

Introduction

Origins and Issues of the African Court of Justice and Human and Peoples' Rights

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1. INTRODUCTION

In June 2014, at its summit in Malabo, Equatorial Guinea, the Assembly of Heads of State and Government ('Assembly') of the African Union adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the 'Malabo Protocol'). The so-called Malabo Protocol was one of eight legal instruments adopted by African Union (AU) leaders, but undoubtedly one of its most significant. The significance stems, partly, from the consideration and addition of a third section to the proposed African Court of Justice and Human Rights (ACJHR) which had already formally anticipated the possibility of a regional tribunal with jurisdiction over human rights issues as well as general disputes arising between African States. The new Court will, once its statute enters into force upon achievement of the 15 required ratifications additionally possess the competence to investigate and try 14 international, transnational and other crimes in a highly ambitious tribunal with three separate chambers and jurisdictions:¹ (1) the General Affairs Section, (2) the Human and Peoples' Rights Section and (3) the International Criminal Law Section. The merger of these three chambers addressing inter-state disputes, human rights and penal aspects into a single court with a common set of judges represents a significant development in Africa and in wider regional institution building and law making.

The adoption of the Malabo Protocol is the culmination of a process that began long before what many African Court sceptics see as the outcome of the

¹ African Union, Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014, available online at: www.africancourtcoalition.org/images/docs/legal-texts/Protocol_on_amendments_to_the_Protocol_on_the_Statute_of_the_African_Court_of_Justice_and_Human_Rights%20.pdf (Malabo Protocol).

indictment by the International Criminal Court (ICC) of President Omar Al-Bashir of Sudan. It is true that between 2009 and 2014, the draft protocol was subject to a series of politically driven calls to expedite the expansion of the criminal jurisdiction of the proposed merged court as a sort of African alternative to the ICC. The calls had been preceded by a decision of African leaders taken in February 2009 during the Twelfth Ordinary Session of the Assembly directing the AU Commission to assess the implications of the present African Human Rights Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes. This would later lead to the AU Commission's preparation of a draft legal instrument. The draft was then presented to and debated by African states over the course of several years. The process of negotiating and adopting the Malabo Protocol was influenced by political concerns and push back at the ICC by some African States under the scrutiny of The Hague, including most prominently Kenya. That context would lead to a key amendment to the clause concerning immunity of high-level officials and also fast tracked the eventual adoption of the draft regional treaty at Malabo towards the end of June 2014.

However, although these circumstances led to the unfortunate perception of the African Court among scholars and practitioners of international criminal law as a rebel court against the ICC that should be ignored rather than studied, a careful review of the evolution of African human rights institutions generally and the criminal jurisdiction of the African Court in particular confirms that the journey to Malabo began long before the Al-Bashir saga and 2009.

2. THE JOURNEY TO THE AFRICAN COURT MALABO PROTOCOL

One early marker for the beginning of the court formation process was the 1981 adoption of the African Charter on Human and Peoples' Rights by the Organization of African Unity (OAU), the AU's predecessor.² This Charter

² G. Abraham, *Africa's Evolving Continental Court Structures: At the Crossroads?*, South African Institute of International Affairs (SAIIA), Occasional Paper 209, January 2015, available online at: www.saiia.org.za/cat_view/2-occasional-papers?dir=DESC&limit=10&order=name&start=220, at 7. For further historical accounts of the lead up to the Malabo Protocol, see A. Abass, 'Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges', *European Journal of International Law* 24(3) (2013) 933; D. Deya, *Worth the Wait: Pushing for the African Court to Exercise Jurisdiction for International Crimes*, Open Society Initiative for Southern Africa (OSISA), 6 March 2012, available online at: www.osisa.org/openspace/regional/african-court-worth-wait; M. du Plessis, *Implications of the AU decision to give the African Court jurisdiction over international crimes*, Institute for Security Studies (ISS), ISS Paper 235, June 2012, available online at: www.issafrica.org/publications/papers/

entered into force in 1986 and enabled the 1987 establishment of the African Commission on Human and Peoples' Rights, a quasi-judicial oversight body tasked with interpreting the charter and hearing complaints of human rights violations brought by individuals against their home states.³ Yet another and even earlier marker for establishment of an African court was the 1961 Lagos Conference on Primacy of Law in which an idea emerged to adopt an African human rights convention with the view to establishing an African human rights court modelled on the European and Inter-American Courts of Human Rights.⁴ This proposal resurfaced in 1969 at the UN Seminar on the Creation of Regional Commissions on Human Rights with specific reference to Africa held in Cairo in 1969. At the time, the UN's recommendation to the OAU went unimplemented.⁵

However, scholars such as C. R. M. Dlamini have documented several initiatives and seminars held over a period of 10 years to discuss and advocate for the establishment of an African Commission on Human Rights or court⁶

implications-of-the-au-decision-to-give-the-african-court-jurisdiction-over-international-crimes; M. Hansungule, 'African courts and the African Commission on Human and Peoples' Rights' in A. Bosl and J. Diescho, *Human Rights in Africa* (Namibia: Konrad-Adenauer-Stiftung, 2009) 233, available online at: www.kas.de/upload/auslandshomepages/namibia/Human_Rights_in_Africa/8_Hansungule.pdf; V. O. Nmehielle, "'Saddling' the New African Regional Human Rights Court with International Criminal Jurisdiction: Innovative, Obstructive, Expedient?", *7 African Journal of Legal Studies* (2014) 7; K. Rau, 'Jurisprudential Innovation or Accountability Avoidance? The International Criminal Court and Proposed Expansion of the African Court of Justice and Human Rights', *Minnesota Law Review* 97 (2012) 669; M. Sirleaf, 'Regionalism, Regime Complexes and International Criminal Justice in Africa', *Columbia Journal of Transnational Law* (2016), Forthcoming, available online at: http://d-scholarship.pitt.edu/27276/1/Sirleaf_Regionalism%2C_Regime_Complexes_and_International_Criminal_Justice_3-19-16.pdf; F. K. Tiba, 'Regional International Criminal Courts: An Idea Whose Time Has Come?', *Cardozo Journal of Conflict Resolution* 17 (2016) 521; Deakin Law School Legal Studies; F. Viljoen, 'AU Assembly should consider human rights implications before adopting the Amending Merged African Court Protocol', *AfricLaw*, 23 May 2012, available online at: <https://africlaw.com/2012/05/23/au-assembly-should-consider-human-rights-implications-before-adopting-the-amending-merged-african-court-protocol/>; International Federation for Human Rights (FIDH), *The African Court on Human and Peoples' Rights: towards the African Court of Justice and Human Rights*, April 2010, available online at: www.fidh.org/IMG/pdf/african_court_guide.pdf.

³ Ibid.

⁴ C. R. M. Dlamini, 'Towards a regional Protection of human rights in Africa: The African Charter on Human and Peoples' Rights' XXIV CILSA 1991.

⁵ Dlamini, citing Weinstein 'Africa's Approach to Human Rights at the United Nations', unpublished paper.

⁶ These include the following: 'Seminar on measures to be taken on the national level for the implementation of the United Nations Instrument aimed at combating and eliminating racial discrimination and for the promotion of harmonious racial relations' held in Yaounde, 16–21 June 1971; 'Seminar on the participation of women in economic life', Libreville, Gabon

such as the 1961 conferences and seminars that the UN and the International Commission of Jurists organized on the rule of law in Dakar (1976), Dar es Salaam (1976) and Dakar (1978). All these meetings led to successive resolutions urging the OAU to adopt a regional human rights instrument for Africa.⁷ By 1979, at a symposium convened by the UN in Monrovia, Liberia adopted a strong position on the need to create such a body, which reportedly influenced the decision of the Assembly of the Organization of African Union (OAU). A series of political developments centred on human rights violations in several African states in Uganda, the Central African Republic and South Africa as well as a concerted campaign to create an African Commission resulted in the historic decision of the OAU Assembly at its February 1979 Summit requesting the organization's Secretary-General to convene a meeting of experts which would propose the establishment of relevant bodies for the protection of human rights on the continent in the form of the African Charter on Human and Peoples' Rights.⁸

In January 1981, an OAU Council of Ministers adopted a preliminary draft of an African Charter in Banjul, The Gambia, which had been prepared in 1979 by a Committee of Experts headed by renowned Senegalese jurist Kéba Mbaye. Mbaye and the other legal experts had debated a number of proposals. The focus of most of the proposals was largely on the human rights issues. But, for our limited purposes, one of the most significant was a proposal submitted by the Republic of Guinea suggesting that the future court should also be endowed with jurisdiction to prosecute gross violations of human rights constituting international crimes such as crimes against humanity. The Guinean proposal seemed to have been motivated by a desire to condemn the gross human rights violations taking place in South Africa under a ruthless apartheid regime at the time. The proposal was not successful. And the experts proved to also not be convinced that African states were ready for a human rights court. They therefore recommended the establishment of a human rights commission, while urging the return to the idea of a court capable of issuing binding decisions in the future. The eventual Charter, endorsing the commission idea, was adopted by the OAU Assembly Summit held in Nairobi,

27–29 1971; 'Seminar on the study of new ways and means for promoting human rights with special attention on the problems and needs of Africa' Dar es salaam Tanzania 23 October–5 November 1973. See Dlamini, 190 citing UO Omuzurike, 'The African Charter on Human and Peoples', *Rights' American Journal of International Law* 903–4.

⁷ Dlamini, citing Kannyo, 'Human Rights in Africa: Problems and Prospects (1980) 24 et seq.

⁸ Dlamini, 191. Dlamini records that a meeting of experts subsequently convened by the UN in Morovia in September to discuss the creation of the African Commission would make proposals to the OAU on a model of the Commission.

Kenya in June 1981⁹ and came into force in 1986. The African Commission, the institution established under the Charter to interpret the treaty and to help protect and promote human rights in Africa, was established in November 1987 and based in Banjul, The Gambia.¹⁰

In an attempt to bolster the charter and hear grievances, the African Court of Human Rights (ACHPR), which complements the protective mandate of the African Commission on Human and Peoples Rights,¹¹ was inaugurated in 2006. This was based on a recognition that the Banjul Charter entailed some limitations as well as a desire to enhance its efficiency. The African Court sits in Arusha, Tanzania and besides the power to issue advisory opinions, may hear individual applications relating to human rights violations brought before it by the AU Commission, as well as complaints initiated by individuals as well as African intergovernmental organisations and member states.¹² It was created by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, adopted on 10 June 1998, which entered into force on 25 January 2005.¹³ A significant legal limitation to the jurisdiction is that a special declaration by a state is required for the Court to have competence to entertain individual human rights complaints against it, which perhaps unsurprisingly given the current state of human rights on the continent, has, at the time of this writing, only been entered by seven African states.

The push to establish an African Court is as old as the African Charter itself, having been considered but rejected on various grounds by the Committee of Experts that drafted the African Charter in 1979.¹⁴ It was motivated, in part, by the need to strengthen the African human rights system and enhance the system's capacity to engender positive responses from states through binding decisions. However, the subject matter jurisdiction of this Court was limited to human rights violations and did not extend to international crimes, except in the context of 'massive violations'.¹⁵ It interprets and applies the African Charter on Human Rights, the Protocol Establishing

⁹ See Dlamini, 193 citing Kannyo at 20.

¹⁰ Art 45 African Charter.

¹¹ Rt 1, Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights

¹² *Ibid.* at 8.

¹³ Currently 27 of 54 possible states are party to it.

¹⁴ On the drafting history of the Charter, see Rapporteur's Report, Committee of Experts. See also, Frans Viljoen, 'A Human Rights Court for African, and Africans' *Brooklyn Journal of International Law*, 30:1 (2004) 1–66 pp 4–6.

¹⁵ See Article 48, African Charter.

the Court and any other relevant (human rights) instrument ratified by the states concerned.¹⁶ At the same time, the decisions of the African Commission are mere recommendations.¹⁷

However, with the transition from the OAU to the AU in 2000, several organs were created by the AU's Constitutive Act. One of these organs of the AU, which addressed aspects of the expressed commitment to promote deeper commitment to human rights by condemning and rejecting impunity, is the African Court of Justice. In 2001, a second inter-state court structure was included in the AU's Constitutive Act and was further developed in the 2003 Protocol of the Court of Justice of the AU, becoming known as the African Court of Justice (ACJ).¹⁸ The ACJ was intended to be the principal judicial organ of the AU, with authority to rule on disputes over the interpretation of AU treaties.¹⁹ Although this protocol entered into force in 2010, the ACJ was superseded by the Protocol on the Statute of the African Court of Justice and Human Rights (the Merger Protocol).²⁰

In explaining the merger of the courts, among other factors, many believed that the proliferation of institutions was problematic and that the viability of these institutions was in question in view of funding constraints. There also remained some apprehension about the extent of commitment to the establishment of a robust court. In 2007, a group of African legal experts was commissioned by the AU to advise on a possible conjunction of the ACHPR and the ACJ.²¹ The Assembly requested the AU Commission to appoint a Committee of Experts to consider a possible merger and prepare a protocol for the same.²² The Committee of Experts was appointed and produced a draft protocol. A merger of the African Court on Human Rights and the African Court of Justice was justified as part of the rationalization and cost-cutting measures undertaken by the AU. This merged court would become the ACJHR.²³

¹⁶ Art 3, Protocol Establishing the African Court.

¹⁷ Art 58(2). See Frans Viljoen, 'A Human Rights Court for African, and Africans' *Brooklyn Journal of International Law*, 30:1 (2004) 1–66 at 13.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008, available online at: www.au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights (Merger Protocol).

²¹ *Ibid.*

²² AU Commission Report on the decision of the Assembly of the Union to merge the Court on Human and Peoples' Rights and the Court of Justice of the African Union, EX CL/162 (VI) Sixth Ordinary Session. 24–28 January 2005, pp 1–4.

²³ Sirleaf, *supra* note 2 at 20.

During the meeting of Experts and Ministers of Justice and Attorneys General held at the AU Headquarters in Addis Ababa in April 2008, the Protocol on the African Court of Justice and Human Rights was considered and approved. The Assembly subsequently adopted the Protocol of the Merged Court at its 6th Ordinary Session in Sharm El Sheikh, Egypt in July 2008. The joining of the two courts into a 'Merged Court' contemplated two jurisdictional chambers: a general chamber to consider inter-state issues and labour matters affecting employees of the AU (which was the original jurisdiction of the ACJ) and a human and peoples' rights chamber with the same powers as the ACHPR. The AU urged member states to proceed with speedy ratification.²⁴ The Merger Protocol was to enter into force after 15 ratifications, the current threshold for most AU treaties. To date, only five states have ratified it.²⁵

However, it was the eruption of the contentious debate in 2008 on universal jurisdiction following the indictment of Rwandese officials by courts in France and Spain coupled with the controversy over the indictment of Sudanese President Al-Bashir by the Prosecutor of the ICC in 2009 that complicated the path to ratification when the AU redirected its efforts towards expanding the jurisdiction of the Human Rights Court before the Protocol establishing the Merged Court could come into force.²⁶ By this time, the African Court on Human Rights that had been inaugurated in 2006 was engaged in setting up its structures and negotiating a working relationship with the African Commission. As a consequence of a UN Security Council Article 13(b) referral of the Sudan Situation in March 2005, the ICC issued an indictment on two charges of war crimes and three charges of crimes against humanity against President Al-Bashir of Sudan.²⁷ The controversy revolved around the ICC prosecutor's refusal to not reconsider the application for the issuance of the arrest warrants, despite Sudan being a non-party to the Rome Statute and the AU's concerns about the ongoing peace process to end the conflict in Darfur. The first arrest warrant

²⁴ AU Assembly Decision on the Single Legal Instrument on the Merger of the African Court on Human and Peoples' Rights and the African Court of Justice
Doc.Assembly/AU/13 (XI).

