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DOI:10.51204/Zbornik_UMKP_24109A
Originalni naučni rad

INTERNATIONAL LAW & AFRICA'S PERSPECTIVES ON CRIMINAL JUSTICE INSTITUTIONS

Abstract: This paper examines some international legal principles and Africa's unique perspectives on criminal justice institutions, focusing on the 2012 Model Law on Universal Jurisdiction, the principle of complementarity and the proposal to establish the African Court of Justice and Human Rights under the 2014 Malabo Protocol. Adopting the Model Law within the African Union offers African national courts a distinctive avenue to hold perpetrators of international crimes accountable. Prompted by concerns over potential abuse and politicisation of universal jurisdiction by certain European states, the African Union's stance reflects a proactive approach to safeguarding against perceived injustices. Furthermore, the proposal for the African Court of Justice and Human Rights aligns with the principle of complementarity vis-à-vis the International Criminal Court, showcasing Africa's evolving role in shaping international legal mechanisms to combat impunity and crimes. This paper explores these initiatives' motivations, challenges, and implications for Africa's engagement with international legal frameworks.

Keywords: International Legal Principles, African Union, Model Law on Universal Jurisdiction, African Court of Justice and Human Rights, International Criminal Justice Institutions.

1. INTRODUCTION

In recent years, there has been a noticeable trend towards establishing regional international criminal courts specifically aimed at prosecuting individuals

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implicated in international crimes[1]. This growing interest underscores the acknowledgement that addressing certain crimes is important for specific regions, considering their distinct characteristics and requirements.

The principle of complementarity, articulated in various articles of the Rome Statute of the International Criminal Court (ICC), notably Articles 17 and 53, underscores the Court's role in intervening only when national jurisdictions fail to prosecute crimes within its purview. As regional judicial bodies in international criminal law, particularly in Africa, emerge, questions arise regarding jurisdictional allocation and coordination with institutions like the ICC. In "Transitional Justice Cascades" by Aleksandar Marsavelski and John Braithwaite, a three-level transitional justice framework is proposed, with restorative justice mechanisms addressing individual offenders and victims at the bottom level, supported by an International Reparation and Reconciliation Support Unit. A mid-level response involves collaboration between international transitional justice units and national criminal justice systems to indict middle-ranking officials, while the ICC handles high-ranking officials due to challenges in delivering fair trials at the national level.[2] Prioritising the jurisdiction of a prospective regional African Criminal Court over the ICC within the African region can be viewed as aligning with principles of sovereignty, complementarity, and regional autonomy. Such an approach would ensure that regional entities spearhead justice administration. However, addressing these complexities necessitates establishing a framework for cooperation and coordination between the ICC and regional courts. A formal agreement between the International Criminal Court, the African Union, and African regional organisations could serve as a mechanism for resolving jurisdictional issues and ensuring a balanced approach to prosecuting serious crimes. Such an agreement would delineate the roles and responsibilities of each entity, fostering synergy and preventing duplication of efforts.

To mitigate or eliminate speculation regarding the ICC's perceived bias towards African nationals and the non-use of African legal elements by the International Criminal Court[3], creating an African regional criminal court would represent a possible answer and a proactive measure towards combating serious crimes in Africa and advancing Sustainable Development Goal 16, which aims to promote peace, justice, and robust institutions. While Westen K. Shilaho, in his article "Africa and the International Criminal Court," emphasizes the necessity for domestic courts in Africa to possess the capacity and political resolve to prosecute those responsible for mass atrocities, the establishment and empowerment of such institutions could potentially address the unique challenges faced by African nations in combating

1 F. K. Tiba, „Regional International Criminal Courts: An Idea Whose Time Has Come", *Cardozo Journal of Conflict Resolution (CJCR)*, Vol. 17, 2/2016, *Deakin Law School Research Paper*, 16–07, https://ssrn.com/abstract=2718605, 10.05.2024.

2 A. Marsavelski, J. Braithwaite, „Transitional Justice Cascades ", *Cornell International Law Journal*, Vol. 53, No. 2, 2020, 3–42.

3 M. Stewart, M. T. Pardis, R. Rajah, „The (Non-)Use of African Law by the International Criminal Court", *European Journal of International Law*, Vol. 34, 3/2023, 555–580, https://doi.org/10.1093/ejil/chad035.

impunity and ensuring accountability for serious human rights violations[4]. Moreover, the successful implementation of hybrid tribunals in Africa underscores the region's capacity to administer justice effectively. The landmark trial of Hissène Habré in the African Extraordinary Chambers exemplifies the application of universal jurisdiction within the African context[5]. Collaborative efforts between the African Union and Senegal facilitated Habré's prosecution for crimes and egregious human rights violations committed during his tenure as Chad's Head of State. This case serves as a testament to the collective endeavors of regional and international stakeholders in pursuing justice and ensuring accountability. Building on these achievements, the adoption of the 2012 Model Law on Universal Jurisdiction by the African Union signifies a significant step towards providing African national courts with a viable mechanism to hold perpetrators of international crimes accountable. There is no denying that when European states exercise universal jurisdiction, their aim is to administer justice and underscore the global fight against international crimes. This approach highlights the potential of universal jurisdiction as a tool to combat impunity. For example, Germany's domestic courts, notably the Koblenz Higher Regional Court, have garnered worldwide attention for their pursuit of universal jurisdiction cases, particularly concerning state-sponsored torture in Syria and crimes perpetrated by the Islamic State.[6] These landmark rulings underscore Germany's dedication to robustly enforcing International Criminal Law through domestic trials, showcasing its leadership in advocating for justice on the global stage. However, careful and equitable implementation is essential to avoid potential political misuse. Concerns regarding the abuse and politicisation of universal jurisdiction by certain European states have prompted initiatives like the Model Law of the African Union, demonstrating a proactive approach to safeguarding against perceived injustices and affirming sovereignty in matters of criminal responsibility.

