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Difficult to Create But Easy to Reject: The Case of ICC Rejection by the AU

Paul S. Masumbe
Senior Lecturer & Chair, Higher Degrees & Research Committee, Department of Legal Studies, Walter Sisulu University
Email: pmasumbe@wsu.ac.za

Abstract:

Even though the creation of the International Criminal Court (ICC) was greatly welcomed by African states, the prosecution of mostly African state officials by the Court since its creation has sparked animosity between the ICC and the African Union (AU), leading to the rejection of the Court's perceived bias activities in the Africa continent. While it is legally justifiable for the Prosecutor of the ICC to prosecute African state officials, partly because the Court has jurisdiction to entertain crimes committed by African state officials and also because 33 states in Africa have ratified the Rome Statute, it is legitimately inappropriate for the Prosecutor of the ICC to prosecute mostly African state officials given the fact that the ICC has jurisdiction to entertain similar crimes committed in other continents of the world. Accordingly, not all cases and situation prosecuted by the Office of the Prosecutor (OTP) of the ICC that are legally justifiable are legitimate. After discussing the creation of the ICC, this article will examine whether it was legally and legitimately justifiable for the Prosecutor of the ICC to target mostly African state officials for almost two decades and whether the creation of the African Criminal Court (ACC) is the African panacea as a consequence of the alleged bias between the ICC and the AU regarding the prosecution of African state officials.

Keywords:

the Rome Statute; African state officials; the ACC; legality; legitimacy

I. Introduction

After several attempts to create an international criminal court during the periods of both the First and Second World Wars failed (Achaleke, 2016), it was only at the International Conference of Rome in 1998 that the Rome Statute finally saw the light of the day (Annika, 2018). The ICC was the first ever permanent international criminal court created by treaty by 120 consented states parties and it came into force on 1 July 2002((Cannon, Pkalya, & Maragia, 2016). Many nations of the world including African states participated greatly toward the creation of the Court. Various committees, Action Groups and Non-Governmental Organisations (NGO) also took part during the negotiation processes leading to the final draft of the ICC (Annika, 2018). The main rationale for the creation for the ICC was to end impunity for perpetrators of crimes such as the crime of genocide, crimes against humanity, war crimes and the crime of aggression (Article 5 Rome Statute, 2002). Unfortunately for some of the African states, just few years after the ICC came into force, its targeted only African state officials (Deguzman, 2016), and this has led to an unfriendly relationship between the ICC and the AU and consequently, massive attempt by AU member states to withdraw from the ICC leading to the creation of the ACC as an alternative. Part 2 of this article will examine the creation of the ICC and contribution of African states. Part 3 will examine whether the targeting of African state officials by the ICC was justifiable and why

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Africa? Part 4 will also examine whether the creation of the ACC is the African panacea regarding international crime. And finally, Part 5 will conclude with some recommendations.

II. Research Methods

The research methods used in this investigation is mainly empirical. However, theoretical techniques were also explored. The key methodological approach of this investigation will be case law, literature surveys, internet and other electronic sources from the ICC and AU libraries. In addition, the study will also rely on articles to further examine the issue of heads of state Immunity and impunity with regard to senior state officials before the ICC and the ACC. Empirically, drawing inspirations from the Al Bashir debacle with the ICC allows this investigation to arrive at its conclusion.