²⁵ *Ibid.*

²⁶ Charles C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', *Criminal Law Forum* 21(1) (2010) 1–65; Charles C. Jalloh, 'Regionalizing International Criminal Law', *International Criminal Law Review* 9(3) (2009) 455–99.

²⁷ Situation in Darfur, Sudan Prosecutor v Omar Hassan Al Bashir available at www.icc-cpi.int/iccdocs/doc/doc639078.pdf.

was issued on 4 March 2009 while the second, which added charges relating to the crime of genocide, was issued on 12 July 2010.

Within months of the adoption of the Protocol Establishing the Merged Court, and during its Twelfth Ordinary Session held between 1–3 February 2009 in Addis Ababa, the Assembly of Heads of State and Government requested the AU Commission, in consultation with the African Commission on Human and Peoples' Rights, and the African Court on Human and Peoples' Rights, 'to examine the implications of the Court being empowered to try international crimes such as genocide, crimes against humanity and war crimes'.²⁸ In its decision of 3 February 2009, the AU had argued for an 'accommodation' to allow the continental body more time to find a negotiated solution to the armed conflict in Darfur, cautioning that these peacemaking efforts could be undermined by the indictment of President Al-Bashir.²⁹ The AU indicated that it was not opposed to accountability for atrocity crimes in Sudan, irrespective of who were the perpetrators, but that timely political resolution of the conflict could be undermined by an untimely prosecution. In other words, the question of peace versus justice, or rather the sequencing of peace and justice, which had been already raised in the Uganda Situation now took centrality in what would prove to be an ICC-AU debacle that continues to this day.³⁰

At the close of its Thirteenth Ordinary Session in Sirte, Libya on 3 July 2009, the Assembly renewed its call to the AU Commission, expressing its desire to have the process speeded up and urged the commission to aim for an 'early implementation' of its February decision.³¹ The Assembly 'expressed its deep concern at the indictment issued by the Pre-Trial Chamber of the ICC against President Omar Hassan Ahmed Al-Bashir of the Republic of the Sudan'.³² In its view, the indictment had prejudiced its efforts to find peace in Darfur. It noted, with concern:

the unfortunate consequences that the indictment has had on the delicate peace processes underway in The Sudan and the fact that it continues to

²⁸ See *farr*, para 9.

²⁹ AU Assembly, 'Decision on the application by the International Criminal Court Prosecutor for the Indictment for the President of the Republic of Sudan' the 12th Ordinary Session in Addis Ababa Ethiopia on 3 February 2009 during Assembly/AU/Dec.221 (XII).

³⁰ For more on the wider Africa-ICC relationship, see Kamari Clarke et al. (eds), *Africa and the ICC* (Cambridge University Press, 2016); Charles Jalloh and Ilias Bantekas (eds), *The International Criminal Court and Africa* (Oxford University Press, 2017).

³¹ AU Assembly Decision on the meeting of African States Parties to the Statute of the Rome Statute of the International Criminal Court, (ICC) Doc. Assembly/AU/13(XIII), Sirte, Libya, 3 July 2009, para 5.

³² AU Assembly of the African Union, 'Decision on the meeting of African States Parties to the Rome Statute of the International Criminal Court' (ICC)(Doc. Assembly/AU/13(XIII)) Thirteenth Ordinary Session, held in Sirte Libya on 1–3 July 2009, para 2.

*undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur.*³³

It is clear from the Sirte decision that the AU's concerns over the Al-Bashir indictment directly influenced its decision to call on relevant AU organs to speed up the work on its request made earlier in the year, to investigate the prospects of vesting the ACJHR with a criminal prosecution mandate. A central factor, which preceded the Al-Bashir indictment controversy and that was also very important to understanding the origins of the criminal jurisdiction idea, had been the 2006 recommendation of a separate committee of AU experts relating to the trial of Chadian president Hissnié Habré. That committee proposed that Senegal be entrusted with the responsibility of trying the former Chadian president, but also urged consideration for the addition of a criminal jurisdiction to the existing African Human Rights Court in order to have a mechanism to prosecute any similar cases that might arise in the future. And by late 2009, in response to the directives received from the Assembly, the Office of the Legal Counsel of the AU commissioned the Pan African Lawyers Union (PALU) to carry out a study and prepare recommendations and a form of draft amendment to the Merger Protocol to enable the Court to try international crimes 'such as' genocide, crimes against humanity and war crimes.³⁴

PALU submitted its first draft report and draft legal instrument to the Office of the Legal Counsel (OLC) of the AUC in June 2010, proposing amendments to the existing Protocol as well as its Statute. In August 2010, PALU submitted the second draft report and draft legal instrument, incorporating the directives and suggestions of the OLC.³⁵ Following this, two validation workshops were held in South Africa in August and October/November 2010. The meetings were privately organized and brought together the AUC and the legal advisors of all relevant AU organs and institutions, as well as the legal advisors of the Regional Economic Communities (RECs), to consider the draft report and draft legal instrument.³⁶ A number of individuals were reportedly invited to participate in the meetings, based on their connection to the principals of PALU. Civil society organizations, academia and independent legal experts in international criminal law were not formally included in the process. An opportunity was thus lost to take advantage of the availability of specialists in these issues from within Africa as well as internationally.

³³ AU, Assembly of the African Union, Thirteenth Ordinary Session, held in Sirte Libya on 1–3 July 2009, para 3.

³⁴ *Ibid.*; Deya, *supra* note 2 at 24.

³⁵ *Ibid.*

³⁶ *Ibid.*

In any event, between March and November 2011, three additional meetings of government experts took place in Addis Ababa, Ethiopia to consider the draft report and draft legal instrument. Both the draft report and draft legal instrument were amended at each stage based on directives and suggestions from each of the meetings.³⁷ After further discussions, delays and amendments, in May 2014, a revised version of the 2012 draft was put before the first session of the AU Specialised Technical Committee (STC) on Justice and Legal Affairs in Addis Ababa. The STC is composed of Ministers of Justice and/or Attorneys General, Ministers responsible for constitutional development and rule law as well as Ministers charged with Human Rights responsibilities in the AU member states. At this meeting, attended by legal representatives of 38 AU member states, two AU organs and one REC, the draft was adopted and submitted for consideration and adoption to the AU Assembly, through its Executive Council. Three independent legal experts, two of whom are co-editors of this book (Jalloh and Clarke), were invited by the third co-editor (Nmehielle – who was then legal counsel to the African Union Commission) in the week just before the STC opened to provide feedback on the draft instrument. The key limitation was that the draft instrument, having been approved at the ministerial level twice, was not subject to further substantive changes. Neither for that matter, in accordance with AU treaty making process, were the seven other legal instruments under consideration in the same meeting of the STC. Nonetheless, based on the assistance of the independent experts, the legal counsel was successful in advocating for the STC to adopt a number of significant last-minute amendments relating to, for example, definitions of crimes as well as the establishment of a full-fledged Defence Office to ensure principled equality of arms with the prosecution. Some of the delegations seemed uncomfortable with the mere presence of the legal experts. So it was even more remarkable that the consensus was not broken over the AUC counsel's proposed amendments. Together with the then new AU legal counsel, we could only wish that we had been involved at an earlier stage of the drafting process as that might have assisted in addressing some of the key issues with and gaps in the Malabo Protocol.

From that point on, the legislative process of the Malabo Protocol – from the commissioning of PALU in late 2009, to the Ministerial meetings held in October and November 2012 to agree on a draft protocol that would involve the addition of criminal jurisdiction to the African Court – followed a number of starts and stops. However, it was the ICC's indictment of Uhuru Kenyatta and William Ruto, two prominent politicians from Kenya, who

³⁷ du Plessis, *supra* note 2 at 4.

would eventually become the President and Deputy President of Kenya respectively, that reignited the debate on the 2012 draft African Court Protocol with renewed calls to establish the court. The process was also influenced by African government concerns about what they alleged to be the abuse and misuse of universal jurisdiction. In other words, though as seen earlier the origins of an African court with criminal jurisdiction can be traced back to the early 1980s and more recently to the recommendation of the experts on the best means for the trial of Habré, the push to create an African criminal jurisdiction can ultimately be explained by the drafters as a search for a mechanism over which African states would exert more control on dispensing justice in their continent. It was propelled by a sort of Pan-Africanist view that the AU should seek ‘African solutions for African problems’, which to date seems to be used more in symbolic and rhetorical rather than in substantive terms. The AU’s reported disillusionment with the efficacy of the global security architecture is said to inform this position, and the development of the AU’s peace and security framework is in part driven by the seeming preference to find appropriate, locally owned and expeditious responses to African security challenges through the formation of a consolidated court – *One Court* – with three jurisdictions.

3. THE STRUCTURE OF THE EMERGING COURT

The new ACJHR proposed by the Malabo Protocol has been designed to have both original and appellate jurisdiction, interestingly with only 15 serving judges³⁸ sitting in three separate chambers: a General Affairs Section, a Human and Peoples’ Rights Section and an International Criminal Law Section.³⁹ The General Affairs Section has been structured to hear all cases submitted under Article 28 of the Statute, except those ‘assigned to the Human and Peoples’ Rights Section and the International Criminal Law Section as specified in this Article.’⁴⁰ It was designed to exercise the jurisdiction to examine all cases and disputes of a legal nature, with the exception of those involving the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned, or those relating to international criminal law.⁴¹

³⁸ Ibid. at Arts. 3 and 10 amending Art. 21 in the original statute.

³⁹ Ibid. at Art. 16(1)

⁴⁰ Ibid. at Art. 17.

⁴¹ du Plessis, *supra* note 2 at 5.

The second section – that is the Human and Peoples’ Rights Section – ‘shall be competent to hear all cases relating to human and peoples’ rights.’⁴² Those cases are described very broadly in Article 28 as relating to ‘the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; or any other legal instrument relating to human rights, ratified by the States Parties concerned’.⁴³ The Human and Peoples’ Rights Section will have three judges.⁴⁴

The third section is the International Criminal Law Section. It is described as being ‘competent to hear all cases relating to the crimes specified in this Statute.’⁴⁵ The proposed new International Criminal Law Section will have personal jurisdiction over natural and quite significantly *legal persons* in respect of the following crimes: (1) Genocide, (2) Crimes Against Humanity, (3) War Crimes, (4) The Crime of Unconstitutional Change of Government, (5) Piracy, (6) Terrorism, (7) Mercenarism, (8) Corruption, (9) Money Laundering, (10) Trafficking in Persons, (11) Trafficking in Drugs, (12) Trafficking in Hazardous Wastes, (13) Illicit Exploitation of Natural Resources and (14) the Crime of Aggression.⁴⁶ Article 28 (N) of the Protocol defines basic modes of responsibility to include inciting, instigating, organizing, directing, facilitating, financing, counselling or participating as a principal, co-principal, agent or accomplice in any of the offences stipulated above.⁴⁷

Three Chambers will operate in the International Criminal Law (ICL) Section, effectively following the model of the ICC comprised of a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber that will have one, three and five judges, respectively. It is doubtful whether the reproduction of a three-tier chamber structure was a sound decision in light of the ICC’s experiences to date. We also wonder whether such few judges might prove to be sufficient for the mandate contemplated.⁴⁸ Article 8 of the amended statute (Article 18 of the original statute) addresses revision and appeals. Appeals are allowed only for the ICL Section, not the Human Rights or General Sections, giving prosecutors and defendants a right to appeal from a decision of the Pre-Trial Chamber or the Trial Chamber.⁴⁹ The grounds for appeal are typical

⁴² Ibid. at Art. 17.

⁴³ Ibid. at Art. 28.

⁴⁴ Ibid. at Art. 21.

⁴⁵ Ibid. at Art. 17.

⁴⁶ Ibid. at Art. 28A.

⁴⁷ Ibid. at Art. 28N.

⁴⁸ Ibid. at Arts. 16(2) and 10(3)-(5).

⁴⁹ Ibid. at Art. 18(2).

for such courts: a procedural error, an error of law and an error of fact.⁵⁰ An appeal may also be made against a decision on jurisdiction or admissibility of a case, an acquittal or a conviction.⁵¹ The Appellate Chamber may affirm, reverse or revise the decision appealed against. The decision of the Appellate Chamber shall be final.⁵² The right to appeal was provided to ensure compliance with current international human rights standards, in particular, the right to a second level review pursuant to Article 14 of the International Covenant on Civil and Political Rights which is widely deemed to be customary international law.

In a sense, each of the three sections of the court – the General Affairs Section, the Human Rights Section and the International Criminal Law Section – have separate histories that predates the process commenced by the Addis Ababa resolution requesting the African Commission on Human and Peoples Rights and the African Court on Human and Peoples Rights (ACHPR) to investigate the possibility of vesting the Court with an international criminal law jurisdiction.⁵³ Technically, the request related to the jurisdiction of the yet-to-be-established Court of Justice and Human Rights (the Merged Court), rather than the human rights court.

4. THE ‘ONE COURT’ CONCEPT: SOME KEY CRITICISMS IN THE LITERATURE

The adoption of the Malabo Protocol has provoked strong reactions. Those who are in favour of it stress the potential contributions it could make to the search for viable mechanisms to comprehensively address human rights and criminal law issues in Africa in a single legal forum. Those in this camp tend to emphasize the innovations contained within it and would typically assert that regionally driven means to prosecute serious international and other crimes could prove to be complementary with the ICC. Those in the opposite camp, on the other hand, perceive the Malabo Protocol as a rebel or protest court created by the AU to undermine the ICC. The latter argument is frequently made by reference to the components of the Malabo Protocol that contradict the ICC Statute such as the last-minute addition of a temporary immunity exception, which had been

⁵⁰ Ibid.

⁵¹ Ibid. at Art. 18(3).

⁵² Ibid. at Art. 18(4).

⁵³ AU Assembly, ‘Decision on the Implementation of the Assembly Decision on the Abuse of the Principle of Universal Jurisdiction’ Twelfth Ordinary Session 1–3 February 2009 Addis Ababa, Ethiopia Doc.’ Assembly/AU/3(XII), para 9

proposed by Kenya. This impression may be understandable, given the current and wider tension between the AU and the ICC concerning the alleged double bias and selectivity of ICC administered international criminal law.

However, as is so often the case with binary arguments, the truth is not a black or white issue as the two opposing poles of the arguments might suggest. It lies somewhere in the middle, and to stay with the colour analogy, may in fact reflect many shades of grey. We see an appreciation of the historical circumstances leading to the establishment of the proposed court as crucial in this regard and note that the recommendation to establish a court with multiple jurisdiction stems from circumstances arising from the effort to give some justice to the victims of the actions of former Chadian president Hissène Habré which predated the ICC-Africa saga. True, that proposal was made around 2006 and was not initially taken up although this did occur later. For our part, we do not outright reject the idea of the future court, even if we may have concerns about specific aspects of it. Part of the reason for that is we do not perceive the AU experiment to create its own regional court as incompatible with support for the ICC or the struggle for greater accountability in Africa or the sovereignty that African States enjoy under international law.