2. MODEL LAW OF THE AFRICAN UNION

The 2012 Model law on universal jurisdiction adopted within the African Union can serve as an alternative way for African national courts to bring to criminal responsibility those guilty of committing international crimes. It should be emphasized that the African Union adopted this Model Law on Universal Jurisdiction on July 13, 2012.[7] The adoption of this Model Law on Universal

4 W. K. Shilaho, „Africa and the International Criminal Court" in *Oxford Research Encyclopedia of International Studies*, 2023.

5 S. Weill, K. T. Seelinger, K. B. Carlson (ed.), *The President on Trial: Prosecuting Hissène Habré*, Oxford University Press, 2020.

6 A. Susann, F-J. Langmack, „Universal Jurisdiction Cases in Germany: A Closer Look at the Poster Child of International Criminal Justice ", *Minnesota Journal of International Law*, Vol. 31, 2/2022.

7 African Union. (2012). Union Model National Law on Universal Jurisdiction over International Crimes (Doc. EX.CL/731(XXI)), https://www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf, 10.5.2024.

Jurisdiction was prompted, in particular, by concerns that African states had about possible abuse and politicization of the use of universal jurisdiction by some European states, as reflected in the comments of the African Union contained in the UN Secretary General's report on the scope and application of the principle of universal jurisdiction of 2020.[8] African states have raised objections through various decisions of the AU, especially after 2008, when some European states have indicted a number of African officials. The AU Model Law is a common position adopted by African states with respect to universal jurisdiction.

The preamble of the AU Model Law refers to the AU's commitment to combating impunity by ensuring that serious crimes of concern to the international community do not go unpunished.[9] The AU Model Law does not define what is an international crime but indicates a list of crimes in respect of which states could apply the principle of universal jurisdiction in national legislation. This model law provides for the possibility of extending the universal jurisdiction of states not only to crimes of genocide, war crimes, crimes against humanity, piracy, but also to some transnational crimes, such as drug trafficking and terrorism.[10]

The location of the suspect on the territory of a State that intends to prosecute him is crucial in determining whether that State has priority to exercise universal jurisdiction over the person. There are two approaches to universal jurisdiction, i.e. a broad and narrow understanding of universal jurisdiction. The AU Model Law applies a narrow interpretation of universal jurisdiction, which requires the suspect to be in the territory of the state claiming to prosecute him. According to the broad interpretation of universal jurisdiction, it is not necessary for the suspect to be in the territory of the state that wishes to prosecute him. The narrow understanding of universal jurisdiction corresponds to the widespread position that the state in whose territory the suspect is located has the advantage of prosecuting him.

There are differing opinions in doctrine regarding universal jurisdiction. Some scholars point out that universal jurisdiction can be viewed as interference in the internal affairs of a state,[11] and also note that states should not claim to establish and exercise their jurisdiction over matters that have nothing to do with them.[12]

8 United Nations (2020). Report of the UN Secretary-General on the scope and application of the principle of universal jurisdiction (Doc. UN A/75/151). P. 50.

9 African Union. (2012). Union Model National Law on Universal Jurisdiction over International Crimes (Doc. EX.CL/731(XXI)). https://www.un.org/en/ga/sixth/71/universal_jurisdiction/african_union_e.pdf, 10.5.2024.

10 M. Ventura, A. Bleeker, „Universal Jurisdiction, African African Perceptions of the International Criminal Court and the New AU Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights", *The International Criminal Court and Africa: One Decade On* (ed. T. M. C. Asser Institut), Cambridge/Antwerp/Portland, Intersentia, 2016, 14.

11 B. Graefrath, „Universal criminal jurisdiction and an International Criminal Court", *European journal of international law*, Vol. 1, 1/1990, 74.

12 N. V. Kravchuk, A. R. Kayumova, *Criminal jurisdiction in international law*, Center for Innovative Technologies, Kazan, 2017, 488, Social and human sciences. Domestic and foreign literature. Ser. 4, State and Law: Abstract Journal, (4), 166–170.

Other scholars argue that despite the existing criticism in the doctrine, universal jurisdiction is provided for by the legislation of a number of states in the world and is more often applied in practice.[13]

Despite the fact that European states, for a long time, until the 90s of the XX century, opposed the idea of including the principle of universal criminal jurisdiction in the Draft Code of Crimes against the Peace and Security of Mankind, taking into account the fact that they did not want to lose the right to diplomatic protection of their citizens and recognise the decisions of foreign states in criminal cases rendered on the basis of universal principle[14], they started to apply it in relation to citizens of other states as a result of the adoption of relevant national acts providing for the application by their courts of universal jurisdiction over certain crimes.

Following indictments of some high-ranking African officials in a number of European States, the African Union Assembly of Heads of State and Government adopted a series of resolutions[15] in which it reaffirmed that universal jurisdiction is a principle of international law, the purpose of which is to ensure that persons who have committed serious crimes, such as genocide, war crimes and crimes against humanity, did not go unpunished and were brought to justice, which corresponds to Art. 4 (h) of the AU Constitution.[16]

However, in these and subsequent decisions, the AU expressed serious concern about the possibility of political manipulation and abuse of universal jurisdiction. In this regard, the AU, in particular, called for the introduction of a moratorium on the issuance or execution of arrest warrants issued on the basis of universal jurisdiction and the creation of an appropriate international body competent to consider disputes related to the exercise of universal jurisdiction by States and to start holding meetings on this issue at the regional level (between the African Union and the European Union)[17] and at the universal level within the UN. The adoption of the Model Law on Universal Jurisdiction of the AU and enactment of national laws by African states based on it may allow states in the Continent to hold accountable those responsible for international crimes as an alternative to other mechanisms for administering international criminal justice

13 A. N. Lavlinskaya, „Universal jurisdiction and the principle of "aut dedere aut judicare" in the international fight against maritime piracy", *Eurasian Law Journal*, No. 32, 2011, 46–50.

