005, as well as the situation in Libya in 2011 by UNSC Resolution 1970 of 2011.

116 Situations in Kenya and Burundi by the ICC's Prosecutor using the *proprio motu* powers under Art. 15 of the Rome Statute.



Aghem Hanson Ekori

ating with the ICC,<sup>117</sup> and the prosecution of African state officials by the ICC is legally justifiable.<sup>118</sup> Additionally, it was only when the Prosecutor of the ICC indicted two senior African state officials, President Uhuru Kenyatta of Kenya and Vice President William Ruto,<sup>119</sup> who assumed office after the ICC proceedings began, and President Al Bashir of Sudan (now the former president),<sup>120</sup> that the issue of the ICC targeting African state officials was ignited and subsequently gave birth to the immunity provision under Article 46A *bis* of the 2014 Malabo Protocol.<sup>121</sup> Even though the AU has challenged the ICC on the prosecution of AU states, it was legally justifiable given the fact that some of the cases were referred by the governments of some states to the ICC jurisdiction.<sup>122</sup> Despite the many arguments that the AU has advanced against Article 27 of the Rome Statute in favour of the immunity of serving African state officials,<sup>123</sup> the ICC's fight against impunity for crimes under its jurisdiction overshadows these claims by the AU.<sup>124</sup> In fact, according to President Muhammad Buhari of Nigeria, the ICC is needed more than ever before given the increasing proliferation of the most serious crimes around the world.<sup>125</sup> Accordingly, while not all sovereign acts of the state officials are inconsistent with international criminal law, all criminal acts performed by state officials are inconsistent with sovereign acts of the state. The ICC will therefore prosecute all sovereign acts of the state officials, in general, and African state officials, in particular, that amount to crimes within its jurisdiction.<sup>126</sup> Given the fact that the ICC was born of a universal need to provide justice to victims of some of the most atrocious crimes that has shocked mankind,<sup>127</sup>

117 M. Abaya, 'Ordinary Citizens: The Hope for International Criminal Justice in Africa', *UCLA Journal of International Law and Foreign Affairs*, Vol. 23, 2019, p. 6, noting that five situations in Africa were self-referred to the jurisdiction of the ICC by their respective government.

118 See Cannon, Pkalya & Maragia, 2016, pp. 13-15.

119 'Decision on Africa's Relationship with the International Criminal Court (ICC)', 2015, p. 91.

120 See M.D. Kielsgard & K. Ge-Kin, 'Prioritizing Jurisdiction in the Competing Regimes of the International Criminal Court and the African Court of Justice and Human Rights: A way Forward', *Boston University International Law Journal*, Vol. 35, No. 2, 2017, pp. 298-299.

121 See *The AU's Extraordinary Summit decisions on Africa-ICC Relationship*, available at: [www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/](http://www.ejiltalk.org/the-aus-extraordinary-summit-decisions-on-africa-icc-relationship/) (last accessed 23 April 2020).

122 See Abaya, 2019, pp. 6-7. However, the *Al Bashir* and *Kenyatta* cases were not referred by their respective governments to the ICC.

123 For example, as seen in Abaya, 2016, pp. 194-197, holding that immunity allows African state officials to function on their responsibility, prevent constitutional duties of African state officials from being disrupted, allows the functions of constitutional institution and constitutional order without disruptions, would not undermine both the sovereignty of the office they hold and the sovereignty of African states and that immunity granted to serving African state officials would facilitate reconciliatory efforts and create peace and cooperation in African nations.

124 See the *Speech of the ICC President to the United Nations General Assembly on 29 October 2018*, available at: [www.icc-cpi.int/Pages/item.aspx?name=181029-pres-stat-un](http://www.icc-cpi.int/Pages/item.aspx?name=181029-pres-stat-un) (last accessed 6 May 2020).

125 *Ibid.*

126 See Art. 5 of the Rome Statute for crimes within the jurisdiction of the ICC as well as Arts. 12 and 13 of the Rome Statute dealing with exercise of the Court's jurisdiction.

127 See *ASP President, O-Gon Kwon, reaffirms unwavering support for the ICC on 25 March 2020*, available at [www.icc-cpi.int/Pages/item.aspx?name=1521](http://www.icc-cpi.int/Pages/item.aspx?name=1521) (last accessed 6 May 2020).

and that impunity for these crimes still persists,<sup>128</sup> even in the African continent, the Court remains more relevant than ever. It needs the support of everyone, including the AU member states, whose formal legal instruments at the regional level indicate a commitment to fight against impunity.