For one thing, at the level of principle and as emphasized by the Nuremberg Tribunal judgment, international law does not bar a group of states coming together to create a new court that would do what each of them are able to do singly. Second, there are several key innovations in the instrument that suggests that AU states wish to Africanize international criminal law to deal with certain concerns specific to their region, including an expanded list of crimes and corporate criminal liability. This is consistent with what has happened in the past in other areas of international law including human rights law, where African states have – like other regions – chosen to forge their own path. Third, while there are some problematic aspects of the Malabo Protocol such as the temporary immunity clause, regionalizing international criminal law opens up potentially new spaces for accountability bringing this field closer to the multi-level national, regional and international system familiar to the cognate field of international human rights law. This, provided it is done well, can thus be better seen as complementary mechanisms for the ICC which was in any case never intended – for both pragmatic and sovereignty reasons – to be the sole institutional response to atrocity crimes. The ICC system was, as is emphasized by the Rome Statute itself including in its preamble and substantive provisions, predicated on the notion that it is the duty of all states to exercise criminal jurisdiction over those most serious crimes of concern to the international community as a

whole and that it is imperative that they are more effectively prosecuted by taking measures at the national level – and we would add if need be at the regional level – and by enhancing international cooperation. This is what makes the ICC's criminal jurisdiction complementary, rather than supplanting, national criminal jurisdictions.

The existing literature on the African Court, while limited, cursorily addresses the key pillar constituting what we call the 'one court' concept. The fledgling literature focuses in particular on the desirability of such a court (though that matter appears to be settled by the decision of African States to adopt the protocol), its possible (in)compatibility with the ICC Statute or the repercussions of merging courts from civil, human rights and criminal law jurisdictions.⁵⁴ For example, as already noted, Article 16 of the Statute establishes a General Affairs Section, a Human and Peoples' Right Section and an International Criminal Law Section.⁵⁵ The first two sections embody the civil jurisdiction of the Court while the third embodies its criminal jurisdiction. However, Abass suggests that the combination of civil and criminal jurisdictions in a single court is not only almost unprecedented in international judicial practice, but is also fraught with a myriad of substantive and procedural problems that the Court, under the current proposal, will be unable to handle.⁵⁶ Scholtz similarly notes that the merging of the international criminal chamber with the human rights and general affairs divisions of the ACJHR is unprecedented in international law and fraught with challenges given the incompatible functions and mandates of the divisions.⁵⁷ While the general and human rights sections address issues of state responsibility and accountability in respect of inter-state disputes and human rights violations, the International Criminal Law Section deals with individual criminal responsibility.

The reality is that the newly proposed court is the first of its kind in the world at the regional level with the objective of addressing both human rights and ICL.⁵⁸ While this has some potential for innovation, a range of scholars,

⁵⁴ See Abass, *supra* note 2 at 935 and 943–44; D. Juma, 'Lost (or Found) in Transition? The Anatomy of the New African Court of Justice and Human Rights', *Max Planck Yearbook of United Nations Law* 13 (2009) 267 at 280–1; G. M. Musila, 'African Union and the Evolution of International Criminal Justice in Africa: challenges, controversies and opportunities', 5 *June* 2013, available online at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391140 at 18–20; Rau, *supra* note 2 at 681, 685, 689–689; W. Scholtz, 'The proposed International Criminal Chamber section of the African Court of Justice and Human Rights: A legal analysis', *South African Yearbook of International Law* 37 (2012) 248 at 261–2; Viljoen, *supra* note 2 at 4–5.

⁵⁵ Malabo Protocol, *supra* note 1 at Art. 16.

⁵⁶ Abass, *supra* note 2 at 935.

⁵⁷ Scholtz, note 54 at 261.

⁵⁸ The first reference is available at footnote 99, Addis, *infra* note 99.

such as Viljoen and Scholtz, have cautioned that there is good reason why such distinct functions have never before been merged into a single judicial entity or organ at the international level.⁵⁹ They note that there are major differences between courts dealing with *state responsibility* and those dealing with *individual criminal responsibility*, including that very different evidentiary standards apply.⁶⁰ While state responsibility is determined with reference to the standard of a balance of probabilities, the standard in an international criminal tribunal is that of 'beyond reasonable doubt'.⁶¹ According to Viljoen, while cases of state responsibility or accountability for human rights violations are generalised and would not necessitate a level of seriousness, the prosecution of crimes would almost inevitably be *ad hoc* and be reserved for the most serious cases where a very high threshold of seriousness had been reached.⁶² Noting that the amended protocol has already resulted in the reduction of the number of judges with a particular human rights competence,⁶³ he argues that another potential negative consequence of the introduction of a tri-sectional judicial institution is the likelihood of the reduction in the focus on human rights.⁶⁴

In the current human rights court based in Arusha, there are 11 judges, while the amended protocol calls for only five judges with three judges to form a quorum in the Human and Peoples' Rights Section.⁶⁵ Here we see an argument claiming that it is inevitable that the limited resources available to the AU would be spent on the more prominent issue of criminal justice, especially given that the cost of one criminal prosecution may far exceed the cost of the budget of the entire African Human Rights Court.⁶⁶ The merging of the three discrepant sections could have the effect of inevitably reallocating resources disproportionately towards criminal justice cases rather than on cases dealing with human rights.⁶⁷ We are not certain of the basis of this assumption, though we do not discount the possibility since one of the rationales for creating a single court is to ensure better use of limited resources. It, would, however, be quite unimaginable that the AU would deliberately starve any of the components of the Court of funds, particularly because the appropriation of funds for the Court

⁵⁹ Scholtz, *supra* note 54 at 261; Viljoen, *supra* note 2 at 4.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Viljoen, *supra* note 2 at 4.

⁶³ *Ibid.*

⁶⁴ *Ibid.* at 5.

⁶⁵ Malabo Protocol, *supra* note 1 at Art. 21.

⁶⁶ Viljoen, *supra* note 2 at 5.

⁶⁷ *Ibid.*

would be done based on a holistic budget presented for all the three sections. We note nonetheless that there still remains the possibility that the entire institution, rather than just one part of it, could be underfunded.

On an operational level, it has also been suggested that decisions of the Human and Peoples' Rights Section may be overturned on appeal by an Appellate Chamber not well versed in human rights matters.⁶⁸ The author observes that the Malabo Protocol stipulates that the 'Appellate Chamber may affirm, reverse or revise the decision appealed against', without restricting these decisions to either 'general', 'human rights' or 'criminal law' matters. The only 'Appeal Chamber' mentioned in the Protocol is the 'Appellate Chamber of the International Criminal Law Section.' This, it is suggested, creates the impression that this chamber – consisting of judges elected with expertise on international criminal law – would also hear appeals about human rights matters.⁶⁹ In opposition to this potential, Viljoen calls for the composition and role of the Appellate Chamber to be clarified. In providing such clarification, he insists that, as set out in Article 7 in the current version of the Statute, the Human Rights Section alone should be competent to hear cases related to human and peoples' rights.⁷⁰

However, it is hard to understand the basis of this criticism. The language of the relevant provisions in the Malabo Protocol seems to not be as ambiguous as has been suggested. In the first place, the ordinary language of the jurisdictional clause indicates that the appeals are contemplated only for the criminal law section. It should also not be assumed that judges in the appeals chamber would be less able to decide on human rights issues since their selection would presumably be attentive to the substantive expertise across the board in terms of all the courts' jurisdictions. The need for expertise in all areas within the jurisdiction is emphasized by the substantive requirements attached to the qualifications to hold judicial office in the tribunal. The Malabo Protocol, at Article 6, therefore contemplates candidates being nominated based on competence in matters of general international law (List A); international human rights and humanitarian law (List B) and competence in international criminal law (List C). This plainly requires that they have the expertise in all the areas. And, assuming that the states parties take them seriously when nominating candidates for the court, it would be difficult to see how the judges would not reflect the expertise since it is on the basis of the nominations that the candidates would be elected. From the point of view of the court, as a

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*; See also Malabo Protocol *supra* note 1 at Art. 18.

⁷⁰ *Ibid.*

matter of judicial consistency, their decisions would have to enjoy a measure of coherence across all three jurisdictions at least in relation to the same issues. After all, as Article 19(2) of the Malabo Protocol confirms, a Judgment by one of the chambers of the tribunal is considered as a ruling of the Court.

Some, including African States, have recommended that a provision giving states the option to accept the jurisdiction of only the Human Rights and General Affairs Sections should be included in the statute.⁷¹ One author argued that the jurisdiction of the International Criminal Law Section should be optional rather than a necessary consequence of ratification, that such a possibility would address the concern that an all-or-nothing approach could deter some states from ratifying the Amending Merged Court Protocol.⁷² Nevertheless, while it could have the effect of attracting more member states, this book argues that such an approach to the jurisdiction of the merged court – including chambers for treaty law, state-level international human rights violations and individual-level criminal international human rights violations – would radically restructure the one court concept. That vision of a single court underpins judicial human rights accountability efforts in light of the bifurcated structure of current courts, potentially complicating an already controversial African justice efforts.⁷³

A range of commentators agree that the ACJHR jurisdiction would help to overturn the longstanding bifurcation of state and individual accountability for human rights abuses, a structural separation of state and individual mechanisms that are a key element of accountability efforts for human rights abuses.⁷⁴ For example, Rau suggests that the conceptual advantages of institutional unification of state and individual-level proceedings. She notes that there is significant conceptual overlap between the regimes, and that while no court currently considers claims of human rights violations against both states and individuals, this dual-prong system is indispensable to comprehensively address grave human rights violations.⁷⁵ She notes the potentially irreconcilable goals of the two mechanisms, noting that state-level accountability is rooted in the doctrine of international legal order, while individual-level accountability stems from a tradition of imposing legal obligations upon persons. State-level accountability efforts can fill the gaps that assignment of individual blame may leave in the processes of truth-telling and accountability and thus may serve to further reconciliation and peace, the ultimate goals of

⁷¹ *Ibid.* Note that this recommendation was made while the statute was still in draft form.

⁷² *Ibid.* at 7.

⁷³ Rau, *supra* note 2 at 681.

⁷⁴ *Ibid.* at 685.

⁷⁵ *Ibid.*

transitional justice.⁷⁶ Conversely, individual accountability personalizes the prosecution, conviction and sentences for human rights violations, lifting the ‘corporate veil’ of state responsibility.

The two approaches are difficult to reconcile, and may lead to diverging solutions when applied to practical problems that arise from the relationship between state and individual responsibility.⁷⁷ Ultimately, Rau concludes that while the current bifurcated system of accountability for human rights abuses undoubtedly reflects various flaws, the proposed ACJHR expansion is a remedy ill-suited to the problem.⁷⁸ She notes that the institutional separation between state-level and individual-level proceedings remain important, in part, because the fundamental goals of state and individual accountability will not always be complementary; indeed, at times, they may work at cross-purposes.⁷⁹ By merely patching together state and individual accountability into a single institution, the ACJHR’s proposed expansion would produce a jurisprudential hodgepodge, rather than streamlined justice.⁸⁰ For while individual- and state-level systems undoubtedly and necessarily interrelate, and while the current structure fails to recognize this interaction adequately, she suggests that the goal should be to coordinate them rather than to merge them into a single institution.⁸¹

In spite of this interesting conclusion, our conceptual approach to the ACJHR is an important one, especially as it relates to considerations about how the African Court is expected to function in relation to the AU system. It suggests that the ‘one court’ structure may allow for a more nuanced and fulsome approach to African justice issues, and one that situates the Court within a multi-layered system of African regional mechanisms that are working together to address political, legal, social and cultural issues. For though it is true that a court is insufficient to address the legal, social and political complexities produced by human rights violations, the reality is that the African Court cannot be seen solely in relation to its judicial capacities. In this way, then, it is possible to conceptualize the African Court as one aspect of a wider institutional framework working towards enhancing human rights, accountability, democracy and access to justice on the continent as a whole. With this in mind, it seems possible then to situate mechanisms such as the African Court and the AU’s African Governance Architecture (AGA) within

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid. at 688.

⁷⁹ Ibid.

⁸⁰ Ibid. at 689.

⁸¹ Ibid.

the framework of ‘African solutions to African problems’, and to see these structures as integral to a fairly unique continent-wide African transitional justice approach.

5. THE ‘ONE COURT’ AS A TRANSITIONAL JUSTICE MECHANISM

One way to conceptualize the institutional vision for the future court is through an appreciation of its inter-relationship with other AU, African state and civil society mechanisms. For example, on the institutional level, the African Governance Architecture (AGA) of the AU, is an institutional framework designed to strengthen coordination and collaboration amongst existing institutions at the regional, sub-regional and national levels.⁸² The rationale for the AGA was that while there are several governance instruments, frameworks and institutions at the regional, sub-regional and national levels, there is little or no effective synergy, coordination and harmonization amongst them. These institutions work mostly in silos and do not benefit adequately from each other at the level of sharing information and coordinating their activities for effective performance.⁸³ As such, it is anticipated that the architecture will provide the process and mechanisms to enhance policy dialogue, convergence, coherence and harmonization amongst AU organs, institutions and Member States as a way of speeding up the integration process on the continent.⁸⁴

The AGA is an evolving mechanism composed of three principal pillars: a vision/agenda; organs and institutions; and mechanism/processes of interactions amongst AU organs/ institutions with a formal mandate in governance, democracy and human rights.⁸⁵ The African Court on Human and Peoples’ Rights is one of the institutions critical to pillar two, which will give operational and accountability expression to the African Governance vision.⁸⁶ Similarly, the ACJHR can be viewed as a key institution charged with promoting democracy, governance and human rights in Africa at a regional and continental level with attention to transitional justice mechanisms at its core.

According to Godfrey Musila: ‘the idea of transitional justice’ in Africa, relates to a variety of mechanisms deployed by societies emerging from

⁸² African Union, The African Governance Architecture (AGA) and Platform, available online at: <http://aga-platform.org/>; ‘The African Governance Architecture’, Europafrica.net, March 2011, available online at: <https://europafrica.net/2011/03/10/the-african-governance-architecture/>.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

conflict to address certain key concerns of impunity, undemocratic rule, and gross human rights violations, which appears to have taken root on the continent.⁸⁷ He notes that, in parallel to this, the role and presence of the AU in these situations has expanded as the continental body re-invents itself.⁸⁸ Despite its increasing role in the areas of peacemaking, peacekeeping, peacebuilding and the work of the ICC, Musila observes that the AU has not had a policy or structured way of engaging in the context of transitional justice.⁸⁹ He argues that an *ad hoc* approach to different situations perhaps undermined any lasting impact the AU could have had. He also explains that as a contribution to the ongoing efforts by the AU to fight impunity and promote a holistic approach that balances the imperatives of peace and justice in post-conflict contexts, the AU Panel of the Wise (AUPOW)⁹⁰ adopted a report recommending the development of a policy framework on transitional justice.⁹¹

What we can see is that key parts of the draft transitional justice policy framework involve the following: the consolidation of peace, reconciliation, justice in Africa and the prevention of impunity. Likewise the Malabo Protocol has been designed to contribute to ending repressive rule and conflicts and nurturing sustainable peace with development, social justice, human and peoples' rights, democratic rule and good governance; drawing lessons from various experiences across Africa in articulating a set of common concepts and principles to constitute a reference point for developing and strengthening peace agreements and transitional justice institutions and initiatives in Africa; and developing AU benchmarks for assessing compliance with the need to combat impunity.⁹²

By drawing on past and ongoing transitional justice experiences in a number of African countries, the AUPOW have distilled several transitional justice principles of relevance to the African context.⁹³ These include: the urgency to pursue peace through inclusive negotiations, rather than force/military struggles; the suspension of hostilities and protection of civilians to provide enabling conditions for participation in dialogue and the search for

⁸⁷ Musila, *supra* note 54 at 18–20.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ See www.peaceau.org/en/page/29-panel-of-the-wise-pow.