14 B. Graefrath, „Universal criminal jurisdiction and an International Criminal Court", *European journal of international law*, Vol. 1, 1/1990, 73.

15 African Union (2012) Assembly/AU/Dec. 420(XIX) – Decision on the Abuse of the Principle of Universal Jurisdiction (Doc. EX.CL/731(XXI)). Nineteenth Ordinary Session of the Assembly, Addis Ababa, Ethiopia.

16 United Nations (2009). Letter from the Permanent Representative of the United Republic of Tanzania to the United Nations addressed to the Secretary-General (UN Doc. A/63/237/Rev. 1).
https://documents.un.org/doc/undoc/gen/n09/421/25/pdf/n0942125.pdf?token=1wK0AnCsJpKQUnMg7W&fe=true, 10.5.2024.

17 C. C. Jalloh, I. Bantekas, *The International Criminal Court and Africa*, Oxford University Press, Oxford, 2017, 57.

in Africa. However, in this case, it is also necessary to resolve the issue of possible politicisation of this mechanism by states.

3. MALABO PROTOCOL AND AFRICAN CRIMINAL COURT

Another international criminal justice institution in Africa that deserves attention is the African Court of Justice and Human Rights, which criminal jurisdiction provided for by the 2014 Malabo Protocol. Much has been written about this court.[18] Various, sometimes opposite opinions were expressed regarding the rationale of adopting the 2014 Malabo Protocol and creating an African criminal court with criminal jurisdiction over international crimes, some of which fall within the jurisdiction of the International Criminal Court.

To start with the historical background, it has to be mentioned that proposals to establish a court on the African continent to investigate and prosecute persons for committing international crimes were discussed in the second half of the 20th century within the framework of the Organization of African Unity (OAU). The idea of establishing this kind of court was, in the first place, proposed in the early 1970s and 1980s during the elaboration process of the African Charter on Human and Peoples' Rights.[19]

At the time, the Republic of Guinea proposed the idea of creating an African human rights court to deal with human rights violations as well as prosecute crimes under international law[20]. However, it was decided to establish the African Commission on Human and Peoples' Rights as a quasi-judicial body with a main purpose to promote and protect human rights in Africa[21] by monitoring compliance by states with the provisions of the African Charter on Human and Peoples' Rights by considering interstate communications and individual complaints, as well as state reports.[22]

There are different opinions on why the African Charter did not provide for establishing a judicial body. Some authors point out that this was due to the fact that the traditional way of resolving disputes in Africa is mediation and conciliation

18 E.Y. Omorogbe, „The crisis of international criminal law in Africa: A regional regime in response?", *Netherlands International Law Review*, Vol. 66, 2019, 287–311.

19 CC. Jalloh, K. M. Clarke, V. O. Nmehielle, *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, Cambridge University Press, Cambridge, 2019, 4.

20 M. Ssenyonjo, S. Nakitto, „The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?", *International Criminal Law Review*, Vol. 16, 1/2016, 74.

21 A. Kh. Abashidze & others, *African system for the protection of human rights and peoples: a textbook for universities* (edited by A. Kh. Abashidze), 3rd ed., revised. and additional, Yurayt Publishing House, Moscow, 2024, 138, Text: electronic Educational platform Urayt [website]. — URL, https://urait.ru/bcode/545382 11.05.2024

22 See. Art. 45 of the African Charter on Human and Peoples' Rights.

rather than judicial litigation, which resulted in one of the parties winning the case.[23] On the other hand, it is argued that African states did not want to limit their newly acquired sovereignty by conferring some of their prerogatives to an international judicial body.[24] At the same time, it should be noted that the possibility of creating a judicial body in the future was envisaged through the adoption of an additional protocol to the African Charter on Human and Peoples' Rights.[25] Subsequently, in 1998, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights was adopted.[26] This protocol was enacted on January 25, 2004, after being ratified by more than fifteen states.[27]

In 2002, the OAU was dissolved, and the African Union (AU) was formed. In accordance with the Constitutive Act, the goals of the creation of the AU are to maintain peace, security, and stability on the African continent and protect human and people's rights. and among the principles of the AU, the peaceful resolution of disputes is provided for through measures that can be taken by the AU Assembly and the powers of the AU to intervene in member states in the case of serious crimes such as war crimes, genocide and crimes against humanity; respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities[28], etc.

The AU founding act created a judicial body to settle interstate disputes and interpret AU acts, but its jurisdiction does not include prosecuting individuals for international crimes. In 2003, the Protocol establishing the Court of Justice of the African Union[29] as the main judicial organ of the Union was adopted, which entered into force on 11 January 2009.

The Court did not become operational due to the fact that in July 2004. The AU Assembly of Heads of State and Government decided to merge the African Union Court of Justice and the African Court on Human and Peoples' Rights in order to strengthen the AU institutions and provide them with the necessary

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23 A. Kh. Abashidze, A. M. Solntsev, „Anniversary of the African Charter of Human and Peoples' Rights", *Eurasian Legal Journal*, 2/2012, 24.

24 *Ibidem*.

25 Amnesty International (2016). Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court. London, 2016//URL: https://www.amnesty.org/en/documents/afr01/3063/2016/en/ 11.05.2024.

26 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998), https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and, May 12, 2024.

27 N. S. Simonova, „African Court of Human and Peoples' Rights", *Institutes of International Justice: Textbook. Manual* (ed. V. L. Tolstykh), International Relations, Moscow, 2014, 360.

28 See Art. 4 (e), (h), (o) of the Constitutive Act of the African Union//URL: https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf, 12.05.2024.