#### 4.2 *The Future of the Immunity of African State Officials as Determined by the ACC*

The immunity provision in Article 46A *bis* of the 2014 Malabo Protocol has been criticized for promoting impunity and is inconsistent with the efforts made by the international criminal law to end immunity for perpetrators or state officials responsible for international crimes.<sup>129</sup> As indicated earlier, even though the AU has advanced many convincing reasons for the inclusion of the immunity provision in Article 46A *bis* of the 2014 Malabo Protocol, none of these arguments supersede the determination to fight against impunity in the African continent, although its provision may be legally justifiable under customary international law. In an open letter to the heads of state and government of the AU, Amnesty International has argued that the AU should not adopt Article 46A *bis* of the 2014 Malabo Protocol as this would undermine not only the integrity of the ACC, but also the AU goals to ensure justice to victims of crimes under international law.<sup>130</sup> Moreover, Article 46A *bis* of the 2014 Malabo Protocol will further prevent the investigations and prosecution of serving African state officials while in office should they mastermind any of the crimes under the jurisdiction of the ACC.<sup>131</sup> Additionally, the immunity provision in Article 46A *bis* is equally inconsistent with some of the articles in the Constitutive Act of the AU.<sup>132</sup> According to Professor Charles Jalloh, keeping in mind the history of coup d'états on the continent and the status of some countries as fledgling democracies, the immunity provision might well incentivize suspects to attempt to stay in power as a means of avoiding the initiation of investigations or prosecutions.<sup>133</sup> This argument, which brings to the fore AU policies on the promotion of democracy, links the interests in the stability of African states to the interests of peace and justice. Finally, and one wonders whether the immunity provision has anything to do with this, the ACC has not yet entered into force, and currently no single African

128 See *Dakar Conference on the Day of the International Criminal Justice*, available at: [www.icc-cpi.int/Pages/item.aspx?name=PR1322](http://www.icc-cpi.int/Pages/item.aspx?name=PR1322) (last accessed 23 April 2020).

129 Kielsingard & Gee-Kin, 2017, p. 299; Art. 27 of the Rome Statute.

130 See Amnesty International, *Open Letter to Heads of State and Government of the African Union*, available at: [www.amnesty.org/en/documents/AFR01/012/2014/en/](http://www.amnesty.org/en/documents/AFR01/012/2014/en/) (last accessed 28 April 2020).

131 *Ibid.*

132 See Art. 4 of the *Constitutive Act of the AU*, adopted on 7 November 2000 and came into force on 26 May 2001, (the Constitutive Act of AU), available at: <https://au.int/en/treaties/constitutive-act-african-union> (last accessed 28 April 2020); Abaya, 2016, p. 197.

133 See C.C. Jalloh, 'Reflections on the Indictment of Sitting Heads of State and Government and Its Consequences for Peace and Stability and Reconciliation in Africa', *African Journal of Legal Studies*, Vol. 7, 2014, p. 59.

Aghem Hanson Ekori

state official has ratified the 2014 Malabo Protocol.<sup>134</sup> While the adoption of the 2014 Malabo Protocol, with its extended jurisdiction of 14 international crimes, is aimed at fighting impunity in the African continent, the immunity provision in Article 46A *bis* of the Malabo Protocol may shield serving African state officials from investigation and prosecution while in office.<sup>135</sup> Likewise, this provision may hinder the mechanism to end impunity for perpetrators of international crimes adopted by the Rome Statute, even though it is consistent with customary international law rules on the immunities of state officials before foreign jurisdiction. Again, immunity under international criminal courts is determined by the statute creating the court and not necessarily customary international law. Therefore, the future of the immunity of African state officials with respect to international crimes may be deterred by the immunities provision in Article 46A *bis* of the 2014 Malabo Protocol since it is inconsistent with the fight against impunity for the most severe crimes globally.<sup>136</sup> In other words, the gap between immunity and impunity is very narrow in the eyes of the international criminal justice system nowadays. It should never be promoted by the 2014 Malabo Protocol. Despite the immunity provision in the ACC, the Malabo Protocol brought great innovations to international criminal law, in general, and the fight against impunity in Africa. The crime of unconstitutional change of government and the expanding jurisdiction for international crimes are some examples of this.<sup>137</sup> Additionally, the African states, through the AU, have contributed to the development of the international criminal law in many ways as follows: (i) African countries participated in the creation of the ICC, and Senegal was the first state in the world to ratify the Rome Statute; (ii) African state officials provided a hotspot for crimes where the ICC could practice its trade when it came into force; (iii) and, finally, the ACC, through the Malabo Protocol, has widened the scope of crimes in international crime law.