⁹¹ African Union, Panel of the Wise, Peace, Justice, and Reconciliation in Africa: Opportunities and Challenges in the Fight Against Impunity, February 2013, available online at: http://reliefweb.int/sites/reliefweb.int/files/resources/ipi_e_pub_peacejusticeafrica.pdf; Musila *supra* note 54 at 18–20.

⁹² *Ibid.*

⁹³ Musila *supra* note 54 at 18–20. Also See Kamari Clarke, chapter? in this volume.

meaningful peace and justice; and, importantly from the perspective of the ACJHR, a broader understanding of justice to encompass processes of achieving healing, equality, reconciliation, obtaining compensation and restitution and establishing the rule of law.⁹⁴ With this in mind, the framework is rightly held out as a potential consolidation of Africa's contribution to the emerging field of transitional justice and international law by broadening understanding and approaches to impunity and justice.⁹⁵ By defining transitional justice in such a context sensitive way to include a range of processes and mechanisms associated with mitigating conflict, ensuring accountability and promoting justice, the framework proposes a definition that goes beyond current mainstream understandings of transitional justice.⁹⁶

With this understanding of the workings of the future tribunal as embedded in what Donald Deya has termed *African ecosystems*, or what Kamari Clarke has called elsewhere *African Ecologies of Justice*, one can begin to easily situate the proposed expanded Court within a comprehensive transitional justice process aimed at dealing with past conflicts and securing sustainable justice going forward. This volume expands on this theme through a 'One Court' model of an African court with three jurisdictions and presents another option for African states whose domestic judiciaries may not be capable of hearing the most serious cases that the African Court can competently address.⁹⁷

But there are also other benefits to having a regional court take on cases of concern to the region. For the court's proximity to those affected by violence could also increase its legitimacy and credibility with Africans, thereby increasing the likelihood of norm promotion due to the proximity to the communities impacted by the human rights violations.⁹⁸ Ultimately, the African Court as a product of new regional formations could be seen as revolutionary not only because of the significance of its regional character, but also because it could consolidate a range of administrative and procedural issues that are well outside the capacities of the typical African state. The flip side of that remains the possibility that the regional mechanism will stunt national level developments to strengthen domestic capacity to prosecute atrocity crimes. Nonetheless, in the realm of the criminal law section, a number of scholars have noted that the creation of the African Court provides

⁹⁴ Ibid.

⁹⁵ Musila, *supra* note 54 at 18–20.

⁹⁶ Ibid.

⁹⁷ Ibid. at 55.

⁹⁸ Ibid. at 63 and 64.

an opportunity for the development of international criminal law.⁹⁹ The proliferation of regional criminal justice systems reflect opportunities for the development of ICL. It is suggested that the new court in Africa will have a relative advantage in the implementation of international criminal justice approaches that reflect the cultural norms and political economic realities and histories that constitute an African conception of justice.

6. SOME INNOVATIVE ASPECTS OF THE PROPOSED REGIONAL COURT

The regional court could be better equipped to take into account variations in procedural traditions and address charges of a foreign institution imposing its will;¹⁰⁰ and a regional criminal court could theoretically help to fill an impunity gap by prosecuting situations that the ICC does not or cannot because of its limited jurisdiction and resources pursue.¹⁰¹ When it comes to the crimes, for instance, Charles Jalloh has suggested that the Malabo Protocol reflects a Rome Statute or ICC Plus approach in at least two ways. First, the ICC crimes were taken as a starting point for defining the crimes, but not necessarily as the end point. This is reflected in Article 28A of the Malabo Protocol which defines the crimes. For example, in adopting the same definition of genocide as that contained in the ICC Statute, Article 28B of the Malabo Protocol ensures compatibility with Article 6 of the Rome Statute and the definition of the same crime contained in the 1948 Genocide Convention. Nonetheless, to reflect developments that occurred in the African continent since the ICC Statute was negotiated, the Malabo Protocol added a new paragraph f to Article 28B (which defines genocide) to account for developments in the Akayesu Case in which rape was judicially determined to constitute genocide if it occurs in such a context against a protected group. This was then further expanded by the Malabo Protocol definition to capture acts of rape or ‘any other form of sexual violence’, thereby addressing a traditional gender blind spot in international criminal law.

⁹⁹ See T. D. Addis, ‘Some reflections on the current Africa’s project on the establishment of African Court of Justice and Human Rights (ACJHR)’, *AfricLaw*, 29 June 2015, available online at: <https://africlaw.com/2015/06/29/some-reflections-on-the-current-africas-project-on-the-establishment-of-african-court-of-justice-and-human-right-acjhr/>; Nmechielle, *supra* note 2 at 29; Rau, *supra* note 2 at 678–9, 681–2 and 685; Sirleaf, *supra* note 2 at 23–5, 29, 55–9, 66 and 68–9.

¹⁰⁰ *Ibid.* at 64.

¹⁰¹ *Ibid.* at 67.

A second manifestation of this Rome Statute or ICC Plus approach can be seen in the addition of serious crimes of particular concern to Africa as prosecutable offences in the regional court. One of the best examples of this is the crime of unconstitutional change of government (Article 28E). Here, the addition of new crimes that are not prosecutable in the ICC because they are not within its jurisdiction can be seen as further justification for the Malabo Protocol. In this regard, Jalloh has gone further and suggested that, so long as a regional court does not pursue a Rome Statute or ICC Minus approach, meaning a reduction of the standards contained therein, the development of additional crimes or better definitions of existing ones could be seen as an addition to the corpus of international criminal law. This helps, to the extent that the problem of fragmentation of the development of such crimes or inconsistency in their application can be avoided.

Put slightly differently, in his argument, the Rome Statute is better understood as having established a floor rather than a ceiling for accountability. Any credible system that adds to the accountability effort which potential the Malabo Protocol holds should in that conception be welcomed as a way to extend the reach of international criminal law. Relatedly, regional systems can benefit from states with greater socio-economic, environmental and security interdependence, because it encourages greater compliance with the decisions of regional bodies, and regional mechanisms like the criminal tribunal can help to serve as intermediaries between the state's domestic institutions and the global system.¹⁰²

In the General Affairs Section, the Court enjoys inherent competence over all cases and all legal disputes submitted to it relating to an incredibly broad range of issues. This includes the interpretation and application of the AU's Constitutive Act; the interpretation, application or validity of other AU treaties and all subsidiary legal instruments adopted within the framework of both the AU and its predecessor the OAU. Jurisdiction also exists with respect to acts, decisions, regulations and directives of the AU organs; all matters specifically provided for in any other agreements that States Parties may conclude among themselves or with the AU and which confers jurisdiction on the tribunal. As if that is not sufficiently broad, the general jurisdiction can also address any question of international law. Moreover, the Court will also have appellate jurisdiction and can thus hear any matters or appeals that may be referred to it, and agreements that AU member states

¹⁰² *Ibid.*

or RECs or other international organizations recognized by the AU may conclude among themselves or with the AU.

This extraordinary competence for a regional court is matched by a directive allowing the judges to invoke both regional (African/AU) law to resolve disputes as well as to rely on the traditional sources of general international law. In the result, it seems clear enough that to the extent that African States invoke these provisions to settle matters against other African States in the regional court, much judicial work can be generated for the future court to settle disputes on a wide variety of issues. It is an open question whether African States would choose to settle disputes against other African States in an African Court rather than prefer the International Court of Justice. Surely, on the regional issues that can only be settled in the African Court, there could be the draw of using the available forum. Cost of litigation might also be lesser if kept within the region. But when it comes to international legal questions ('any question of international law'), it may well prove to be more attractive to African States to pursue a case in an established and globally known court in The Hague rather than in a fledgling and untested court in Arusha.

With respect to the Human Rights Section and jurisdiction, there are two broad types of jurisdiction which match the experience of other regional human courts in the sense of an inter-state dispute settlement system meant for use by the States to hold each other accountable and a system for individual complaints against their home states (which have entered the special declaration to enable that). Article 3 of the Protocol to the African Court on Human and Peoples' Rights provides for the jurisdiction of the Court in relation to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the Protocol and any other relevant Human Rights instrument ratified by the States concerned. This is a truly wide jurisdiction that enables the judges to examine holistically the human rights violations of a given African state, without limiting it to particular instruments. In other words, if for instance a party to the African Human Rights Charter and also the International Covenant on Civil and Political Rights, the ruling can address the allegation of violations under all two instruments. In the subsequent iteration of this competence, the tribunal will also have specific competence in relation to the interpretation and the application of the Charter on Human and Peoples Rights on the Rights of Women in Africa. A second type of jurisdiction is more advisory in nature and offers the possibility for a member state of the AU, any of its organs, or any African organization recognized by the AU, to request that the Court provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments. This has occurred, as of this writing, in relation to

only one State (Mali) but apparently not any organ. The only rider for any such empowered entities is that the subject matter of the opinion should not be related to a matter being examined by the Commission.

In terms of innovativeness, it is apparent that the future court will also have broad jurisdiction over human rights issues specifically alongside international law issues more generally. However, given that many states do not initiate disputes against other states concerning human rights matters (which has been the experience of not just the African system but also that of the Inter-American human rights system and the European human system – albeit to a lesser extent), the reality may be that we might not expect a large docket from the court arising from complaints about violations of human rights by African state A versus African state B. In relation to individual complaints, because of the hurdle of the special declaration required with only 7 African States having so far entered them (i.e., many cases have not yet been addressed by the tribunal – at least in so far as the merits are concerned). Indeed, in a sort of signal of what is to come, the very first case to have reached the current human rights courts in Arusha involved Senegal; the case was dismissed for lack of jurisdiction since that West African state had not yet entered the special declaration accepting jurisdiction in relation to individual complaints of human rights violations.

Returning to the criminal law section, reconstituting international criminal justice as a regional idea will add significance to international criminal law.¹⁰³ For example, the African court will be one of the first courts to include corporate criminal liability in its statute.

A. Corporate Criminal Responsibility

One of the most ground-breaking aspects of the Malabo Protocol is the inclusion of corporate criminal liability under Article 46C.¹⁰⁴ The inclusion

¹⁰³ *Ibid.* at 66.

¹⁰⁴ See Scholtz, *supra* note 54 at 258; Sirleaf, *supra* note 2 at 33–8 and 58; Tiba, *supra* note 2 at 544; Malabo Protocol, *supra* note 1 at Art. 46C. Article 46 C reads:

1. For the purpose of this Statute, the Court shall have jurisdiction over legal persons, with the exception of States.
2. Corporate intention to commit an offence may be established by proof that it was the policy of the corporation to do the act which constituted the offence.
3. A policy may be attributed to a corporation where it provides the most reasonable explanation of the conduct of that corporation.
4. Corporate knowledge of the commission of an offence may be established by proof that the actual or constructive knowledge of the relevant information was possessed within the corporation.

of corporate criminal responsibility is significant in that corporate entities have fuelled many of the conflicts that have plagued African states,¹⁰⁵ but they have not been accounted for in the predominant ICL trends that have popularized the individualization of criminal responsibility as the key domain of liability. However, what we see in Africa is that many of the conflicts are over natural resources such as oil, diamond, gold, etc., for which several multinational and national corporations compete. Some of these entities would do anything to obtain concessions over those resources, even if it means fuelling wars.¹⁰⁶ Extending criminal responsibility for core international and other crimes to corporate entities could thus be seen as part of Africa's way of putting an end to 'business as usual', whereby corporate players that aid and abet, or that are complicit in gross violations of human rights and the commission of, egregious crimes are made accountable.¹⁰⁷

The attention to corporations for possible international criminal law violations originated in the Nuremberg trials when the Allied Control Council passed laws aimed at punishing the corporations that were complicit with the Nazi regime.¹⁰⁸ One of our authors, Joanna Kyriakakis, argues that the regional criminal tribunal's provision for corporate criminal liability puts pressure on the prevailing legal landscape both within and outside of Africa, and that this regional innovation might help to clarify the status of corporate criminal liability in international criminal law.¹⁰⁹ She posits that the developments could include such things as: greater coordination on the regulation of corporate activity; a greater accountability for corporations than the one that is currently possible at the domestic or international level; and the enablement of international criminal trials to establish an accurate historical record of conflicts.¹¹⁰

The idea of corporate criminal responsibility for international crimes was considered during the negotiation of the ICC Statute. France made a proposal to include such form of responsibility over 'juridical persons' defined as

5. Knowledge may be possessed within a corporation even though the relevant information is divided between corporate personnel.
6. The criminal responsibility of legal persons shall not exclude the criminal responsibility of natural persons who are perpetrators or accomplices in the same crimes.

¹⁰⁵ Nmehielle, *supra* note 2 at 30.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at 34.

¹⁰⁹ *Ibid.* at 35.

¹¹⁰ *Ibid.* at 35 and 58.

‘a corporation whose concrete, real or dominant objective is seeking private profit or benefit’ within the then future ICC, but there was insufficient support to see it through due to a deep divergence of views concerning the desirability of ascribing such responsibility to legal persons and the lack of sufficient time to reach agreement on the substantive question. Many national legal systems do not recognize such forms of liability. The proposal highlighted the possible advantages of imposing such responsibility. This included the possibility of securing compensation for victims of atrocity crimes, where criminals did not have the financial means, but the corporation that they were associated with did. Second, condemning the corporations involved in such crimes would ensure opprobrium against them. Third, it was felt that the possibility of a conviction could lead to more responsible decisions on the part of corporate leaders who may otherwise aid and abet or be complicit in the commission of such crimes. In addition to the reality that there is corporate penal responsibility contemplated in various international and regional treaties, the mere fact of the proposal in relation to the ICC, however, indicates that at least some states see an important link between the commission of such crimes and the responsibility of powerful corporate actors in our age of human rights. In fact, in its early years, the International Law Commission considered but rejected a proposal to extend criminal responsibility to legal persons. In the context of a more recent project concerning a draft convention on crimes against humanity, the ILC has proposed that, subject to the requirements of national criminal law, each State must take measures – where appropriate – to establish the liability of legal persons for crimes against humanity. This could be civil, criminal or administrative sanction.

Accordingly, the inclusion of Article 46C should not be that surprising given the increasing global convergence towards corporate criminal liability in domestic systems.¹¹¹ This convergence is also evident in the Council of Europe and the European Union member states both of which have adopted several regional treaties providing for corporate criminal responsibility for various transnational crimes such as corruption (which is also within the jurisdiction of the ACJHPR). She notes that before the 1990s, many states within the civil law tradition opposed the concept of corporate criminal culpability. But as of 2013, only Greece, Germany and Latvia remain without some kind of corporate criminal liability in Europe.¹¹² However, some key challenges in operationalizing Article 46C relate to complementarity with

¹¹¹ See Chapter 27.

¹¹² *Ibid.* at 7.

domestic systems¹¹³ and enforcement challenges,¹¹⁴ including that corporations implicated in the offences may be transnational and as such are incorporated in one jurisdiction, but act through related entities in another as well as the fact that corporations cannot be extradited to appear before the court. That said, it seems apparent that the leadership of a corporate body could be held liable for the conduct of a corporation that is attributable to it.