III. Discussion

3.1 The Creation of Rome Statute and Contributions by African States

The road map leading to the creation of the first ever permanent international court was reignited in 1989 (Scheffer, 1999) , when the United Nations General Assembly (UNGA) mandated the International Law Commission (ILC) to draft the statute of the ICC (General Assembly Resolution 44/39,1989). The continuation process of the establishment of the international criminal court was revived by Trinidad and Tobago in 1989 due to the proliferation of illegal narcotic drugs and criminal activities prevailing within their borders (letter from Trinidad and Tobago to the United Nations, 1989). In 1993, the UNGA requested the Commission to complete the draft statute with urgency and by 1994 the draft was completed by the ILC (Ferencz, 1998). After the completion of the draft, the UNGA in 1994 (Report of the International Law Commission, 1994), created an *Ad hoc* Committee to review the drafted statute of the ICC (General Assembly Resolution 49/53, 1994). The *Ad hoc* Committee which worked for more than one year was replaced by the Preparatory Committee in 1996 (Bassiouni, 1999). While the main duty of the *Ad hoc* Committee was to deliberate on substantive and administrative matters (UNCA Resolution on the Establishment an International Criminal Court, 1996) on the one hand, the Preparatory Committee continued with the rest of the draft statute on the other hand and on 3 of April 1998, its mission ended (GA Res.50/46 UN GAOR, 1995).The Preparatory Committee was created and directed solely by the UNGA. The Committee works in close collaborations with NGOs that are interested in international law, conflict resolutions and nations building (Benedetti & Washburn, 1999). Like-minded Groups (LMG), which was made up of a group of approximately 40 committed nations (Atkinson, 2011), partnered with the NGO in the negotiation process and called for a strong, effective independent international criminal court (Akhavan, 2001). The General Assembly instructed the Preparatory Committee to complete the final draft statute which will be ready for signature and ratification at a diplomatic conference (Report of the Preparatory Committee, 1998). The final draft had 173 pages that consist of 116 articles, and 1300 bracket for optional words choices (Bassiouni, 1999). Furthermore, the Preparatory Committee had a bureau consists of a chairman and three vice-chairs elected in different geographical location as demanded by the General Assembly (Benedetti & Washburn, 1999). Moreover, in order to achieve its target, the Preparatory Committee was divided in six sessions. The first session of the UN Preparatory Committee for the establishment of the ICC took place on 25 March to 12 April 1996. The core issues discussed was matter of jurisdiction, relationship with the national court and cooperation. They also considered an alternative to the ILC draft.

The second session met on 12 to 30 August 1996 and deliberated on its plenary session and minor political issues. Meanwhile, issues such as general principle of criminal law, evidence and procedures had been dealt with by informal intersessions during the first session.

Similarly, the third session was held on 11 February to 21 February 1997. This session was very successful, as it dealt with definitions of crimes such as genocide, crimes against humanity and general principles of criminal law. Likewise, the fourth session which was convened on 11 August to 15 August 1997, also achieved its targets. It also dealt with issues of complement to national court, triggered mechanism of the jurisdiction of the court and the role of the UNSC related to jurisdiction (Dube, 2015).

Furthermore, the fifth session was convened on 1 to 12 December 1997 and continued with the procedural matters and penalties. It considered the revised text of some articles and as well as the definition of war crimes. Finally, the sixth session that was held on 16 of March to 3 April 1998, handled all the unresolved issues. The composition of the court, final clauses, revision of some articles dealing with procedure, general principles of criminal law and applicable law were all resolved at this final session (Benedetti & Washburn, 1999).

Ultimately, on 15 June to 17July 1998, the United Nations (UN) Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened in Rome, Italy and adopted the Rome Statute (Atkinson, 2011), which created the ICC. One day after the adoption, Cherif M. Bassiouni, who chaired many vital committees at the preparatory process, said the following:

> The world will never be the same after the establishment of the International Criminal Court. Yesterday's adoption of the Final Act of the United Nations Diplomatic Conference and today's opening of the Convention for signature marks both the end of a historical process that started after the World War I as well as the beginning of a new phase in the history of international criminal justice. The establishment of the ICC symbolizes and embodies certain fundamental values and expectations shared by all peoples of the world and is, therefore, a triumph for all peoples of the world. The ICC reminds governments that *realpolitik*, which sacrifices justice at the altar of political settlement, is no longer accepted. It asserts that impunity for perpetrators of genocide, crimes against humanity and war crimes is no longer tolerated (Bassiouni, 1999).

After the adoption of the ICC on 17 July 1998, it officially entered into force on 1 July 2002 as required by article 126 of the Rome Statute.