#### 4.3 *The Future of the Immunity of the African State Officials as Determined by a Blend of the ICC and the ACC*

As indicated earlier in this article, while the ICC does not recognize the immunities of state officials before its jurisdiction in its Article 27 of the Rome Statute, the ACC recognizes the immunities of African state officials before its juris-

134 While 15 states have signed the 2014 Malabo Protocol, not even one of these has ratified the Protocol, as seen in <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights> (last accessed 28 April 2020).

135 See N.C. Ani, 'Implications of the African Union's Stance on Immunity for Leaders on Conflict Resolution in Africa: The Case of South Sudan and Lessons from the Habre Case', *African Human Rights Law Journal*, Vol. 18, No. 2, 2018, p. 454, noting that the AU's position on not prosecuting serving state officials will jeopardize their effort to fight against impunity for incumbent leaders and senior government officials in South Sudan.

136 See again ASP President, O-Gon Kwon, *reaffirms unwavering support for the ICC on 25 March 2020*, available at: [www.icc-cpi.int/Pages/item.aspx?name=1521](http://www.icc-cpi.int/Pages/item.aspx?name=1521) (last accessed 6 May 2020).

137 See C.C. Jalloh, 'The Place of the African Court of Justice and Human and Peoples' Right in the Prosecution of Serious Crimes in Africa', in C.C. Jalloh, K.M. Clarke & V.O. Nmehielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, Cambridge, Cambridge University Press, 2019, pp. 91-95.

diction, as seen in Article 46A *bis* of the 2014 Malabo Protocol. Therefore, merging the ICC and the ACC would first require that either Article 27 of the Rome Statute or Article 46A *bis* of the 2014 Malabo Protocol be amended. In this regard, either Article 46A *bis* of the 2014 Malabo Protocol should be amended to waive all the immunities of serving African state officials to enable consistency with the ICC or both jurisdictions may be treated separately with regard to immunity. The simple deletion of the provision will bring the ACC instrument back in line with the ICC instrument.

Another issue to consider in the proposed blend of jurisdiction between the ICC and ACC is the complementarity principle.<sup>138</sup> This principle, on the one hand, enables national courts of all state parties to prosecute suspected state officials of any of the crimes under Article 5 of the Rome Statute before their jurisdiction, while the ICC will intervene only when the states are unwilling or unable to genuinely carry out the investigation or prosecution of these crimes.<sup>139</sup> Hence, the ICC applies the fail-safe principle and is also considered as a standby generator. The ACC, on the other hand, is a regional court, and therefore<sup>140</sup> Article 17 of the Rome Statute may be amended or made flexible in order to accommodate a regional court like ACC.<sup>141</sup> Additionally, the ICC report on complementarity also indicates that the Court should not only eye the national courts of the states on whose territory crimes have been committed but also regional courts, special tribunal and hybrid courts as these courts play a vital role in criminal accountability.<sup>142</sup>

Moreover, the issue of crimes within the jurisdiction of both courts should also be considered. While the ICC has the jurisdiction to entertain only five crimes, the ACC's jurisdiction is wider, entertaining 14 international crimes. Similarly, the assumed jurisdiction of the blended courts will be facilitated by the following factors: (i) the fact that both the ICC and the ACC share the common goal of tackling impunity; (ii) the fact that complementarity is a jurisdictional principle common to both courts; and (iii) positive complementarity for national and regional courts.<sup>143</sup> Finally, since both the ICC and the ACC were created by treaty,<sup>144</sup> the Vienna Convention on the Law of Treaties should be considered to resolve any matter regarding interpretation and applicability of international

138 *Ibid.*, noting that one of the foundations of the ICC is that it recognizes the primary jurisdiction of states to investigate and prosecute crimes and as a court of last resort; the ICC is complementary to national jurisdictions.

139 See ICC-ASP/13/30 *Report of the Bureau on complementarity* Thirteenth session, New York, 8-17 December 2014, p. 3.

140 See Tladi, 2015, p. 43, *supra* note 71, noting that the complementarity principle under the Rome Statute is applicable only to the national court, not the regional court.

141 See ICC-ASP/17/34 *Report of the Bureau on Complementarity* Seventeenth session, The Hague, 5-12 December 2018, p. 17, where it was noted that the ICC is the last line as a default court needed only when the other courts are unwilling or unable to take responsibility and that the ICC in this case is backup generator, that Africa needs the ICC as a backup generator and, finally, that the ACC should be promoted.