B. *Immunity Provision: Article 46Abis*

One of the most controversial and widely discussed issues in the Malabo Protocol relates to immunity for heads of state.¹¹⁵ Even before the immunity provision was added to the draft protocol, this issue was a hotly debated one. The debates only escalated when the subsequent draft protocol was released and included an explicit immunity provision under Article 46 *ABis*. The provision reads as follows:

No charges shall be commenced or continued before the Court against any serving African Union Head of State of 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.¹¹⁶

Some call the inclusion of immunity through article 46*Abis* an overreaching exercise that sends a firm message that African leaders reject trials of sitting heads of state so long as they are African.¹¹⁷ They also note that the provision is at odds with the AU's own Constitutive Act, as well as the various official justifications by the AU relating to the expansion of the African Court, which states that impunity for international crimes is intolerable and that the perpetrators of such crimes must be held accountable.¹¹⁸ Furthermore, they find the provision difficult to square with the rest of the ACJHPR Protocol, and in particular, a number of the new crimes established thereunder which either by definition or by inference are committed, or most likely to be committed,

¹¹³ See *Ibid.* at 26–8.

¹¹⁴ See *Ibid.* at 28–31.

¹¹⁵ See Abass, *supra* note 2 at 41–2; Abraham, *supra* note 2 at 13; Du Plessis, *supra* note 2 at 9; Du Plessis and Fritz, note 237, *infra* note 237; Du Plessis, *supra* note 237, *infra* 237 at 8; Murungu, *supra* note 219 at 1082 and 1086; Nmehielle, *supra* note 2 at 32–5; Sirleaf, *supra* note 2 at 3–4 and 47–51; D. Tladi, 'The Immunity Provision in the AU Amendment Protocol', *Journal of International Criminal Justice* 13 (2015) 3–17, at 5; Van Schaak, *supra* note 259; Ventura and Bleeker, *supra* note 253 at 4.

¹¹⁶ Malabo Protocol, *supra* note 1 at Art. 46 *ABis*.

¹¹⁷ Du Plessis and Fritz, *supra* note 237, *infra* note 237.

¹¹⁸ *Ibid.*

by incumbent heads of state and senior officials (e.g. unconstitutional changes of government, corruption, aggression).¹¹⁹

Indeed, there are several technical, normative and doctrinal issues that have been raised regarding the immunity provision.¹²⁰ For example, the exact scope of the provision has been one of the many issues under debate since the amended protocol was released in June 2014. Without precise definitions for terms such as ‘African Union Head of State or Government’, ‘anybody acting or entitled to act in such capacity’ and ‘senior state officials’, some African States and many scholars have raised concerns that it remains unclear who exactly benefits from such immunity.¹²¹ According to Du Plessis, the phrase ‘African Union Head of State or Government’ presumably refers to people occupying such an office in a state which is party to the AU Constitutive Act; however, the circumstances in which someone might be ‘acting or entitled to act’ in the capacity of a head of state remain unclear.¹²² The term ‘senior officials’ is not defined, with the former suggesting that the records of the deliberations on the Protocol indicate that it has been left to the new court to determine the reach of the term.¹²³ The broad interpretation could result in the inclusion of all ministers and even all members of parliament in some states, while a narrow one could confine the definition to a deputy head of state or government.¹²⁴ There is also a lack of clarity on what exact ‘functions’ are likely to result in the granting of immunity.¹²⁵

The second ambiguity with regard to scope raised by Tladi (this volume) is whether Article 46*Abis* aims to provide both immunity *rationae personae* and immunity *rationae materiae*, or only one.¹²⁶ An ordinary meaning of Article 46*Abis* supports two separate categories, with the first category, immunity *ratione personae*, applicable to ‘Heads of State or Government’ and ‘anybody acting or entitled to act in such capacity’.¹²⁷ The second category, approximating immunity *ratione materiae*, would apply to ‘other senior officials based on

¹¹⁹ Ibid.

¹²⁰ See also Du Plessis and Fritz, *supra* note 237, *infra* note 237 and Sirleaf, *supra* note 2.

¹²¹ Du Plessis and Fritz, *supra* note 237, *infra* note 237; Du Plessis, *supra* note 237, *infra* note 237 at 8; Sirleaf, *supra* note 2 at 47–51; Tladi, *supra* note 115, 139 and 141 at 5; Van Schaak, *supra* note 259.

¹²² Du Plessis and Fritz, *supra* note 249; Du Plessis, *supra* note 249 at 8.

¹²³ Du Plessis and Fritz, *supra* note 237, *infra* note 237; du Plessis, *supra* note 249 at 8; Van Schaak, *supra* note 259.

¹²⁴ Tladi, either 115,139 or 140.

¹²⁵ Ibid.

¹²⁶ Tladi, either 115,139 or 140.

¹²⁷ Ibid.

their functions'.¹²⁸ He notes that the phrase 'based on their functions' appears only to qualify 'other senior officials' and not 'Heads of State or Government, or anybody acting or entitled to act in such capacity'.¹²⁹ Assuming the 'two types of immunity' interpretation is correct, Tladi notes that this would mean that immunity *ratione personae* under the Statute of the African Court would not be extended to Ministers for Foreign Affairs, contrary to the finding the International Court of Justice (ICJ) decision in the *Arrest Warrant* case.¹³⁰

As an initial matter, it is important to observe that the immunities recognized in Article 46A bis are a form of immunity *ratione personae*, meaning that the immunity attaches to the office and is possessed by the officeholder only so long as he or she remains in office.¹³¹ This form of immunity dates back hundreds of years and was developed to ensure that certain high-ranking officials, including but not limited to heads of state, can discharge their functions unhindered by potentially politically motivated charges.¹³²

Immunity *ratione personae* (also known as personal immunity) has traditionally been applied to those State agents with high-level responsibility for foreign affairs in order to ensure that these individuals can travel freely without harassment by other States, thereby promoting effective communications between States.¹³³ Because *any* arrest or detention would distract these officials from their duties, and, by extension, would have negative implications for the foreign policy, economy, and citizens of the State they represent, they are absolutely immune from prosecution by a foreign state, regardless of when the

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ Ibid.; Tladi, either 115, 139 or 140. See also *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), International Court of Justice, 14 February 2002, General List No. 121, para. 54.

¹³¹ See Dapo Akande, International Law Immunities and the International Criminal Court, *The American Journal of International Law* 407, 409 (2004); du Plessis, Shambolic, shameful and symbolic, supra note 132, infra note 132, at 7.

¹³² Akande, supra note 131, at 410; International Law Commission, Report of the International Law Commission, 65th Session, Doc. A/68/10, page 58 (2013), <http://legal.un.org/docs/?symbol=A/68/10>; Max du Plessis, Institute for Security Studies, Shambolic, shameful and symbolic: Implications of the African Union's immunity for African Leaders 5 (November 2014), <https://issafrica.s3.amazonaws.com/site/uploads/Paper278.pdf>.

¹³³ See Akande, International Law Immunities and the International Criminal Court, supra note 131, at 410; International Law Commission, Report of the International Law Commission, 65th Session, supra note 132, at page 60; Mark Kielsgard and Ken Gee-kin, Prioritizing Jurisdiction in the Competing Regimes of the International Criminal Court and the African Court of Justice and Human Rights: A Way Forward, 38 *Boston University International Law Journal* 285, 301 (2017).

crime was committed or whether it constituted an international crime.¹³⁴ However, because immunity *ratione personae* is designed to ensure that high-level officials can carry out their functions, its protections are temporary and end when the individual leaves office.¹³⁵

Immunity *ratione personae* is different from immunity *ratione materiae* (also known as functional immunity), which attaches to official acts and prevents the prosecution of a government official for those acts, regardless of whether the individual continues to serve in office.¹³⁶ This form of immunity recognizes that official acts are essentially acts of the State, rather than acts of the government official, and that a third State should not sit in judgment on those official acts through proceedings against the official who implemented the acts.¹³⁷ Nonetheless, it seems to be increasingly acknowledged that immunity *ratione materiae* does not protect officials from prosecution for international crimes.¹³⁸

There has been some debate as to whether Article 46A bis includes immunity *ratione materiae*, in addition to immunity *ratione personae*, because the provision extends immunity to ‘senior state officials *based on their functions*.’¹³⁹ Although it is true that the question of function is typically relevant

¹³⁴ See Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ¶¶ 10, 13, 71 (14 February 2002) (holding that official was immune from criminal process even though accused of international crimes); see also Akande, International Law Immunities and the International Criminal Court, *supra* note 131, at 410–11; Max du Plessis, Institute for Security Studies, Shambolic, shameful and symbolic: Implications of the African Union’s immunity for African Leaders 6 (November 2014), <https://issafrica.s3.amazonaws.com/site/uploads/Paper278.pdf>.

¹³⁵ du Plessis, Shambolic, shameful and symbolic, *supra* note 134, at 6; Asad G. Kiyani, Al-Bashir & the ICC, ‘The Problem of Head of State Immunity’, *Chinese Journal of International Law* 12 (2013) 467, 473.

¹³⁶ For a discussion of the two types of immunities, see Akande, International Law Immunities and the International Criminal Court, *supra* note 131, at 409–15; see also Antonio Cassese, When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case, *European Journal of International Law* (2002) 853, 862–64, <http://ilmc.univie.ac.at/uploads/media/Cassese.pdf>; United Nations, General Assembly, International Law Commission, Preliminary report on immunity of State officials from foreign criminal jurisdiction ¶¶ 78–82 (29 May 2008); ANTONIO CASSESE, *International Criminal Law* 265–7 (2003).

¹³⁷ Akande, International Law Immunities and the International Criminal Court, *supra* note 131, at 413.

¹³⁸ Akande, International Law Immunities and the International Criminal Court, *supra* note 131, at 413–14; du Plessis, Shambolic, shameful and symbolic, *supra* note 134, at 6.

¹³⁹ E.g., Dire Tladi, The Immunity Provision in the AU Amendment Protocol and the Entrenchment of the Hero-Villain Trend, *Journal of International Criminal Justice* 13 (2015) 3, at 3–4 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2628137.

to immunity *ratione materiae*, it is plain that the inclusion of the phrase in Article 46A bis is meant to qualify ‘senior state officials’ by specifying that such officials should be identified ‘based on their functions.’ That these senior state officials are covered by immunity *ratione personae* – and not immunity *ratione materiae* – is evident from the fact that the article goes on to indicate that these senior state officials shall receive immunity ‘during their tenure of office,’ which is the defining characteristic of immunity *ratione personae*. Moreover, as Dire Tladi has observed, the phrase ‘based on their functions’ ‘appears to have been drawn from the ICJ’s reasoning for extending immunity *ratione personae* to Ministers for Foreign Affairs in the *Arrest Warrant* case,’¹⁴⁰ and thus its inclusion seems meant to help indicate why immunity should be extended to such officials and which officials receive that immunity.

Immunity is a procedural rule¹⁴¹ that concerns *whether* and *when* a court has jurisdiction over a particular individual. For example, a head of state with immunity *ratione personae* cannot be brought before a criminal court during his or her term in office, but that does not mean the head of state is exonerated from criminal responsibility – he or she may still be prosecuted, and thus held criminally responsible, after leaving office.¹⁴² This is different from the issue of substantive responsibility, which is a substantive rule of law that concerns whether a government official can be held responsible – at all – for his or her acts.¹⁴³

At a legal level, the inclusion of article 46A bis *might* have assisted in advancing the procedural argument that, as a matter of customary international law (at least insofar as African states are concerned) heads of state continue to enjoy immunity from prosecution while in office irrespective of the nature of the crime in question.¹⁴⁴ However, if article 46A bis could potentially have been used to advance this argument, its current formulation does not do so because, by providing that *only* ‘AU Head of State and Government’ shall enjoy immunity whilst in office, and not Heads of State and Government *generally*, the AU may have effectively abandoned the

¹⁴⁰ Tladi, *The Immunity Provision in the AU Amendment Protocol and the Entrenchment of the Hero-Villain Trend*, supra note 139, at 4.

¹⁴¹ Case Concerning the Arrest Warrant of 11 April 2000, supra note 134, at ¶ 60; International Law Commission, Report of the International Law Commission, 65th Session, Doc. A/68/10, page 55 (2013) (confirming that immunity from criminal jurisdiction is ‘procedural in nature’), <http://legal.un.org/docs/?symbol=A/68/10>.

¹⁴² Case Concerning the Arrest Warrant of 11 April 2000, supra note 134, at ¶ 60; ILC Report of the International Law Commission, 65th Session, supra note 132, at page 55.

¹⁴³ Case Concerning the Arrest Warrant of 11 April 2000, supra note 134, at ¶ 60; ILC Report of the International Law Commission, 65th Session, supra note 132, at page 55.

¹⁴⁴ Du Plessis and Fritz, supra note 237, *infra* note 237.

customary international law immunity argument in favour of a ‘treaty-based’ immunity argument.¹⁴⁵ They observe that throughout its engagement with the ICC, the AU has premised its immunity argument on customary international law and now it will be difficult for the AU to raise that argument in future given that article 46A*bis* effectively ‘removes’ the general customary international law immunity afforded to heads of state and other senior officials, and replaces it with a regional ‘treaty-based’ immunity afforded only to African leaders.¹⁴⁶

Nevertheless, it is important to note that in relation to matters of criminal responsibility, the statutes of the hybrid tribunals as well as the ICC did *not* address the issue of immunity *ratione personae*. Instead, these provisions concerned the separate issue of criminal responsibility. As the ICJ has explained, ‘[i]mmunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts,’¹⁴⁷ and thus arguments that *criminal responsibility* provisions in the statutes of international courts reflect a customary international law rule against *immunity* mistakenly conflate these two legal principles.¹⁴⁸ As explained above, immunity is a procedural rule¹⁴⁹ that concerns *whether* and *when* a court has jurisdiction over a particular individual. For example, a head of state with immunity *ratione personae* cannot be brought before a criminal court during his or her term in office, but that does not mean the head of state is exonerated from criminal responsibility – he or she may still be prosecuted, and thus held criminally responsible, after leaving office.¹⁵⁰ By contrast, provisions on criminal responsibility are substantive rules of criminal law¹⁵¹ that determine whether a government official can be held responsible for his or her acts. Arguments resting on provisions in international statutes regarding the concept of criminal responsibility do not indicate anything about whether there is a customary law rule on the entirely separate issue of immunity; as Dapo Akande has stated, ‘[t]o say that official capacity does not exclude criminal responsibility

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 134, at ¶ 60.

¹⁴⁸ Kiyani, Al-Bashir & the ICC: The Problem of Head of State Immunity, *supra* note 135, at 491. For examples of such conflation, see, e.g., Dan Kuwali, Article 46A Bis: A Step Backward in Ending Impunity in Africa (22 September 2014).

¹⁴⁹ Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 134, at ¶ 60; International Law Commission, Report of the International Law Commission, 65th Session, Doc. A/68/10, page 55 (2013) (confirming that immunity from criminal jurisdiction is ‘procedural in nature’), <http://legal.un.org/docs/?symbol=A/68/10>.

¹⁵⁰ Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 134, at ¶ 60; ILC Report of the International Law Commission, 65th Session, *supra* note 132, at page 55.