29 Protocol of the Court of Justice of the African Union. (2003). https://au.int/sites/-default/files/treaties/36395-treaty-0026_-_protocol_of_the_court_of_justice_of_the_african_union_e.pdf, 12.05.2024.

powers and resources to effectively carry out their missions[30]. It aimed to create a unified African court, which could be empowered to hear interstate disputes and complaints about human rights violations.[31] Consequently, at its 2008 Summit, the Assembly of Heads of State and Government of the AU in Sharm El Sheikh, Egypt, adopted the Protocol on the Statute of the African Court of Justice and Human Rights[32] to merge the African Union Court of Justice (2003 Protocol) and the African Court on human and peoples 'rights (Protocol 1998) into a single judicial body for general affairs and human and peoples' rights.

Initially, it was assumed that this new court would have two chambers: one for considering interstate disputes and various general cases and the other for dealing with human rights (Articles 16-17 of the 2008 Protocol). However, there was no provision in that Protocol about the criminal jurisdiction of the Court. As a result of discussions on creating a single regional judicial organ in Africa, in 2014, it was decided to amend the 2008 Protocol on the African Court to give the new court international criminal jurisdiction. This Protocol was adopted in 2014 at the AU Heads of State and Government Summit in Malabo (Equatorial Guinea). The 2014 Malabo Protocol represents an innovative approach to international criminal law, as there are currently no similar regional criminal courts.

The literature has different opinions regarding the rationale of granting criminal jurisdiction to the yet-to-be-established African Court. Some authors and human rights organizations argue that the adoption of the Malabo Protocol is a step forward in the right direction[33]. Other authors argue that the decision to grant criminal jurisdiction to the African Court may undermine and duplicate the ICC's activities and that this was an AU response to the ICC's activities in Africa, a result of the deterioration of relations between the ICC and African States, especially in relation to investigations against some sitting Heads of state[34]. Agwu argues that granting criminal jurisdiction to the African Court is inappropriate since the possibility of prosecuting the sitting Heads of state and government is excluded from its jurisdiction[35]. Some scholars even argue that

30 The Institute for Human Rights and Development in Africa (IHRDA). La Cour africaine de justice et des droits de l'homme (CAJDH), https://www.ihrda.org/fr/la-cour-africaine-de-justice-et-des-droits-de-l%E2%80%99homme-cajdh/, 12. May 2024.

31 M. Ssenyonjo, *Protocol on the Statute of the African Court of Justice and Human Rights*, The African Regional Human Rights System, Brill Nijhoff, Leiden, 2012, 535–555.

32 Protocol on the Statute of the African Court of Justice and Human Rights, July 01, 2008. URL: https://au.int/en/treaties/protocol-statute-african-court-justice-and-human-rights, 12. May 2024.

33 M. V. S. Sirleaf, „Regionalism, Regime Complexes, and the Crisis in International Criminal Justice", *Columbia Journal of Transnational Law*, Vol. 54. 2015, 701.

34 M. Ssenyonjo, S. Nakitto, „The African Court of Justice and Human and Peoples' Rights 'International Criminal Law Section': Promoting Impunity for African Union Heads of State and Senior State Officials?", *International Criminal Law Review,* Vol. 16, 1/2016, 72.

35 F. A. Agwu, *Africa and International Criminal Justice: Radical Evils and the International Criminal Court*, Routledge, New York, 2019, 7.

the ICC remains 'the only credible forum for states emerging from conflict and seeking justice and reconciliation.'[36] in the African context.

It is difficult to agree with the authors who argue that the decision to create a regional criminal court in Africa was exclusively the AU's reaction to the activities of the ICC[37]. It should be noted, as mentioned above, that the idea of granting criminal jurisdiction to the African Court was discussed in the 70s and 80s of the XX century when the African Charter on Human and Peoples' Rights was being elaborated. Moreover, proposals for the creation of an African criminal court were considered when ways for prosecuting the former President of Chad, Hissene Habré were examined.

In this connection, it has to be noted that in 2006, the African Union established a Committee of Eminent African Jurists to consider and propose the best options for prosecuting Hisséne Habré and possible regional mechanisms to prosecute individuals for international crimes in the future. The Committee of Eminent African Jurists indicated, in addition to the establishment of a special tribunal, that it is possible to establish an African Court on the basis of a project to merge the AU Court and the African Court of Human and Peoples' Rights, giving this new judicial body the authority to administer international criminal justice and that the African Court will not duplicate the work of the International Criminal Court.[38]

It is, therefore, difficult to agree with those authors who argue, as indicated above, that the creation of an African Court with jurisdiction over international crimes is solely an AU response to the activities of the International Criminal Court. It can be concluded that the idea of creating this regional judicial body with international criminal jurisdiction was proposed by an independent Committee of Jurists composed of experts and not from representatives of African states.

Consequently, the activities of the ICC in Africa cannot be considered the only decisive reason for the establishment of a criminal chamber at the African Court. At the same time, it is very likely that the ICC's prosecution of sitting Heads of state and other high officials of African states had an impact on accelerating the process of creating a regional criminal court, but the activities of ICC were not the main reason for the establishment of such a judicial body.

It should be noted that some human rights organizations and some states have a negative view of the AU's attempts to create a regional criminal court, arguing that it is 'an attempt by the AU to shield African heads of state and

36 B. Cannon, D. Pkalya, B. Maragia, „The International Criminal Court and Africa: Contextualizing the Anti-ICC Narrative", *African Journal of International Criminal Justice*, Vol. 2, 1–2/2017, 6.

37 F. A. Agwu, „The African Court of Justice and Human Rights: the future of international criminal justice in Africa", *Africa Review*, Vol. 6, 1/2014, 30.

38 Committee of Eminent African Jurists. (2006). Report of the Committee of Eminent African Jurists on The Case of Hissène Habre, para. 35, https://thehagueinstituteforglobaljustice.org/files/legacy/justice/habre/ceja_repor0506.pdf, 13. May 2024.

senior state officials from being held to account' and that it can undermine the ICC's activities.[39]

It has to be reminded that an important limitation for regional organizations in the implementation of their functions, in particular, the creation of bodies and the adoption of various documents, is contained in Art. 52 of the UN Charter, which states that nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.[40] The 2014 Malabo Protocol does not contradict the UN Charter. On the contrary, with the entry into force of the Malabo Protocol and the establishment of an African court with criminal jurisdiction, additional mechanisms will be available to combat impunity for serious crimes under international law.