The process leading to the creation of the ICC was challenging, with many sacrifices and sleepless nights relinquished by various delegates representing nearly all the countries on earth, including African states, under different committees and NGOs (Cannon, Pkalya & Maragia,2016). Despite their differences in the negotiating process, like the LMG, they all had one thing in common which was the establishment of the first ever permanent international criminal court (Benedetti & Washburn, 1999).

Prominent in the Preamble of the Rome Statute is the caption; to 'put an end to impunity' for committers of offences such as crimes against humanity, war crimes, genocide as well as aggression. This is referred to as the most serious crimes of international concern.

The ICC is also objectively intended to prevent these offences. Even though many states and nations participated in the creation of the ICC and have also ratified the Rome Statute (Teja-Cole, 2016), African states officials have been its primary targets for almost two decades of its existence (Clarke, 2016). The next section examines whether the ICC targeting of only African state officials is justifiable.

3.2 Whether the Targeting of African State officials by the ICC was Justifiable

In order to determine whether the issue of targeting African state officials by the ICC through the OTP was justifiable, it is imperative to examine the concept of legality and legitimacy in relation to the jurisdiction of the Court as well as the prosecutorial strategy on the one hand and why targeting African state officials for more than a decade since its creation on the other hand (DeGuzman, 2016).

To begin with, the concept of legality according to Cassese means the conformity or nonconformity of a body politic, or a national or international mechanism, with the legal rules that regulate its establishment (Cassese, 2012). Legality also mean the statutes of a particular jurisdiction are the basis for any act, agreement or contract in that jurisdiction and that no crime exists if an action is not a crime in that specific jurisdiction (Black Law Dictionary, 2023). In other words, the Prosecutor could only prosecute individuals that are criminally responsible before the jurisdiction of the ICC. At the inception of this section let me quickly assert that although ICC may have justification to prosecute crimes within its jurisdiction, however, the prosecution may be illegitimate and inappropriate because of its prosecutorial strategy (DeGuzman, 2016). Therefore, not all situation and cases prosecuted by the Prosecutor of the ICC which is legally justifiable is legitimate. The ICC has jurisdiction to entertain the crime of genocide, crimes against humanity, war crimes and recently activated the jurisdiction over the crime of aggression (Bachmann & Abdelkader, 2018). Accordingly, the state officials whose states are parties to the Rome Statute after ratification are subjected to the jurisdiction of the Court if accused of any of the crimes within its jurisdiction, given the fact that the ICC was created by treaty. Nevertheless, non-state parties and their officials also have access to the jurisdiction of the Court by consent and acceptance of its jurisdiction (Article 12(3) Rome Statute 2002).

Crimes within the jurisdiction of the Court could be initiated in three ways: (i) through a state party to the Rome 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 (Articles 13, and 15, Rome Statute 2002). Accordingly, the ICC's Prosecutor will investigate crimes committed by African state officials if the offence was committed in the territory of a state party to the Rome Statute and if the state officials is a national of any state party.

As justifications for targeting African state officials, not all the cases before the jurisdiction of ICC were initiated by the OTP (Abaya, 2019). Some of the cases were referred by the government of African state (Situations under Investigation, 2023), while the government of other states such as Cote d'Ivoire which was non-state party to the Rome Statute at the time of the proceedings accepted the jurisdiction of the Court and later became a state party in 2013 (Situation in Cote d'Ivoire, 2023). Moreover, there are currently 13 situations under investigation by the Prosecutor of the ICC and 10 are in Africa. Finally, the entire 45 defendant before the Court so far are African state officials, and of the 123 states parties that have ratified the Rome Statute, 33 are from Africa. Based on the above analyses, targeting African states was justifiable because of the following reasons: (i) the ICC have jurisdiction over all the crimes suspected to have been committed by African state officials; (ii)

some of the cases and situation were referred to the jurisdiction of the Court by the various government of African states and one African state accepted the jurisdiction of the Court; (iii) Africa continent constitutes a majority of all the states parties with respect to other continent and more than half of all the states in Africa have ratify the Rome Statute; (iv) most of crimes committed in Africa were suspected to have been committed by senior African state officials with immunity recognised by international law and article 27 of the Rome Statute removes all forms of immunities enjoyed by state officials before its jurisdiction.