¹⁵¹ Case Concerning the Arrest Warrant of 11 April 2000, *supra* note 134, at ¶ 60; ILC Report of the International Law Commission, 65th Session, *supra* note 132, at page 55.

is not necessarily to say that the person may not be immune from the jurisdiction of particular tribunals.¹⁵² He has persuasively explained, whether an international criminal court may prosecute an official otherwise entitled to immunity depends first on the provisions of the statute regarding criminal responsibility and immunity and second whether the official's state is bound by that statute.¹⁵³ The ICTY and ICTR were both created by UN Security Council resolutions¹⁵⁴ and thus were binding on all UN member states, including the Federal Republic of Yugoslavia and Rwanda.¹⁵⁵ The Rome Statute of the ICC, as a treaty, is plainly binding on all states that ratify it. Even assuming that these three tribunals can prosecute sitting heads of state and other senior state officials – something neither the ICTY nor the ICTR did – they are not evidence that *any* international tribunal could do so.

Yet, the knee-jerk dismissiveness towards the regional criminal court because of the immunity provision has blinded commentators and led to their failure to consider how the regionalization of international criminal law could uniquely position regional mechanisms as essential parts of a robust system of global justice.¹⁵⁶ Consistent with these principles, the AU has repeatedly stressed its commitment to combating impunity¹⁵⁷ – including

¹⁵² Dapo Akande, ICC Issues Detailed Decision on Bashir's Immunity (... At long Last ...) But Gets the Law Wrong, EJIL: TALK! (15 December 2011); See, e.g., D. Jacobs, 'The ICC and Complementarity: A Tale of false promises and Mixed up Chameleons', *Post-Conflict Justice*, 11 December 2014, available at <http://postconflictjustice.com/the-icc-and-complementarity-a-tale-of-false-promises-and-mixed-up-chameleons/>; ('there is no conceptual obstacle to recognising that a person may have criminal responsibility in relation to conduct performed in an official capacity, but still say that some procedural bars, such as immunities, prevent certain courts from actually exercising jurisdiction to determine the scope of that criminal responsibility').

¹⁵³ Dapo Akande, International Law Immunities and the International Criminal Court, *supra* note 131, at 416–7; see also Dapo Akande, The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution? 2 (30 July 2008); Akande, ICC Issues Detailed Decision on Bashir's Immunity (... At long Last ...) But Dov Jacobs, *supra* note 152 at 9.

¹⁵⁴ UN Security Council Resolution 827, UN Doc. S/RES/827 (25 May 1993) (establishing the ICTY), www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf; UN Security Council Resolution 955, UN Doc. S/RES/955 (8 November 1994), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N95140/97/PDF/N9514097.pdf?OpenElement>.

¹⁵⁵ Dov Jacobs, *supra* note 152, at 8. Although the Federal Republic of Yugoslavia (FRY) was not admitted to the UN until 2000, the FRY had argued throughout the conflict that it the successor to the Socialist Federal Republic of Yugoslavia and thus a UN member. Akande, ICC Issues Detailed Decision on Bashir's Immunity, *supra* note 131.

¹⁵⁶ *Ibid.* at 3–4.

¹⁵⁷ E.g., African Union, Decision on the Application by the International Criminal Court (ICC) Prosecutor for the Indictment of the President of the Republic of Sudan, *supra* note 29, at ¶ 6; African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), ¶ 4, Assembly/AU/Dec.245(XIII) Rev. 1 (3 July 2009); Assembly/au/dec.270(xiv), Decision on the Report of the Second Meeting of States Parties to the

with respect to abuses by leaders – but has objected to prosecutions of *sitting* heads of state and other senior state officials because under ‘international customary law . . . sitting Heads of State and other senior state officials are granted immunities during their tenure in office.’¹⁵⁸ These immunities ‘apply not only to proceedings in foreign domestic courts but also to international tribunals.’¹⁵⁹ In this regard, following Matiangai Sirleaf, the immunities provision can be seen as, indeed, a ‘red herring’ that has obscured discussion of a number of substantive innovations of the court.¹⁶⁰ But the provision does not in any way impact the ICC’s jurisdiction.¹⁶¹ In fact, the 2012 draft of the Malabo Protocol only contained an immunity provision that was the same as Article 27 of the Rome Statute. It was the change of circumstances and the Kenyan led call for an Extraordinary Summit that led to the introduction of the controversial temporary immunity clause. In any event, though it is doubtful from a policy perspective that this immunity provision is helpful to the stability concerns of some African countries, their inclusion of an immunities provision in the Protocol arguably serves to clarify at least the African stance on immunities. For where Article 27 of the Rome Statute removes the immunity of government officials of states parties *in proceedings before the ICC*, Article 46A Bis of the Malabo Protocol provides that immunities for heads of state and certain other officials may be invoked *before the African Court*. But this provision does not affect the availability of immunity before any other court, whether the ICC or another. Ironically, the fact that the African Court cannot try certain senior officials, including heads of state, does not prevent the ICC from prosecuting those same officials if it has jurisdiction.¹⁶² In other words, with the addition of the rider to this provision, less (not more) protection may be available to African leaders before the ICC. Likewise, the fact that the ICC may have authority to prosecute heads of state and senior state officials does not affect whether the African Court has that same authority.

Rome Statute on the International Criminal Court (icc) doc. Assembly/au/8(xiv). Adopted by the Fourteenth Ordinary Session of the Assembly in Addis Ababa, Ethiopia on 2 February 2010.

¹⁵⁸ African Union, Decision on Africa’s Relationship with the International Criminal Court (ICC), ¶ 9, Ext/Assembly/AU/Dec.1 (October 2013).

¹⁵⁹ African Union, Press Release No. 002/2012 on the Decisions of Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan (9 January 2012), www.iccnw.org/documents/PR_002-ICC_English_2012.pdf.

¹⁶⁰ Sirleaf, *supra* note 2 at 3.

¹⁶¹ *Ibid.*

¹⁶² *Id.*

C. Innovations in the Jurisdiction of the Range of Crimes

Scholars are in agreement that one of the most innovative aspects of the African Court is that it joins the existing three core international crimes (i.e. crimes against humanity, genocide, and war crimes) together with nine new crimes that have never been part of an international criminal justice mechanism.¹⁶³ It is clear that many of the crimes under the Malabo Protocol are not international crimes in the strict sense of the word.¹⁶⁴ Some are defined in existing AU instruments, some are from more general instruments, some are *sui generis*. The treaties that define certain of these crimes merely create obligations on states to enact criminal offences in their domestic law. They are not actually crimes in international criminal law, but only in domestic criminal law.¹⁶⁵ Because the statute lists these crimes, defines them, and expressly provides that the Court shall have the power to try them, as well as includes a provision in Article 46B(1) which provides that ‘a person who commits an offense under this Statute shall be held individually responsible for this crime’, it suggests that a) the Statute itself creates these crimes and b) that given individual responsibility is being applied, the crime is by definition no longer just a transnational crime but is, at least within Africa, a regional international crime (i.e. a supra-national crime in the region, rather than just a crime in the domestic law of AU member states).¹⁶⁶

In addition to these crimes being new to ICL, scholars also note that they, as a grouping, enable the prosecution of crimes that are of particular resonance to Africa.¹⁶⁷ The legitimacy of the inclusion of irreverent or unaccustomed crimes in the jurisdiction of the African Court is unassailable, especially given their non-coverage by the Rome Statute, but this does not imply that all such crimes are, in fact, ‘international’ and ‘serious’ enough to warrant international prosecution.¹⁶⁸ To qualify as a crime for prosecution by an international and in this case regional tribunal, it is important that the crime concerned is recognized as ‘international’ and ‘serious’ enough by customary

¹⁶³ See Abraham, *supra* note 2 at 11; A. Abass, ‘The Proposed International Criminal Jurisdiction for the African Court: Some Problematical Aspects’, *Netherlands International Law Review* 60 (2013) 27 at 33–6; Addis, *supra* note 99; Nmehielle, *supra* note 2 at 29–31; Sirleaf, *supra* note 2 at 3–4 and 30–32; Tiba, *supra* note 2 at 544.

¹⁶⁴ Jalloh, in this volume; but also Abass, *supra* note 163 at 34; Kamari Clarke, see forthcoming 2018.

¹⁶⁵ *Ibid.*

¹⁶⁶ Email, *supra* note 151.

¹⁶⁷ See Abass, *supra* note 163 at 36; Nmehielle, *supra* note 2 at 30; Sirleaf, *supra* note 2 at 30; Tiba, *supra* note 2 at 544.

¹⁶⁸ Abass, *supra* note 163 at 34. See also Addis, *supra* note 99.

international law by the majority of the states designating it as such and/or for the crime to be a subject of a treaty in force for those states. Ademola Abass asserts that the twin criteria of 'international' and 'seriousness' are *sine qua non* to establishing jurisdiction over international crimes since international criminal tribunals are, by very their nature, only reserved for the most serious international crimes.¹⁶⁹

Some of the prohibited acts are not necessarily uniquely African. However, some of the problems for which African states are proposing prohibitions that would attract individual penal responsibility are usually associated with regions of the world where the rule of law and human rights are not entrenched.¹⁷⁰ Tiba observes that 'Africa has been watching itself helplessly as numerous governments were unconstitutionally overthrown, its human and material resources looted, became a dumping ground for hazardous wastes and its waters infested by pirates.'¹⁷¹ Similarly, Sirleaf contends that African borders are notoriously non-natural and porous, rendering them more susceptible to transnational crimes such as drug and arms trades and terrorist attacks.¹⁷² The frequency and pervasiveness of such crimes ultimately compromises the security and stability of many African states, and that the particular grouping of quotidian crimes under the Malabo Protocol involves responding to such common security threats.¹⁷³ She adds that because many of the conflicts or common security threats in Africa tend to diffuse or have a contagion effect, a regional tribunal may be the best placed institution to adequately address the many different groups.¹⁷⁴ Indeed, given the particularities of the African context and the general legal weaknesses of domestic courts of some African states, their coming together to address problems that they individually may not be as well placed to address could be a significant development for peace and security.

The Malabo Protocol recognizes both the background and foreground of international criminal law violations. Massive atrocities and the core crimes do not take place in a vacuum. Rather, they are embedded in the particularities of regions, power imbalances and histories of plunder and the lack of rectification of political inequalities at the global level.¹⁷⁵ As such, the particular grouping of crimes under the Malabo Protocol can be seen as an innovative approach to

¹⁶⁹ Ibid.

¹⁷⁰ Tiba, *supra* note 2 at 544.

¹⁷¹ Ibid.

¹⁷² Sirleaf, *supra* note 2 at 30.

¹⁷³ Ibid. at 31.

¹⁷⁴ Ibid. at 32.

¹⁷⁵ Ibid. Also see Clarke, 2009.

tackling both everyday security threats as well as structural violence that is unique to the African context – a form of Africanization of mainstream international criminal law. Because linkages exist between these crimes, even on the international level, it may open the door for a richer and more developed sense of global international criminal law that could redound to the benefit of the future regime. As Abass has argued, the importance of Article 28(A)(2), which provides that ‘The Assembly may extend upon consensus of the States Parties the jurisdiction of the Court to incorporate additional crimes to reflect the developments of international law’, is extremely useful, especially in light of the prevalence of certain crimes which affect many African countries but which are not at present internationally justiciable.¹⁷⁶

As a final note on the innovative approach to criminal jurisdiction adopted by the Malabo Protocol, it is worth mentioning that none of the crimes falling within the jurisdiction of the Court (not only the typical international crimes) shall be subject to any statute of limitation.¹⁷⁷ Thus, this is the first time that white-collar crimes, such as corruption and money laundering, are treated on par with the most egregious crimes known to man, in regard to the statute of limitations.¹⁷⁸ These crimes tend to be interconnected, as the ICC prosecutions of cases in the Libya Situation seems to have found with the same actors that commit crimes against humanity in some cases being mercenaries, drug traffickers and money launderers.

D. *Unconstitutional Change of Government*

Also significant is the crime of unconstitutional change of government as the African continent continues to face significant challenges from UCGs. This includes African governments refusing to relinquish office after they lose elections.¹⁷⁹ These unconstitutional changes of government ‘are a threat to peace and security’ on the continent,¹⁸⁰ and contravene the right of a people

¹⁷⁶ Malabo Protocol, *supra* note 1 at Art. 28A(2); Abass, *supra* note 163 at 36.

¹⁷⁷ Malabo Protocol, *supra* note 1 at Art. 28A(3).

¹⁷⁸ Tiba, *supra* note 2 at 544.

¹⁷⁹ Dionne Searcy and Jaime Yaya Barry, Yahya Jammeh, Gambian President, Now Refuses to Accept Election Defeat, *The New York Times* (9 December 2016), www.nytimes.com/2016/12/09/world/africa/yahya-jammeh-gambia-rejects-vote-defeat-adama-barrow.html; African Union, Peace and Security Council, Communiqué, PSC/PR/COMM. (DCXLVII) (13 January 2017), www.peaceau.org/uploads/647.psc.comm.gambia.13.01.2017-1.pdf.

¹⁸⁰ Organization of African Unity, Assembly of Heads of State and Government, Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5 (XXXVI) (2000); see also African Charter on Democracy, Elections and Governance, preamble (describing UCG as ‘one of the essential causes of insecurity, instability and violence conflict in Africa’), <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>.

to choose their governments,¹⁸¹ and impede socio-economic development.¹⁸² Ending UCG, which was formerly also a phenomenon in Latin America where it was subsidised as democracies have matured, is therefore critical to consolidating good governance, promoting human rights, building stable governments and strong economies, and preventing conflict, as the AU and its predecessor have recognized.¹⁸³ For years, African States have engaged in efforts to consolidate democracy and respect for the rule of law, including through the elimination of unconstitutional changes of government.¹⁸⁴ These principles are enshrined in the AU's Constitutive Act,¹⁸⁵ and have been incorporated into other key components of the AU's peace and governance architecture, including NEPAD and the Peace and Security Council.¹⁸⁶ As part of these responses, the AU and the OAU agreed to impose significant penalties on perpetrators of UCG, including suspension from participation in the policy organs of the OAU and the AU, as well as sanctions such as visa denials and trade restrictions,¹⁸⁷ and has not hesitated to impose these

¹⁸¹ See, e.g., African Charter on Human and Peoples' Rights, *supra* note 6, art. 13; Organization of African Unity, Assembly of Heads of State and Government, Declaration on the Principles Governing Democratic Elections in Africa, art. IV(1)AGH/Decl.1 (XXXVIII) (2002), www.eisa.org.za/pdf/au2002declaration.pdf; Inter-Parliamentary Council, Universal Declaration on Democracy (1997), <http://archive.ipu.org/cnl-e/161-dem.htm>.

¹⁸² See The New Partnership for Africa's Development, Declaration on Democracy, Political, Economic and Corporate Governance, AHG/235(XXXVIII), www.chr.up.ac.za/chr_old/hr_docs/arpm/docs/book2.pdf; Omotola, Unconstitutional Changes of Government in Africa: What Implications for Democratic Consolidation?, 37.

¹⁸³ Organization of African Unity, Assembly of Heads of State and Government, Decision, AHG/Dec.141(XXXV) (1999), http://archive.au.int/collect/auassemb/import/English/AHG%20Decl%201-2%20XXXV_E.pdf.