142 *Ibid.*

143 For further details see Jalloh, 2019, *supra* note 137, pp. 95-98.

144 See Gaeta, 2009, p. 319.

Aghem Hanson Ekori

law.<sup>145</sup> In all, a blend of rules and regulations between the ICC and the ACC should be promoted to determine the future of the immunities of African state officials since the key is to end impunity, ensure a functional judicial system and enforce the rule of law in Africa.<sup>146</sup>

## 5 Concluding Remarks

The ACC is not the African panacea with regard to the future of immunity of African state officials. This is because Article 46A *bis* of the 2014 Malabo Protocol may be inconsistent with the fight against impunity for the most serious crimes of international concern. History has shown some African leaders and senior state officials have committed some of the most atrocious crimes of international concern while in office. They, of course, are not alone, as we have witnessed in other parts of the world. With 15 of the 55 member states of the AU having signed the 2014 Malabo Protocol and no single state having ratified the Protocol, the ACC will not be likely to be operational any time soon. In other words, although no doubt complicated by several issues, the AU member states appear to be confused as to whether to identify with the ICC or ACC to prosecute African state officials. Again, the immunity provision in Article 46A *bis* of the 2014 Malabo Protocol is not only against Article 4 of the AU Constitutive Act, but also paralyzes the determination to fight against impunity for serious crimes committed by some of the AU senior serving state officials. The immunity provision in the Malabo Protocol may thus hinder the current vision of ending impunity for international crimes and also thwart the role of accountability by African state officials to the people of Africa who placed them in such positions of responsibility. However, since immunities of state officials under international courts are determined by the statutes creating those courts, especially when the courts have jurisdiction, criminal accountability is possible only when the state officials are no longer in office. Moreover, the personal immunity of AU serving state officials recognized by the Malabo Protocol is procedural in nature and does not exempt any state officials from criminal responsibility when they leave office. In other words, Article 27 of the Rome Statute and Article 46A *bis* of the 2014 Malabo Protocol neither violate nor are inconsistent with the customary international law rules with regard to the immunities of state officials before international courts. Accordingly, while the waiver of immunities by Article 27 of the Rome Statute is consistent with customary international law, the recognition or inclusion of immunities in Article 46A *bis* is also consistent with customary international law since the statutes of both the ICC and the ACC have determined their jurisdictions and not customary international law.

145 See Vienna Convention on the Law of Treaties, 1969, done at Vienna on 23 May 1969, entered into force on 27 January 1980, United Nations *Treaty Series*, Vol. 1155, p. 33, available at: <https://treaties.un.org> (last accessed 6 May 2020).

146 See *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda: 'The ICC is an independent court and must be supported'*, available at: [www.icc-cpi.int/Pages/item.aspx?name=PR1322](http://www.icc-cpi.int/Pages/item.aspx?name=PR1322) (last accessed 29 April 2020).

Accordingly, the authority to accept or reject immunities of state officials is determined by the treaty creating their respective statutes. Customary international law, however, recognizes the immunities of state officials under foreign domestic jurisdiction as these are supported by both state practice and *opinio juris*. The future of the immunities of African state officials, therefore, is recommended to continue to be determined by the ICC and by the ACC when it finally comes into force. This will be possible through the blending of certain provisions like Article 17 of the Rome Statute and Article 46H of the 2014 Malabo, both dealing with the principle of complementarity to grant jurisdictions not only to national courts but also endorsed regional courts like the ACC and its authority to prosecute perpetrators of international crimes.<sup>147</sup> In this regard, where the national and regional courts are genuinely unwilling or unable to prosecute these state officials, either the ACC or the ICC will be entitled to prosecute. However, should the ACC and the AU wilfully decide to function solo, thereby refusing to cooperate with the ICC, the 2014 Malabo Protocol and its Article 46A *bis* should nevertheless continue with the fight against impunity since the immunity provision is temporary and only procedural. Accordingly, all AU serving state officials are criminally responsible before the ACC jurisdiction when they leave office. However, the defence of state sovereignty and interference with the functions of senior state officials while in office raised by the AU should never outweigh the need for justice to be served to the common people of Africa. According to Cassese,

it would be a travesty of law and a betrayal of the universal need for justice should the concept of state sovereignty be allowed to be raised successfully against human rights violations.

In other words, it would be unjust to the African people if serving state officials commit crimes against her citizens after staying in office for decades and then leave office at an old age and die without any trial. The prime rationale for any criminal court, including the ACC, should be to end the impunity of senior state officials and other perpetrators, whether in or out of office, promote the rule of law in the African continent and facilitate independent judiciary systems in the national jurisdictions of all AU member states.

147 For further details on complementarity between the ACC and the ICC, see M.M. deGuzman, 'Complementarity at the African Court', in C.C. Jalloh, K.M. Clarke & V.O. Nmeielle (Eds.), *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, Cambridge, Cambridge University Press, 2019, pp. 646-679.