The Malabo Protocol provides for 14 types of crimes, while the International Criminal Court has jurisdiction over only 4 international crimes (the crime of genocide, war crimes, crimes against humanity and the crime of aggression). The 2014 Malabo Protocol covers 14 categories of 'grave' crimes: genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, trafficking in persons, drugs and hazardous waste, illicit exploitation of natural resources and aggression.[41]

With regard to the distinguishing features of the new 2014 Malabo Protocol, it should be noted that it provides for new elements of the crime of aggression (Art.28M) compared to the relative provisions of the Rome Statute of the International Criminal Court (Art.8bis and Art.15). The essential difference between Article 28M of the Malabo Protocol and Art. 8 bis of the Rome Statute of the ICC is that the Malabo Protocol states that acts of aggression can be committed not only by states but also by non-state actors. The Rome Statute refers to acts of non-state actors as acts of aggression only when these non-state actors (organized groups) are under the effective control of a foreign state, while Art. 28M of the Malabo Protocol states that acts of aggression can be committed by both states and non-state organized groups and other foreign entities, and it is not necessary that they have a connection with a foreign state.[42] This is definitely an innovative approach to the crime of aggression in international law.

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39 Amnesty International (2016). Malabo Protocol: Legal and Institutional Implications of the Merged and Expanded African Court. London, 2016//URL: https://www.amnesty.org/en/documents/afr01/3063/2016/en/ 11.05.2024.

40 See Art. 52 of the United Nations Charter. URL: https://www.icj-cij.org/charter-of-the-united-nations, 12.5.2024.

41 https://reliefweb.int/report/world/africa-s-international-crimes-court-still-pipe-dream, 12.5.2024.

42 Art. 28M of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights of June 27, 2014. Status List//URL: https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_

It should be noted that according to the Rome Statute of the ICC, an act of aggression is associated with a clear violation of Article 2 (4) of the UN Charter, i.e. violation of the prohibition on the use of force. This provision does not apply to non-international armed conflict, as the prohibition is addressed to states and does not apply to non-state actors.[43] The provisions of the Malabo Protocol on the crime of aggression apply to both international and non-international armed conflicts, which differs from the provisions of international law on the right to self-defense of states in the event of an act of aggression, which implies that only states can be subjects of aggression and only states can enjoy the right to self-defence. C. Jalloh notes that 'expansion of the crime of aggression to include non-state actors and any foreign entity arguably takes more seriously the role of non-state actors such as rebel, terrorists, and militia groups in the commission of heinous atrocities in Africa.[44]

In addition, unlike the Rome Statute of the ICC, regarding war crimes, the Malabo Protocol criminalizes the use of nuclear weapons and other weapons of mass destruction as a war crime.[45] This is a very important development, taking into account the fact that even in 1996, the International Court of Justice when issuing an Advisory Opinion on the Legality of the Use of nuclear weapons, indicated that there was no clearly established norm in international law on the complete prohibition of the use of nuclear weapons. However, the Malabo Protocol already establishes an international legal norm criminalizing the use of nuclear weapons.[46]

In relation to the crime of genocide, the Malabo Protocol reflects the definition of genocide contained in the Rome statute but includes new elements: rape and any other form of sexual violence which can amount to the crime of

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protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf, 12.5.2024.

43 D. D. N. Nsereko, M. J. Ventura, „Perspectives on the International Criminal Jurisdiction of the African Court of Justice and Human Rights Pursuant to the Malabo Protocol", *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (eds. C. Jalloh, K. Clarke, V. Nmehielle), Cambridge University Press, Cambridge, 2019, 280.

44 C. Jalloh, „A Classification of the Crimes in the Malabo Protocol", *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (eds. C. Jalloh, K. Clarke, V. Nmehielle), Cambridge University Press, Cambridge, 2019, 245, doi:10.1017/9781108525343.009.

45 Art. 28D (g) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights of June 27, 2014//URL: https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_¬and_¬human_¬rig¬hts_e.pdf.

46 A.V. Meleshnikov, „On the issue of the admissibility of the use of nuclear weapons (based on the materials of the advisory opinion of the International Court of Justice", *Bulletin of the UNN,* 4-1/2011, 266. //URL: https://cyberleninka.ru/article/n/k-voprosu-o-dopustimosti-primeneniya-yadernogo-oruzhiya-po-materialam-k¬o¬n¬sultativnogo-zaklyucheniya-mezhdunarodnogo-suda -oon.

genocide as was established in the Aakayesu case by the International Criminal Tribunal for Rwanda.[47]

Moreover, the Malabo Protocol provides for criminal liability not only for individuals but also for legal entities[48]. For the first time in the history of international criminal law, this Protocol provides for the jurisdiction of an international criminal institution to prosecute legal entities.[49]

According to Art. 46E bis of the Protocol, the Court may exercise its jurisdiction one of the following conditions is met: the crime was committed in the territory of a State party or on board a vessel or aircraft registered in the State party; the person who allegedly committed the crime is a national of the State party; the victim of the crime is a citizen of the State party, as well as in the case of extraterritorial acts committed by a citizen of a third State and threatening the vital interests of the State party.[50] The last condition significantly extends the jurisdiction of the new African court by reaching foreign individuals and entities committing the crimes provided for in the Malabo Protocol.

The African criminal court may exercise its jurisdiction with respect to the Malabo Protocol crimes if a situation is referred to the Prosecutor by a State party, by the African Union Assembly of Heads of State and Government or by the African Union Peace and Security Council, or in case when the Prosecutor has initiated an investigation following an authorization by the Pre-Trial Chamber to proceed with such an investigation (Malabo Protocol, art. 46F, 46G)[51], which is similar to the proprio motu investigation of the ICC Prosecutor requesting ICC Pre-Trial Chamber's authorization.