¹⁸⁴ See, e.g., Organization of African Unity, Council of Ministers, Decision, CM/Dec.356(LXVI) (1997), www.peaceau.org/uploads/cm-dec-356-lxvi-e.pdf; Organization of African Unity, Assembly of Heads of State and Government, Decision, AHG/Dec.142(XXXV) (1999), http://archive.au.int/collect/auassemb/import/English/AHG%20Decl%201-2%20XXXV_E.pdf; Organization of African Unity, Assembly of Heads of State and Government, Decision on Unconstitutional Changes of Government in Africa, AHG/Dec.150 (XXXVI) (2000); Organization of African Unity, Assembly of Heads of State and Government, Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5(XXXVI) (2000).

¹⁸⁵ Constitutive Act of the AU, Constitutive Act of the African Union, 1 July 2000, available at: <https://www.refworld.org/docid/4937e0142.html> (accessed 15 January 2019), art. 4.

¹⁸⁶ African Union, Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 9 July 2002, available at: <https://www.refworld.org/docid/3f4b1d374.html>; art. 7(g); African Union, African Charter on Democracy, Elections and Governance, 30 January 2007, available at: <https://www.refworld.org/docid/493fe2332.html>; arts. 24–25 (recognizing the role of the Peace and Security Council in combating UCG); NEPAD Declaration on Democracy, Political, Economic and Corporate Governance, *supra* note __, ¶ 13.

¹⁸⁷ Organization of African Unity, Assembly of Heads of State and Government, Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/

penalties as appropriate.¹⁸⁸ These efforts have been supported by similar initiatives at the sub-regional level.¹⁸⁹

In 2007, faced with continuing violations of democratic governance, the AU adopted the African Charter on Democracy, Elections, and Governance in 2007.¹⁹⁰ The Charter provides a comprehensive definition of UCG,¹⁹¹ confirms the key role of the Peace and Security Council in combating UCG, and reiterates and strengthens the sanctions available against perpetrators of UCG, including a prohibition on participating in transitional elections, suspension from participation in the activities of the AU, and punitive economic measures.¹⁹² The Charter entered into force in 2012 and, as of 15 March 2018, had 30 States Parties.¹⁹³ Five of the acts from the charter are included in the crime of UCG in the Malabo Protocol, ensuring the availability of a competent African Court for their prosecution. However, the Malabo Protocol has six acts that constitute the crime of UCG. It adds an additional prohibited act to the Charter definition, providing criminal responsibility for ‘any amendment or revision of the Constitution or legal instruments . . . which is inconsistent with the Constitution.’¹⁹⁴

Recent events demonstrate a growing willingness by the AU to end such unconstitutional governments. As a result, the environment in Africa is rapidly shifting towards forcing from office heads of state and senior state officials who attempt to unconstitutionally prolong their power. These considerations help propel the type of innovations that are reflective of the emergence of the consolidated African court. An examination of the type of crimes covered by the regional criminal court point to evidence of this.

Decl.5(XXXVI) (2000), www.peaceau.org/uploads/ahg-decl-5-xxxvi-e.pdf; Constitutive Act of the AU, *supra* note 185, art. 30; Omotola, *supra* note 182, at 32–33.

¹⁸⁸ See Morris Kiwinda Mbondenyi, Institutional Mainstreaming and Rationalisation, in Manisuli Ssenyonjo, *The African Regional Human Rights System* 422, 428 (2012).

¹⁸⁹ ECOWAS, Protocol A/SP1/h2/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, arts. 1(b)-(e), 9, www.internationaldemocracywatch.org/attachments/350_ECOWAS%20Protocol%20on%20Democracy%20and%20Good%20Governance.pdf.

¹⁹⁰ See generally African Charter on Democracy, Elections and Governance, <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>.

¹⁹¹ *Id.* art. 23. The full language of the article is provided in Annex 4, *infra*.

¹⁹² *Id.* arts. 24–25.

¹⁹³ African Union, List of Countries which have Signed, Ratified/Accessed to the African Charter on Democracy, Elections and Governance, https://au.int/sites/default/files/treaties/7790-sl-african_charter_on_democracy_elections_and_governance_8.pdf.

¹⁹⁴ Malabo Protocol, *supra* note 1, annex art. 14 (adding art. 28E(1)(e)).

7. KEY FUTURE CHALLENGES FOR THE AFRICAN COURT

Various scholars, in this volume and outside of it, have raised concerns about the AU's ability to meet the fiscal implications of vesting the African Court with an international criminal jurisdiction, alongside an expansive general and human rights jurisdictions.¹⁹⁵ Scholars have repeatedly noted that a vast amount of money is required to ensure proper staffing and capacity for international criminal trials, especially with such an extensive list of crimes as that of the Malabo Protocol, and in light of the chronic underfunding of the AU and its institutions.¹⁹⁶ This includes the reliance on external funders, from outside of the continent, for some of its programmatic needs. Scholars have insisted that the high cost of international criminal prosecutions derives mainly from the excruciating evidentiary processes associated with criminal prosecutions, noting that proving a case beyond reasonable doubt involves an investment of huge financial and time resources, comprehensive and expensive investigations, exhaustive examination of extensive materials, opportunities to question witnesses, lengthy judgments, and the servicing of different levels of chambers within the Court itself, each of which have distinct mandates and staff.¹⁹⁷

A. *Likely Inadequate Funding*

Some, like Viljoen, a prominent voice in African human rights discourse, have concluded that 'through its very concerted attempts to create the tri-sectional court, the AU intends to establish yet another institution that from the outset has been destined to become an empty and ineffectual shell.'¹⁹⁸ In this regard, the challenges that the proposed court will face from a financial perspective range from the reality that the unit cost of a single trial for an international crime in 2009 was estimated to be US \$20 million, or nearly double the approved 2009 budgets for the African Court and the African Commission, standing at US \$7,642,269 and US \$3,671,766, respectively (14% of the AU's total annual budget of US \$140,037,880 for 2008).¹⁹⁹

¹⁹⁵ See Abraham, *supra* note 2 at 11; Addis, *supra* note 99; Abass, *supra* note 163 at 944; Du Plessis, *supra* note 2 at 6, 7 and 9; Coalition, *supra* note 240, *infra* note 240 at 13, 16–17; Du Plessis, *supra* note 2 at 9; Du Plessis, *supra* note 213 at 292–3; Murungu, *supra* note 219 at 1084 and 1086; Musila, *supra* note 54 at 34; Nmehielle, *supra* note 2 at 36; Rau, *supra* note 2 at 697–8; Van Schaack, *infra* note 222; Viljoen, *supra* note 2 at 5–6.

¹⁹⁶ *Ibid.*

¹⁹⁷ Abass, *supra* note 2 at 944; See also Murungu, *supra* note 219 at 1084; Viljoen, *supra* note 2 at 5.

¹⁹⁸ Viljoen, *supra* note 163 at 6.

¹⁹⁹ Du Plessis, *supra* note 2 at 9; Du Plessis, *supra* note 213 at 292–3.

Relatedly, the AU's budget for the 2011 financial year amounted to US \$256,754,447.78, including a total allocation for the African Court on Human and Peoples' Rights of US \$9,389,615; the same year the ICC had a budget of US\$ 134 million, which was US \$ 26 million short of what it said it needed for 2012.²⁰⁰ Comparatively, the ICC budget for investigating just three crimes is more than 14 times that of the African Court without a criminal component; and is just about double the entire budget of the AU.²⁰¹

Similarly, where the unit cost of a single trial is US \$20 million, yet the existing bodies (i.e., the ACtHPR and ACHPR) operate on a total budget of just over US \$13 million, constituting more than 10% of the total AU budget.²⁰² This also compares with the cost of prosecuting Liberian Charles Taylor which was estimated at US \$50 million, while the annual budget of the Sierra Leonean justice sector is about US\$13 million.²⁰³ It also compares with the 2006–2007 biennial budget for the International Criminal Tribunal for Rwanda was in the order of US \$270 million; the AU budget for the African Human Rights Court in 2011 was US \$6 million.²⁰⁴ In light of these concerns, many scholars have expressed serious doubt in the AU's ability to successfully expand the jurisdiction of the court, at least not without a much greater investment of resources than those that had been allocated to the African Human Rights Court in the past, or sacrificing efficiency, transparency and accountability.²⁰⁵ Kenya, in what may largely be a symbolic move, has offered a donation of \$1 million for the future court's use. No other African state has done so. While it can be reliably presumed that the AU's own mechanism would be considerably cheaper than the ICTR and the SCSL, the reality is that no matter how low the salaries and other costs are, a small budget for a tribunal with a wide (and potentially) continent-wide mandate is hardly sustainable – at least in the current environment.

B. *Lack of Infrastructure and Human Resources*

Related to the economic issues raised by Nmehielle, the creation of an additional criminal chamber has implications for infrastructure. Commentators have noted that with an expanded court must come fully functional

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Musila, *supra* note 54 at 34.

²⁰³ Abass, *supra* note 163 at 944.

²⁰⁴ Viljoen, *supra* note 2 at 5.

²⁰⁵ Viljoen, *supra* note 2 at 5–6; Du Plessis, *supra* note 2 at 9; Du Plessis, *supra* note 132 at 292–3; Nmehielle, *supra* note 2 at 36.

detention facilities or penitentiaries that meet international standards, a criminal appeals chamber, and accommodations for inter-state actions related to the apprehension and transfer of suspects.²⁰⁶ In addition, systems need to be created to address issues such as the obtaining and retention of evidence; protection and support for victims and witnesses; pre-trial detention; protection of defence rights; investigations and prosecutions; trials; imprisonment; and state cooperation.²⁰⁷ That being the case, resource constraints are a major impediment to the African Court exercising international criminal jurisdiction.

Relatedly issues concerning human resources have been flagged as to whether the African Court may also be able to obtain and support the required judicial, legal, and staff capacity to deal with the enormous requirements imposed by international criminal trials.²⁰⁸ Stuart Ford (in this volume) observes that the proposed chamber will require a dedicated team of prosecutors and investigators to perform the challenging task of building and getting the cases to court, as well as a raft of highly experienced judges who can preside over the trials and adjudicate the appeals. Du Plessis, like Amnesty International, has questioned whether there will be enough judicial capacity to do anything close to the justice that the expansive criminal jurisdiction proposes, noting that the ICC is staffed with 18 judges for only three crimes while that proposed international criminal chamber would have only 8 judges (i.e. one in the Pre-Trial Chamber, three in the Trial Chamber and five in the Appellate Chamber).²⁰⁹

C. *Limited Buy In from African States*

A number of scholars have raised the concern that African States have a long history of failing to abide by their obligations under international and human rights law, and questioned whether there would be a willingness by member states to pursue investigations, conduct trials, and enforce judgments as part of their obligations under the Malabo Protocol.²¹⁰ This is a valid concern, given

²⁰⁶ See Addis, *supra* note 99; Nmehielle, *supra* note 2 at 36; Rau, *supra* note 2 at 697–8; Scholtz, *supra* note 54 at 261

²⁰⁷ *Ibid.*

²⁰⁸ See Addis, *supra* note 99; Du Plessis, *supra* note 2 at 6–7; Du Plessis, *supra* note 132 at 290–92; Nmehielle, *supra* note 2 at 36–7;

²⁰⁹ Du Plessis, *supra* note 2 at 7; Malabo Protocol, *supra* note 1 at Arts. 16(2) and 10(3)–(5).

²¹⁰ See Abass, *supra* note 163 at 49–50; Coalition, *supra* note 240; Murungu, *supra* note 219 at 1084–5; Rau, *supra* note 2 at 700–1; Scholtz, *supra* note 54 at 267; Sirleaf, *supra* note 2 at 17 and 19.

the challenges that have so far been confronted by the African human rights system. Some note that African states' commitment to fight impunity must be seen to be a reality and not merely rhetoric, explaining that for the extension of the international criminal jurisdiction to succeed, the prevalence of a culture of disrespecting human rights, intolerance, and bad governance must stop.²¹¹ Indeed, some observe that a lack of political will is the foremost issue with respect to enforcement of regional human rights decisions, noting that observers estimate that the rate of states' full compliance with AU Commission decisions is only 14%.²¹² Clearly, the mere addition of the regional criminal court is unlikely to address the normative and structural weakness of the African human rights system.²¹³

D. Independence of the Prosecutor

The ability of the International Criminal Law Section of the African Court to function effectively depends principally on the independence enjoyed by the Office of the Prosecutor in the discharge of its duties.²¹⁴ As a matter of law, Article 22(6) of the Malabo Protocol guarantees that independence: "The Office of the Prosecutor shall be responsible for the investigation and prosecution of the crimes specified in this Statute and shall act independently as a separate organ of the Court and shall not seek or receive instructions from any State Party or any other source."²¹⁵

However, operationalizing this provision implies that, aside from the prosecutor's ability to bring situations to the Court through her *pro prio motu* power (Art. 46(1)), except as may otherwise be permissible under the Statute, the prosecutor shall be free from political influences of the organs of the AU, the Union's member states, and any such political entities within or outside of Africa.²¹⁶ However, for some, Article 22(2), which outlines how the prosecutor will be appointed,²¹⁷ poses a problem in which "[t]he Prosecutor and Deputy Prosecutors shall be elected by the Assembly from amongst candidates who shall be nationals of States Parties nominated by States Parties."²¹⁸ Here, this passage asks us to assess whether the prospect of an independent prosecutor for

²¹¹ Scholtz, *supra* note 54 at 267.

²¹² Rau, *supra* note 2 at 700; Sirleaf, *supra* note 2 at 17.

²¹³ Sirleaf, *supra* note 2 at 17.

²¹⁴ Abass, *supra* note 163 at 42.

²¹⁵ Malabo Protocol, *supra* note 1 at 22(6).

²¹⁶ Abass, *supra* note 163 at 42.

²¹⁷ Abass, *supra* note 163 at 42.; Malabo Protocol, *supra* note 1 at Art. 22(2).

²¹⁸ Malabo Protocol, *supra* note 1 at Art. 22(2).

the African Court will be reduced by predicating its appointment on the most politically volatile of the AU organs.²¹⁹ This is further analyzed by Ademola Abass who suggests that Article 22(10), which states that '[t]he remuneration and conditions of service of the Prosecutor and Deputy Prosecutors shall be determined by the Assembly on the recommendation of the Court made through the Executive Council', allows for the subjugating of the overall functioning of the Office of the Prosecutor to the Assembly.²²⁰

E. *Complementarity Issues*

The concern over complementarity at both a national and international level is one of the key issues taken up in this book and, perhaps in significance, second only to the controversial issue of immunity. Numerous scholars have expressed concern about the fact that the Malabo Protocol, although clearly influenced heavily by the Rome Statute, does not address the relationship between the ICC and the regional criminal tribunal.²²¹ Instead, the Malabo Protocol discusses the tribunal's complementary relationship with national courts, and the courts of RECs within Africa.²²² This is indeed surprising, since the ICC was already in place before the drafting of the African regional treaty took place. The lack of provision for complementarity with the ICC is explained by the context of tension between the AU-ICC as the original draft of what became the Malabo Protocol actually contained a reference to the ICC which was removed at the request of the Office of Legal Counsel of the AU Commission. On the other hand, the ICC Statute – adopted in July 1998 – did not address complementarity with regional bodies, only national courts. In recognition of a possible space for such bodies, which can probably already be accommodated under a teleological interpretation of the Rome Statute, Kenya has made a proposal for an amendment to the Statute to explicitly recognize such bodies. So far, it has not been successful.

²¹⁹ Abass, *supra* note at 163.