Now, about the issue of legitimacy, as indicated earlier, not all situation and cases prosecuted by the OTP which is legally justifiable is legitimate. Accordingly, the concept of legitimacy encompasses many dimensions. On the one hand legitimacy means the moral and psychological acceptance of a body or a political system or an authority by its constituency. In other words, an institution like the ICC is considered legitimate when majority of the population and countries expressed a high degree of consent and approval for it values, objectives and goals. Legitimacy could also be procedural or normative as well as sociological or substantive. Procedural legitimacy on the one hand is objective and is related to the way in which authority can be justified, while substantive legitimacy on the other hand is subjective and is related to the popular attitudes about authority and the law (Peake, 2016).

The OTP is more concerned with the objective legitimacy: which is the legitimate exercise of authority in investigating situations and cases before the jurisdiction of the ICC. In this regard, legitimacy is derived from the following elements: (i) a fair and accepted procedure; (ii) is applied without discrimination; (iii) it does not offend minimum standards of fairness and equality. Accordingly, based on these elements of legitimacy, the fact that the OTP has been targeting only African state officials for almost two decades despite being legally justifiable is discriminatory and unfair given the fact that similar crimes were committed in different continents (Clarke, 2016). The issue of legality and legitimacy, is summarised by Popovski and Turner as follows:

> The legality of an action or policy is assessed by reference to legal texts, case law, and precedents. Challenges and appeals may be raised as part of the adjudicative process, but there is a clear and final view either in favour or against. An action is always either legal or illegal; it cannot be partly legal. In contrast, legitimacy is fluid and changing - it depends on perceptions and outcomes. As a subjective interpretation of what is desirable and appropriate, legitimacy can be maintained by a constant effort to ensure conformity with the normative expectation of the affected constituents. Legitimate decisions are based in democratic participation whereby affected persons have opportunity to raise their voices. When legitimacy is separated from democratic participation, it risks being exposed to ideological and self-concerned manipulation. Legitimacy is a relative measure - it depends upon the perceived acceptability of the rules governing the act, and upon the actor itself. Nuremberg can illustrate this-the law was problematic both in substance and procedure and all prosecutors were from victor's state. Nevertheless, the two alternatives –amnesty or judicial execution – would have been even less legitimate (Cassese, 2012).

Accordingly, with regard to case selection using the prosecutorial strategy, once the investigation is concluded, the Prosecutor will have to select the case to prosecute unless there is no reasonable basis to continue either because the case is inadmissible under article 17 of the Rome Statute or the interests of justice is compromised (Article 53(2) Rome Statute 2002),

and also when there is no legal grounds to issue a warrant under article 58 of the Rome Statute. The Prosecutor will target the individual or state officials based on crimes under article 5 of the Rome Statute and according to the OTP Policy Paper on case selection and prioritisation of 2016, (ICC-OTP Policy Paper, 2016). The criteria for case selection are the gravity of the crimes (ICC-OTP Policy Paper, 2016), the degree of responsibility of the alleged perpetrators or state officials, and the potential charges (ICC-OTP Policy Paper, 2016). Lastly, the Prosecutor prioritised the case after selection taking into consideration the following criteria: (i) comparative assessment based on the same factor used in selecting the case; (ii) whether the person or state officials have already been investigated or prosecuted by the OTP or another state for severe crimes; (iii) the impact of the investigation and prosecution on the victims of the crimes and community affected; (iv) the impact of the investigation and prosecution and its contributions to crime prevention; (v) the impact on the ability of the OTP to pursue cases involving opposing parties to conflicts (ICC-OTP Policy Paper, 2016).