There is also a difference between the Malabo Protocol and the ICC Rome Statute provisions on the immunity of sitting heads of state and other senior state officials during their tenure in office. Art. 46A bis of the Malabo Protocol states

47 C. C. Jalloh, „A Classification of the Crimes in the Malabo Protocol", *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (eds. C. Jalloh, K. Clarke, V. Nmehielle), Cambridge University Press, Cambridge, 2019, 245, doi:10.1017/9781108525343.009.

48 Art. 28D (g) of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights of June 27, 2014//URL: https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_¬and_¬human_¬rig¬hts_e.pdf, 12.05.2024.

49 C. C. Jalloh, „The Nature of the Crimes in the African Criminal Court", *Journal of International Criminal Justice,* Vol. 15, 4/2017, 816.

50 Art. 46E (2) of the Malabo Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights. June 27, 2014//URL: https://au.int/sites/default/files/treaties/36398-treaty-0045__protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_jus¬tice_¬a¬n¬d-_h¬um¬an_¬rights_e.pdf, 12.5.2024.

51 https://au.int/sites/default/files/treaties/36398-treaty-0045__protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf, 12.5.2024.

that 'no charges shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other senior state officials during their tenure in office'[52] (Malabo Protocol, art. 46A bis). Moreover, Art. 46B of the Malabo Protocol provides that the official position of an accused person does not shield him from responsibility and cannot serve as a basis to mitigate the punishment, which means the heads of state and government enjoy immunity from criminal proceedings only during their tenure in office.

The provision of Art. 46A bis of the Protocol about immunities has been vigorously criticized by some researchers and human rights organizations, pointing out that it is contrary to the progress made in the fight against impunity and that the creation of this regional criminal court is contrary to the purposes and object of the Rome Statute.[53] It should be noted that the issues of transferring to the ICC citizens accused or suspected of committing international crimes[54] and the heads of state immunity issue[55] are said, in some cases, to be one of the official reasons for the non-ratification of the Rome Statute by some states.

It can be said that creating an African court with the competence to prosecute international crimes and other gross violations of human rights is a positive step in strengthening international criminal justice, fully consistent with the purposes and principles of the UN enshrined in its Charter. The inclusion in the Malabo Protocol of new crimes such as piracy, terrorism, illegal exploitation of natural resources, and corruption, over which the African Court can exercise criminal jurisdiction and which do not fall under the jurisdiction of the ICC, will provide potential victims with an additional opportunity to access justice. Thus, the African Union makes a great contribution to the development of international criminal justice and thus contributes to the realization of the Sustainable Development Goal 16 (SDG 16: Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels). Dire Tladi points out that the jurisdiction of the African Court does not affect the jurisdiction of the ICC.[56]

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52 https://au.int/sites/default/files/treaties/36398-treaty-0045_-_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf, 12. May 2024.

53 C. B. Murungu, „Towards a criminal chamber in the African Court of Justice and Human Rights", *Journal of International Criminal Justice,* Vol. 9, 5/2011, 1088.

54 A. Kh. Abashidze, „Participation of states in the Rome Statute of the International Criminal Court as a new type of obligations erga omnes", *International Criminal Court: Problems, Discussions, Search for Solutions* (eds. G. I. Bogush, E. N. Tricose), 2008, 47–59.

55 G. I. Bogush, „International Criminal Court and problems of the formation of international criminal justice", *International Criminal Court: Problems, Discussions, Search for Solutions* (eds. G. I. Bogush, E. N. Tricose), 2008, 26-46.

56 D. Tladi, „Article 46A Bis: Beyond the Rhetoric", *The African Court of Justice and Human and Peoples' Rights in Context* (ed. Charles C. Jalloh), Cambridge University Press, Cambridge, 2019, 865.

It should be noted that the African Court of Justice and Human and Peoples' Rights, which has jurisdiction to consider interstate disputes, cases of human rights violations, as well as to consider criminal cases, is a regional court sui generis. The jurisdictional relationship between the African Court and the International Criminal Court has to be regulated in accordance with the principle of complementarity and cooperation between the AU and the ICC.

As Kayumova A.R. correctly notes, 'the principle of complementarity establishes that the jurisdiction of the ICC is implemented only when national legal systems are unable or unwilling to exercise jurisdiction'.[57] She points out that in the event of overlapping jurisdictions between the ICC and national courts, the national courts have priority.[58] Consequently, the ICC exercises its jurisdiction only when the domestic courts are unable or unwilling to conduct relevant investigations.

Article 46H (1) of the Malabo Protocol provides that the jurisdiction of the African Court is complementary to the jurisdiction of the national courts and the courts of the Regional Economic Communities (RECs). At the same time, the Malabo Protocol and the Rome statute are silent on the jurisdiction relationship between the ICC and regional courts in criminal matters. Can it be assumed, for example, that states are free to choose to refer a situation to either the African Court or the International Criminal Court if they consider themselves unable to exercise jurisdiction over international crimes? Since the Malabo Protocol does not provide for complementarity between the African Court and the International Criminal Court, and due to the fact that the ICC Statute does not provide for any criminal prosecution by a regional court (based on the principle of complementarity), it is difficult to resolve the issue.

However, the most important question is what rules, if any, will govern the relationship between the International Criminal Court and the African Court if they face certain legal challenges in the face of overlapping jurisdiction with regard to the situations under their investigation. Will the International Criminal Court exercise some kind of oversight over the activities of the African Court in the field of prosecuting crimes that fall within its jurisdiction, i.e. crimes of genocide, war crimes, crimes against humanity and crimes of aggression, if, in its opinion, the regional court does not make the right decision or is not genuinely dealing with certain cases concerning Rome statute crimes? In a situation where the African Court will conduct an investigation, it is difficult to imagine how the ICC will take the same situation for investigation based on the criteria of unwillingness or failure while ignoring prosecutions being carried out by the African court.