²²⁰ Malabo Protocol, *supra* note 1 at Art. 22(10); Abass, *supra* note 163 at 42–3.

²²¹ See Abass, *supra* note 163 at 944–45; Abass, *supra* note 163 at 47; Addis, *supra* note 99; Coalition, *infra* note 240; Du Plessis, *supra* note 2 at 10; Du Plessis, *supra* note 213 at 294–5; Murungu, *supra* note 219 at 1075, 1081 and 1085–7; Musila, *supra* note 54 at 34–5; Nmehielle, *supra* note 2 at 39 and 42; Rau, *supra* note 2 at 693–6; Scholtz, *supra* note 54 at 263–4; Sirleaf, *supra* note 2 at 42; Tiba, *supra* note 2 at 545; B. Van Schaack, 'Immunity Before the African Court of Justice & Human & Peoples Rights – The Potential Outlier', *Just Security*, 10 July 2014, available online at: www.justsecurity.org/12732/immunity-african-court-justice-human-peoples-rights-the-potential-outlier/.

²²² Malabo Protocol, *supra* note 1 at Art. 46H; Sirleaf, *supra* note 2 at 42.

Article 46H of the Malabo Protocol provides that the jurisdiction of the International Criminal Law Section will be complementary to national courts and the courts of the RECs.²²³ This provision lays out this relationship in a manner similar to that of Article 17 of the Rome Statute, which contains the ICC's complementarity regime.²²⁴ The implication from this provision is that the African Court can accept a case, not only after the national court of an indicted person has proved 'unwilling' or 'unable' to prosecute, but also after a REC court that has jurisdiction has also failed to prosecute that person.²²⁵ Thus, instead of the scheme of complementarity under the Rome Statute, which makes a case admissible once a national court has failed the twin criteria, admissibility of cases to the African Court requires the 'double failure' of national courts and RECs under the same twin standard.²²⁶ The inclusion of RECs within Article 46 of the Malabo Protocol can be seen as confusing as most states in Africa actually belong to more than one REC.²²⁷ As such, the question of which of the RECs' courts should be considered for the purposes of the complementarity principle under the Malabo Protocol remains in cases where the national state of an accused person holds multiple memberships.²²⁸ Whereas national courts are accessible to individuals, some regional courts are not automatically accessible to individuals, creating further complications.²²⁹ The guidance offered by the Malabo Protocol is thus the qualifier to the effect that such RECs have contemplated such jurisdiction.

To date, despite discussions in the West and East Africa regions, the ECOWAS Court of Justice and the EAC Court of Justice have not been conferred such jurisdiction. Nonetheless, there could be political appetite for such to happen in the future. If and when that happens, in principle, this should mean that the cases should not be reaching the regional court since two jurisdictions (at the national and sub-regional levels) would have the first two bites of the jurisdictional apple. In reality, given the experience of the ICC where national jurisdictions have proven to be more interested in offloading cases to The Hague than was initially envisaged, this could mean that the level or workload could be similarly large for the African Court.

²²³ Malabo Protocol, *supra* note 1 at Art. 46H

²²⁴ Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 at Art. 17.

²²⁵ Abass, *supra* 163 at 944.

²²⁶ *Ibid.*

²²⁷ *Ibid.* at 945.

²²⁸ *Ibid.*

²²⁹ *Ibid.*

Significant concern has also been expressed about the fact that the Malabo Protocol is silent on the relationship between the African Court and the ICC or for that matter other ‘international tribunals’. In addition, the ICC’s complementarity provision regulates the relationship with *national* courts, but does not address its relationship with *regional* courts, such as the ACJHR, creating further uncertainty surrounding the complementarity issue.²³⁰ Thirty-three of fifty-four African states are party to the ICC, and at least six have adopted domestic legislation implementing their ICC obligations, which will undoubtedly give rise to conflicting obligations in those states as well as overlapping jurisdiction.²³¹ A number of issues arise as a result of this overlap, including which court will have primacy, how to deal with conflicting obligations, and how to address the doubling up for some states on contributing financially to two courts.²³²

Careful thought also needs to be given to the question of domestic legislation to enable a relationship with the expanded African Court, especially given problems with mutual legal assistance and extradition.²³³ This issue can result in a ‘minefield of difficulties’, including that: elements of crimes in the protocol may be different from the elements of crimes in domestic law (thus requiring a major re-write of many of the domestic laws of African states), or that a number of the crimes listed in the protocol are not crimes in the domestic law of African states, thus requiring careful introduction of these crimes to ensure cooperation; that domestic law may already require an obligation to cooperate with the ICC in the investigation of certain crimes; and that surrender of suspects to the African Court and extradition between states parties will require regulation.²³⁴ In light of these concerns, there is a need for more engagement with the AU on the benefits of the complementarity principle under the Rome Statute, and that this has not been properly explored by the AU in the context of ‘African solution for African problems.’²³⁵

With these various regional innovations, it can be concluded that a justice project of this magnitude while offering significant benefits will also require significant resources and effective management. It is with this point of departure that this volume offers a detailed analysis of the opportunities and challenges of the Malabo Protocol.

²³⁰ Rome Statute, *supra* note 225 at Art. 17

²³¹ *Ibid.*

²³² Du Plessis, *supra* note 2 at 10; Du Plessis, *supra* note 213 at 294.

²³³ *Ibid.*

²³⁴ *Ibid.*; See also Musila, *supra* note 54 at 34–5.

²³⁵ Nmehielle, *supra* note 2 at 42.

F. *Inadequate Drafting and Civil Society Involvement: Might Greater Consultation Have Made a Difference?*

Criticism has also been raised that the rushed drafting process has led to a number of issues regarding definitions of crimes as well as numbering errors and typographical anomalies.²³⁶ Interestingly, a similar issue also arose in relation to the Rome Statute. One specific example raised in the Malabo Protocol context is that Article 18(4) provides that '[t]he Appellate Chamber may affirm, reverse the decision appealed against. The decision of the Appellate Chamber shall be final'.²³⁷ No mention is made of the ICC when complementarity was being addressed, though apparently borrowed from the Rome Statute. Other provisions, such as Article 46E of the Malabo Protocol concerning the preconditions to the exercise of jurisdiction, are missing crucial language which appear to have been removed without any explanation. One might also criticize the lack of provisions on deferral of prosecutions or interests of justice components to the powers of the Prosecutor. Du Plessis and Fritz have raised the more elementary concern that early drafts of the Protocol contained numbering errors (Article 28C(1)(a), (b), (a), (b), and Article 28L(3)) and typographical anomalies, including that Article 28L dealing with 'Trafficking in Hazardous Wastes' imports the definition of 'hazardous wastes' from the *Bamako Convention On The Ban Of The Import Into Africa And The Control Of Transboundary Movement And Management Of Hazardous Wastes Within Africa* (1991), but does not modify the language accordingly.²³⁸ These and related omissions are salient concerns that could have been addressed upfront. That they were not is regrettable. Nevertheless, in a way, these issues make this book—which is to date the first comprehensive work that examines all the three jurisdictions of the Court in a single volume—all the more important. It is an attempt to highlight the promise, as well as the perils, of the project. It allows for concerns to be aired in the context of substantive analysis of the core aspects of the Malabo Protocol. This should provide basis for future improvement of the Court and enhances our ability as

²³⁶ Abass, *supra* note 163 at 935 and 944; du Plessis, *supra* note 163 at 6; Du Plessis, *supra* note 213 at 290; M. du Plessis, *Shambolic, shameful and symbolic: Implications of the African Union's immunity for African leaders*, Institute for Security Studies (ISS), ISS Paper 278, November 2014, available online at: www.issafrica.org/uploads/Paper278.pdf, at 3; M. du Plessis and N. Fritz, 'A (New) New Regional International Criminal Court for Africa?', *iLawyer: A Blog on International Justice*, 1 October 2014, available online at: <http://ilawyerblog.com/new-new-regional-international-criminal-court-africa/>.

²³⁷ Abass, *supra* note 163 at 944.

²³⁸ Du Plessis and Fritz, *supra* note 237.

scholars to unpack the work of the Court in the context of larger domains of politics, economics, diplomacy and power.

Many scholars, policy makers as well as a collective of African civil society organizations have all expressed dismay about the rushed drafting process and the lack of meaningful input from key stakeholders.²³⁹ For while the process appeared to have been stretched out over three years, African governments for whom the implications are the greatest only had less than a year to review the actual text of the draft protocol.²⁴⁰ The draft protocol appear to have only been made available to states and their legal advisers in March 2011, and that NGOs and other externals legal experts were not asked for comment at all.²⁴¹ The draft protocol was never made available on the AU's website, or publicly posted for comment in other media.²⁴² And questions around jurisdiction, definitions of crimes, immunities, institutional design and the practicality of administration and enforcement of an expanded jurisdiction, among others, are seen as a component of the court that require careful examination.²⁴³

G. *Lack of Straightforward Access to the Court*

Relatedly, contributors to the volume have raised concerns about Article 16 of the Malabo Protocol, which relates to other entities eligible to submit cases to the court²⁴⁴ They have argued that this provision limits access to the court by only allowing African individuals or African non-governmental organizations (NGOs) (with observer status at the AU or its organs or institutions) from states that have *made a declaration accepting the competence of the court* to submit applications directly.²⁴⁵ They note that while this article is progressive by giving NGOs an opportunity to submit cases to the court, the provision does

²³⁹ Abraham, *supra* note 2 at 11; du Plessis, *supra* note 2 at 5 and 11; M. du Plessis, 'A new regional International Criminal Court for Africa?', *South African Journal of Criminal Justice* 25 (2012) 286; Nmehielle, *supra* note 2 at 39; Coalition for an Effective African Court on Human and Peoples' Rights, Darfur Consortium, East African Law Society, International Criminal Law Centre, Open University of Tanzania, Open Society Justice Initiative, Pan-African Lawyers Union, Southern Africa Litigation Centre, West African Bar Association, 'Implications of the African Court of Human and Peoples' Rights Being Empowered to Try International Crimes such as Genocide, Crimes Against Humanity, and War Crimes', 17 December 2009, available online at: www.africancourtcoalition.org/images/docs/submissions/opinion_african_court_extension_jurisdiction.pdf [Coalition].

²⁴⁰ du Plessis, *supra* note 2 at 5; du Plessis, *supra* note 213 at 288.

²⁴¹ *Ibid.*

²⁴² du Plessis, *supra* note 213 at 288.

²⁴³ *Ibid.*

²⁴⁴ Scholtz, *supra* note 54 at 258 and 260.

²⁴⁵ *Ibid.* at 260.

not factor in circumstances under which an NGO may wish to forward a case in a country that has not accepted the jurisdiction of the court.²⁴⁶ According to Scholtz, the restrictive access of individuals and NGOs to the African Court, in contrast to the unfettered access of state parties, is antithetical to the tenets of human rights law, which is aimed at protecting the individual from the state.²⁴⁷ These issues raise a number of questions about the development of justice in Africa and how we might reconceive of those mechanisms when issues of access are understood in relation to not only courts but in relation to the overall mechanisms available within *African Ecologies of Justice*.

8. GENERAL OVERVIEW OF THE VOLUME

The volume is divided into five parts. Part I situates the tribunal in the wider context of the more recent transitional justice and accountability efforts in Africa. The six chapters in this section start with the necessary background, exploring the place of the African Court as the first regional mechanism anywhere in the world to contemplate as part of a longer historical fight between regionalism and universalism, of the kind seen in the early development of international human rights law (Charles Jalloh). This is followed by a discussion of the peace versus justice debate in the context of sequencing of justice and the management of violence on the continent (Kamari Clarke). A third piece focuses on the AU's transitional justice policy framework and how it fits in the AU's emerging AGA (George Wachira). The next chapter further fleshes this out by putting the differentiated accountability systems of the court as a judicial mechanism against the wider AU transitional justice architecture (Tim Murithi). The important issue of concurrent jurisdiction of the ICC and the African Court in the case of concurrent referrals is then analyzed (Erika de Wet), followed by a more theoretical discussion of the African Court as a form of emancipatory politics (Adam Branch).

Part II of the volume delves into the criminal jurisdiction of the African Court. The first section of which takes up 15 chapters that address the crimes. The first chapter takes up the more theoretical challenge of identifying the nature of the wide mix of crimes included in the Malabo Protocol (Charles Jalloh), while the second hones in on the 'international crimes' contained within it (Daniel Nsereko and Manuel Ventura). Given its importance, the next chapter takes up genocide and other international crimes by unincorporated groups and whether there could be loopholes for them in the African

²⁴⁶ Ibid. at 258.

²⁴⁷ Ibid. at 260.

Court (Hannibal Travis). This is followed by analysis of the always controversial crime of aggression (Sergey Sayapin). The volume then transitions to the more 'transnational' crimes part of the Malabo Protocol. The authors examine the wider category and then specifically drug trafficking (Neil Boister), followed by piracy (Douglas Guilfoyle and Rob McLaughlin); the crime of terrorism (Ben Saul); mercenarism (José Gomez del Prado); corruption (John Hatchard); money laundering (Cecily Rose); human trafficking (Tomoya Obokata); dumping of hazardous wastes (Matiangai Sirleaf); and illicit exploitation of natural resources (Daniëlla Dam and James Stewart). A last chapter addresses unconstitutional change of government, which in many ways, is *sui generis* (Harmen van der Wilt).

Section 2 of Part II then picks up on institutional and procedural issues. Here, three chapters cover; complementarity (Margaret deGuzman); defence and fair trial rights (Melinda Taylor) and the issue of state cooperation (Dire Tladi). The next section continues with modes of liability and individual criminal responsibility (Wayne Jordash and Natacha Bracq); corporate criminal liability (Joanna Kyriakakis); the issue of immunity (Chile Eboe-Osuji and Dire Tladi); defences to criminal liability (Sara Wharton); sentencing and penalties (Mark Drumbl); and the right to reparations for victims as well as victim participation (Godfrey M. Musila).

Part III of the book then takes up the human rights jurisdiction of the court, with two chapters. The first examines the broad issue of the competence on human rights matters (Rachel Murray) and the possible complementarity between the Human Rights mechanism in Africa with the International Criminal Law Section of the court (Pacifique Manirakiza).

In Part IV, we shift to the general jurisdiction and start with a focus on the wider question of jurisdiction (Edwin Bikundo) and the administrative law aspects of that jurisdiction (Adejoké Babington-Ashaye).

Finally, Part V of the volume then takes up some of the thorniest issues. The first of which relates to financing and sustaining the African Court. Here, Vincent Nmehielle takes a more general and more hopeful tone compared to the contribution of Stuart Ford who focuses on the criminal jurisdiction and expresses more doubt than hope. The last chapter then offers a more general civil society advocate critique the proposed court (Netsanet Belay and Japhet Bigeon.)

Through this volume, we hope to have detailed some of the most significant developments that have emerged with the Malabo Protocol for the African Court as well as key issues that are bound to arise over the next phase of its operationalization. By framing the future of an African court with three jurisdictions within a longer history and social and political context, and subjecting it to deep legal analysis, we have taken on the quest to highlight

the critical role that the African region appears to be playing in contributing to the ongoing development of international law. By including analyses of its history and context, raising important considerations and critically and constructively engaging with its provisions, we map out a range of possibilities through which to make sense of its emergent future. This is the spirit with which the editors and authors of this volume engage with the Malabo Protocol for the African Court. It is a spirit of betterment and improvement. This can only aid in shaping international law in ways that reflect African countries and their related concerns.