In all, it is safe to say that the targeting of African state officials by the Prosecutor of the ICC was legally justifiable because: (i) the jurisdiction of the Court entertained crimes under article 5 of the Rome Statute; (ii) most African state have ratified the Rome Statute and article 27 of the Rome Statute removes all forms of immunities granted to state officials before its jurisdiction; (iii) not all the cases referred to the ICC was initiated by the Prosecutor, some were referred to the ICC by the government of the respective African state officials, some by the UNSC to the Prosecutor of the ICC and others, government accepted the jurisdiction of the Court as earlier indicated. However, with regard to legitimacy, it was inappropriate for the OTP to target only African states officials as indicated earlier since not all cases that are legally justifiable is legitimate for the following reasons: (i) targeting only African state officials was discriminatory, bias and unfair; (ii) it was not credible for OTP and the ICC to prosecute only African state officials; (iii) since legitimacy does not offend the minimum standard, targeting only African state officials was partial, not equitable and this offended the AU and the entire continent of Africa.

As indicated earlier, African states were initially excited about the creation of the ICC and participated in all the processes leading to the establishment of the Rome Statute. Some of the reasons why African states wanted the ICC are as follows: (i) African states wanted to avoid the escalation of genocide and other war related crimes that has plundered the continent (Clarke, 2016), Senegal for instance, was the first state in the world to ratify the Rome Statute and currently, there are 33 states parties from Africa continent that have ratify the Rome Statute; (ii) African states wanted more loans from the International Monetary Fund (IMF) and one of the conditions of granting these loans was the respect of the rule of law, good governance, political and economic stability, and hence, ICC provided an olive branch in this regard since most domestic courts in the continent could not render fair, equitable and just trial against their senior leaders (Clarke, 2016); (iii) African states wanted to hold their leaders accountable and responsible should they abuse power and commit crimes against ordinary citizens especially during elections and others democratic processes (Bassiouni & Hansen,2016).

Unfortunately for the African continent, despite the fact the ICC was greatly welcome, targeting only African state officials was still a challenge and in seeking for alternative solutions, the African Criminal Court was finally given birth after conception for many years.

3.3 Whether the Creation of the ACC is the African Panacea

The road that led to the creation of ACC began when some of the African state officials were indicted in Europe (Murungu, 2011). France for example, in 2009 indicted five

African sitting heads of state namely: Denis Sassou Nguesso of Congo; Teodoro Obiang Nguema of Equatorial Guinea; Omar Bongo of Gabon; Blaise Compaore of Burkina Faso and Eduardo Dos Santos of Angola (Murungu, 2011). Their indictments and prosecutions by the European courts was a wakeup call for the AU to seek alternative means to handle criminal matters within the continent (Africa's Decision on Relationship with the ICC, 2015). Additionally, the Committee of eminent African jurist created by the AU in the *Habre Hissene* case also mapped the road for the creation of ACC (Murungu, 2011). Accordingly, paragraphs 36 of the Committee Report recommended the creation of an ACC which is a chamber in the African Court of Justice and Human and Peoples Rights in line with paragraph 26 of the Report (Report on the Committee of Eminent African Jurist on the case of Hissene Habre, 2019). Perhaps, the immediate cause for the creation of the ACC was the indictments of two African sitting heads of states by the ICC namely, President Al Bashir of Sudan who is now former President and President Uhuru Kenyatta of Kenya (Murungu, 2011). Although the African states contributed enormously to the creation of the ICC (Bachmann & Nwibo, 2018), the AU have accused the ICC of targeting African state officials, and the immediate reaction was the creation of the ACC (Ssekandi & Tesfay, 2017). In June 2014, the AU adopted a Protocol on Amendment to the Protocol on the Statute of the African Court of Justice and Human Rights in Malabo, Equatorial Guinea (2014 Malabo Protocol, Abebe, 2017). The rationale for such amendment was to create a criminal chamber to the African Court of Justice and Human Rights which is now amended as African Court of Justice and Human and Peoples Rights (ACJHPR) (Article 5, 2014 Malabo Protocol).