As mentioned earlier, the Malabo Protocol explicitly provides for the immunity of sitting AU Heads of state or government from criminal prosecution (Art. 46Abis of the Malabo Protocol), which differs from provisions of Art. 27

57 A. R. Kayumova, „The principle of complementarity of the ICC as a model of the relationship between national and international criminal justice: problems of applying the admissibility test", *Modern international law: globalization and integration,* Liber Amicorum in honour of Professor P. N. Biryukova, Voronezh State University, Voronezh, 2016, 111.

58 *Ibidem*.

of the ICC Statute, which does not allow for the exclusion of criminal prosecution based on the official position of the person at the time tenure of office. In this connection and taking into mind the complementarity issue, one can imagine a situation where an African state, in order to deliberately avoid the International Criminal Court's prosecution, refers to the African Court a situation concerning international crimes, in the commission of which an incumbent president of the same state was allegedly involved. If the African Court is unable to investigate the situation with respect to the immunities enjoyed by the sitting president of the State referring to Art. 46Abis of the Malabo Protocol, then the International Criminal Court may be able to intervene, given the failure of the African Court to genuinely carry out the prosecution, because the African court's activities doesn't preclude ICC's jurisdiction in cases (exception is possible for African states that would be non-member states of ICC). However, such a kind of monitoring position of the International Criminal Court over the regional courts is irrelevant since the ICC Statute and the Malabo Protocol do not provide for the applicability of the complementarity principle between the universal (ICC) and regional (African Court) criminal justice mechanisms.

In support of regional complementarity between regional courts and the ICC, it can be argued that a teleological (purposive) interpretation (considering the treaty's object and purpose) of the complementarity principle may encompass not only national but also regional courts. When considering the admissibility of a situation in the ICC, it is important to decide whether an investigation, if any, has been taken, not only in the national courts of a state but also in regional courts.[59] In this regard, it seems necessary to revise the provisions of the Rome Statute relating to the principle of complementarity to reflect its application in relations between the ICC, hybrid tribunals and regional courts. Some authors believe that the African Court and the International Criminal Court will be able to complement each other in the implementation of international criminal justice in accordance with the principle of complementarity.[60] It is noted that other continents will follow the path of the African Union with the possibility of creating regional criminal courts, as well as concluding bilateral treaties[61], i.e. two states would be able through an agreement to establish a criminal court, by expanding the jurisdiction of regional human rights courts to cover investigations of international crimes, which would necessitate a decision on their complementarity with the ICC. In any case, it is necessary to resolve the issue of complementarity in a positive aspect since the establishment and effective functioning of the African Court, which has criminal jurisdiction over international crimes, provides an

59 W. Gerhard, F. Lovell, V. Moritz, *Africa and the International Criminal Court*, Asser Press, Hague, 2014, Annex 1: Africa and the International Criminal Court – Recommendations, 231.

60 M. V. S. Sirleaf, „Regionalism, Regime Complexes, and the Crisis in International Criminal Justice", *Columbia Journal of Transnational Law*, Vol. 54., 2015, 703.

61 M. Jackson, „Regional complementarity: the Rome Statute and public international law", *Journal of International Criminal Justice*, Vol. 14, 5/2016, 1061–1072.

additional opportunity for victims of international crimes and other gross violations of human rights to access justice.

The idea of creating a regional criminal court is being considered not only in Africa but also in Latin America[62], and some scholars also propose the creation of a single judicial body for the CIS member states, which, in particular, would deal with criminal issues. For example, Muratova notes that it is time to create a single judicial body for all Commonwealth of the Independent States (CIS) countries, which could, among other things, deal with human rights violations in the CIS countries, exercise judicial control over extradition in the CIS countries, and coordinate cooperation in the field of criminal proceedings.[63]

Recently, in Latin American and the Caribbean region, an idea on the possibility and necessity of creating a regional criminal court COPLA (Corte Penal Latinoamericana y del Caribe contra el Crimen Transnacional Organizado - Latin American and Caribbean Criminal Court Against Transnational Organized Crime) for Combating Transnational Organized Crime) and prosecute perpetrators of serious conventional offences (crimes of an international character) is being considered.[64] The campaign to create this regional criminal court was initiated by non-governmental organizations[65] in 2013. It is indicated that this Court can be created on the basis of an agreement between all states of the Caribbean and Latin America that have ratified the 2000 UN Convention against Transnational Organized Crime and its protocols.[66] It is noted that its jurisdiction will include the crimes provided for by the UN Convention against Transnational Organized Crime of 2000 and the Protocols thereto, as well as crimes related to drug trafficking, money laundering, transnational corruption and illegal trade in cultural property committed on the territory of states-parties.[67] This idea of creating a regional criminal court has received support from some regional states.[68] It should be noted that on September 20, 2017, the then Vice-President of Argentina Gabriela Michetti, speaking before the UN General Assembly in support of

62 Latin American Criminal Court Against Transnational Organized Crime//URL: http://www.europarl.europa.eu/meetdocs/2014_2019/documents/dlat/dv/07_copla_abstractnov2016/07_copla_abstractnov2016en.pdf, 13.5.2024.

63 N. G. Muratova, „Problems of implementation of the Rome Statute of the International Criminal Court in Russia", *Bulletin of Economics, Law and Sociology*, 3/2007, 61.

64 R. J. Currie, J. L. Copla, „A Transnational Criminal Court for Latin America and the Caribbean", *Nordic Journal of International Law*, Vol. 88, 4/2019, 587.

65 The Latin American and Caribbean Criminal Court against Organized Transnational Crime's Coalition website//URL: http://www.coalicioncopla.org, 12.5.2024.

66 R. J. Currie, J. L. Copla, „A Transnational Criminal Court for Latin America and the Caribbean", *Nordic Journal of International Law*, Vol. 88, 4/2019, 588.