With regard to prosecutions of crimes by the ACC, The Office of the Prosecutor of the ACC shall comprise a Prosecutor and two Deputy Prosecutors. Both the Prosecutor and the Deputy Prosecutors shall be elected by the Assembly of States Parties and must be nationals of any state party nominated by the various states, and also must be persons of high moral character, highly competent and experience in investigating and prosecuting criminal cases (2014 Malabo Protocol). Moreover, while the Prosecutor will serve a single and non-renewable term of 7 years, the Deputy Prosecutors shall serve a term of 4 years and maximum of 8 years as their terms are renewable once. The main function of the Office of the Prosecutor will be to investigate and prosecute crimes under this Statute and he or she must act independently with no instructions from a state party to the ACC or other source. Finally, the Office of the Prosecutor could also be assisted by other staff members in the exercise of their functions when the need arises, and appointment of such staff will be in accordance with the AU Staff Rules and Regulation (2014 Malabo Protocol). The Office of the Prosecutor is also mandated to question accused or suspects, victims and witnesses and to conduct on-site investigations (Article 22A(7), 2014 Malabo Protocol).

The ACC has a wider and broader jurisdiction to prosecute international crimes as compared with the ICC (Abebe, 2017). In other words, the ACC has a wider subject matter jurisdiction than the ICC. By virtue of article 28A of the 2014 Malabo Protocol, the Court has power to prosecute 14 international crimes as follows: 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 expropriation of natural resources and the Crime of Aggression (Article 28A (1), 2014 Malabo Protocol).

Additionally, the court will exercise jurisdiction over any of the above crimes by virtue of article 28A of the 2014 Malabo Protocol when the matter is referred to its jurisdiction by the Prosecutor through a state party (Article 46F(1), 2014 Malabo Protocol). Assembly of heads of state and government of AU or the Peace and Security Council of AU, and *proprio*

muto by the Prosecutor in exercising his or her power using his or her initiative on the basis of crimes within the jurisdiction (Article 46G(1) 2014 Malabo Protocol).

Unlike the ICC which do not recognise any immunity of state officials before its jurisdiction by virtue of Article 27 of the Rome Statute, ACC recognised the immunity *ratione personae* of serving state officials before its jurisdiction (Tladi, 2015). Accordingly, article 46A *bis* of the 2014 Malabo Protocol provide 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 (Article 46A, 2014 Malabo Protocol).

Consequently, no prosecution can be commenced before the ACC against any AU serving or sitting head of state, heads of government or senior state officials based on their functions during their term of office as they are protected by personal immunity recognised under customary international law (Tladi, 2015). In other words, the immunity *ratione personae* of AU state officials are recognised before the ACC, and it is consistent with the position adopted by the *Arrest Warrant* judgment which also recognised the immunity *ratione personae* of state officials under customary international law (*Democratic Republic of Congo v. Belgium*). Additionally, most foreign national jurisdictions have also recognised the immunity *ratione personae* of sitting state officials as conferred by customary international law (Akande, 2018).

With regard to the immunity *ratione materiae* of AU state officials, the position adopted the ACC is consistent with ICC as both jurisdictions do not recognise the functional immunity of former state officials in respect of international crimes (Report on the Committee of Eminent African Jurist on the case of Hissene Habre, 2020). In terms of article 46B (2) of the 2014 Malabo Protocol, the official capacity of state officials will not relieve him or her for crimes committed within the jurisdiction of the ACC as indicated in article 46A *bis* Malabo Protocol.

In sum, while the ACC recognised only the personal immunity of sitting African state officials such as heads of state, heads of government and other senior state officials like the Minister for Foreign Affairs, the ICC waives all forms of immunities before its jurisdiction. However, the ACC like the ICC do not recognise immunity *ratione materiae* of former state officials if accused of any of the crimes within its jurisdiction (Abebe, 2017). Accordingly, the position adopted by the ACC regarding immunity *ratione personae* of the *troika* (heads of state, heads of government and Foreign Ministers), is inconsistent with Article 27 the Rome Statute (Hansen & Mue, 2018). However, it may be consistent with customary international rules of personal immunity and foreign national jurisdictions as both have recognised the immunity *ratione personae* of sitting senior state officials (Abaya, 2016). Likewise, the exercise of jurisdiction by the ACC do not hinder the jurisdiction of the ICC since the ICC could still prosecute other state officials and even African state officials whose state are states parties to the ICC(Tladi, 2015). However, the ACC is not yet operational, and the ratification process is very slow among the AU members (Abebe, 2017). In other words, the ACC is still suffering from both legality and consent legitimacy issues given the fact that only few African states have ratified the 2014 Malabo Protocol and the court has not yet come into force (Yigzaw, 2018). Consequently, the ICC will continue to prosecute crimes in the African continent and the AU states member should cooperate with the ICC especially with regard to the prosecution of former state officials accused of international crimes (Abebe, 2017). Additionally, when the ACC eventually enters into force, it should complement the ICC in prosecuting crimes. Hence, the ACC is not the African panacea with regard to prosecution of crimes in the Africa continent because of the following reasons: (i) the ratification process is

very slow with only seven states that have so far ratified the 2014 Malabo Protocol; (ii) the immunity provision in article 46A *bis* of the 2014 Malabo Protocol hinders the effective prosecution of African state officials as some of these officials stays in power for more than three decades; (iii) the AU lacks the financial resources to set up an effective ACC to prosecute crimes in the continent; (iv) the creation of the ACC is not supported by the ICC and most western countries; (v) both articles 25 and 27 of the Rome Statute grant easy access to the jurisdiction of the ICC for African state officials whose states have ratified the Rome Statute.

IV. Conclusion

The ICC is the first ever permanent international criminal court created to fight impunity. The jurisdiction of the Court entertains crimes that are in most cases politically motivated, and these crimes include: the crime of genocide, the crimes against humanity, war crimes and recently the crime of aggression. These crimes are mostly committed by state officials using state apparatus. Unfortunately for African state officials, the ICC came into force when some of these crimes were freshly evident in the African continent committed by senior African state officials. In other words, African state officials were targeted as the scapegoats before the jurisdiction of the ICC. Even though the prosecution of only African state officials is inappropriate, unfair and bias, as this is illegitimate (Peake, 2016), it was legally justifiable as examined in this article. In other words, even though both the legality and legitimacy of the ICC is unquestionable given the fact that it was created by treaty consented to by various states parties, the prosecution of mostly African state officials by the OTP was an unjustifiable bias and inappropriate despite the legality of the Court (Abebe, 2017). Nevertheless, all the investigations were justifiable as the ICC has jurisdiction to entertain these crimes and they were reasonable grounds to believe that these crimes have been committed in Africa by the suspected African state officials. Consequently, even though the ACC may presumably reduce impunity in the African continent when it comes into force, the ICC should never be underestimated despite the legitimate issue relating to the prosecutions of mostly African state officials for almost two decades of its existence. The Rejection of the ICC by the AU and some African state is temporarily and was intended to limit the prosecution of African officials given the fact that such crimes are committed elsewhere. The ICC has started prosecuting senior state officials out of Africa however selective and questionable as seen in the recent arrest warrant against President Vladimir Putin of Russia. Selective and questionable partly because US, Israeli, UK leaders and officials mired in similar crimes as allegedly committed by President Putin have not been slapped with similar warrants of arrest. Pointedly, the survival and legitimacy of the ICC will be rooted in consistency, fairness, and impartiality towards every state-party to the Rome Statute and other states or officials so referred.

Lastly, it is recommended that both the ICC and the ACC should work together using the complementarity system under the Rome Statute in the future, despite their differences since they both aimed at ending impunity for perpetrators of international crimes in the continent. In this regard, some of the articles in the protocol that created the ACC such as article 46A *bis* of the 2014 Malabo Protocol needs to be amended to accommodate and enhance cooperation between the ICC and the ACC in the interest of international criminal justice and global deterrence.

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