67 *Ibidem.*

68 PGA's Argentinean National Group expresses support for Latin American and Caribbean Criminal Court Against Transnational Organized Crime//URL: https://www.pgaction.org/news/pga-argentiania-supports-criminal-court-against-transnational-organized-crime.html, 12.5.2024.

the idea of creating this judicial body, noted its importance in the fight against drug trafficking[69]. In December 2017, within the framework of the XVI session of the Assembly of States, a separate meeting was held on establishing a regional criminal court for Latin America and the Caribbean.[70]

In this regard, we can say that this initiative is supported and has been appreciated at the international level, while some international actors are more critical towards the creation of an international criminal chamber within the African Court provided for by the Malabo Protocol.

Nevertheless, it can be argued that there is a trend towards the regionalization of international criminal justice, which to some extent meets the specific realities of different regions and that regional criminal courts will be able to effectively administer international criminal justice, taking into account the positive experience of regional systems for the protection of human rights.

Some authors see the process of regionalization of international criminal justice as a positive development[71], including the creation of an African Court with international criminal jurisdiction under the 2014 Malabo Protocol as an important step forward for the implementation of criminal justice, taking into account specific regional needs[72], for example, M. Sirleaf rightly argues that the regional African court 'could arguably tailor criminal accountability to the context, needs and aspirations of the Continent'.[73] Others are sceptical about establishing a regional criminal court in Africa that will work alongside the ICC.

There is a view that the regionalization of international criminal law may lead to the fragmentation of international law. It may be noted that it is possible to overcome fragmentation by applying and strengthening the already-established principle of complementarity in international criminal justice.

4. CONCLUSION

The trend towards establishing regional international criminal courts reflects a recognition of the importance of addressing regional and specific crimes within regions. This situation underscores the acknowledgement that regional dynamics, historical contexts, and unique challenges require tailored approaches to justice administration. As these regional bodies emerge, questions arise regarding their jurisdictional coordination with institutions like the International Criminal Court. The principle of complementarity, as enshrined in various articles of the Rome

69 R. J. Currie, J. L. Copla, „A Transnational Criminal Court for Latin America and the Caribbean", *Nordic Journal of International Law*, Vol. 88, 4/2019, 588.

70 *Ibidem*.

71 M. V. S. Sirleaf, „Regionalism, Regime Complexes, and the Crisis in International Criminal Justice", *Columbia Journal of Transnational Law*, Vol. 54, 2016, 699, 778.

72 M. Sirleaf, „The African Justice Cascade and the Malabo Protocol", *International Journal of Transitional Justice*, Vol. 11, 1/2017, 71.

73 *Ibidem*.

Statute of the ICC, serves as a guiding framework for the intervention of international courts. Notably, Articles 17 and 53 emphasize the ICC's role in stepping in only when national jurisdictions fail to prosecute crimes within its jurisdictional scope. However, with the emergence of regional judicial bodies, such as those in Africa, the delineation of jurisdictional boundaries and the harmonization of efforts with the ICC become critical considerations.We highlighted in this paper "Transitional Justice Cascades", by Marsavelski and Braithwaite, who propose a three-level transitional justice framework that offers a comprehensive approach to addressing international crimes. At the bottom level, restorative justice mechanisms are suggested to address individual offenders and victims, supported by an International Reparation and Reconciliation Support Unit. This approach provides localized solutions to address affected communities' specific needs and circumstances.

Furthermore, a mid-level response involves collaboration between international transitional justice units and national criminal justice systems to indict middle-ranking officials implicated in international crimes. This collaborative effort aims to bridge the gap between international and national justice mechanisms, ensuring a more coordinated approach to accountability and justice.

Moreover, the discussion surrounding the prioritization of jurisdiction for regional courts, such as a prospective African Criminal Court, raises complex legal and political considerations. While prioritizing regional jurisdiction aligns with principles of sovereignty and complementarity, concerns over potential politicization and abuse of universal jurisdiction underscore the need for cautious implementation.

The African Union's adoption of the Model Law on Universal Jurisdiction exemplifies a proactive stance in addressing these concerns, reflecting African states' reservations about the potential abuse and politicization of universal jurisdiction by certain European states. This common position emphasizes the importance of safeguarding against perceived injustices and asserting sovereignty in matters of criminal responsibility.

Additionally, establishing the African Court of Justice and Human Rights, as provided for by the 2014 Malabo Protocol, adds another dimension to the African criminal justice landscape. This court's mandate to adjudicate international crimes, some of which fall within the jurisdiction of the ICC, prompts diverse opinions regarding its rationale and potential implications for regional and international justice mechanisms.

In conclusion, while the emergence of regional international criminal courts presents opportunities for more localized justice administration, careful consideration of jurisdictional complexities, adherence to principles of fairness and accountability, and proactive measures to prevent abuse are essential. By successfully implementing the solutions to these challenges, regional courts can play a pivotal role in combating impunity and ensuring justice for victims of international crimes within their respective regions.

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INTERNATIONAL LAW & AFRICA'S PERSPECTIVES ON CRIMINAL JUSTICE INSTITUTIONS

Summary

This paper examines Africa's distinct perspectives on international legal principles and criminal justice institutions, with a specific focus on three key aspects: the 2012 Model Law on Universal Jurisdiction, the principle of complementarity, and the proposal for the African Court of Justice and Human Rights under the 2014 Malabo Protocol. By adopting the Model Law, African national courts gain a unique mechanism for holding perpetrators of international crimes accountable, countering concerns over the potential misuse of universal jurisdiction by certain European states. Additionally, the proposal for the African Court of Justice and Human Rights aligns with the principle of complementarity, highlighting Africa's growing role in shaping global legal mechanisms to combat impunity and crimes. This paper highlights Africa's evolving engagement with international legal frameworks by exploring the motivations, challenges, and implications of these initiatives.

Keywords: International Legal Principles, African Union, Model Law on Universal Jurisdiction, African Court of Justice and Human Rights, International Criminal Justice Institutions.

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